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Revoking early conditional release measures in Spain

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Abstract

In this article we examine how early conditional release measures for offenders are revoked in Spain. For this purpose we analyse the legal framework of revocation, paying special attention to the criteria and the procedures legally established. We also take a look to the practice of revocation by discussing relevant statistics and the case law on this subject. Finally, we raise some critical points on the Spanish system of revocation suggesting some changes inspired by the principle of revocation as a last resort.

Keywords**:** Early conditional release – Recalling - Prison allocation - Parole.

1. INTRODUCTION: AN OVERVIEW OF THE SPANISH EARLY RELEASE SYSTEM (Cid and Tébar, 2010a).

Spanish law provides two means of early conditional release while serving a prison sentence: open-regime (including home detention curfew) and conditional liberty or parole.

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Both mechanisms are categories or classifications from the Spanish prison system set by the General Penitentiary Act 1979. This Act introduced a progressive system based on individualisation of the prison regime, which provides the following four main levels of classification, or treatment categories as they are named by the Act:

THE SPANISH PRISON SYSTEM	
Prison Treatment Categories	**Prison Regime**
1st category	Closed or max security regime.
2nd category	Ordinary regime
3rd category	Open regime or home detention curfew
4th category	Parole

Open Regime and Home detention curfew

The third category is a kind of semi-detention whereby prisoners spend the day outside prison, usually working, and return to prison only at nights, from Monday to Thursday. From Friday to Sunday third category regime prisoners normally benefit from a weekend leave.

Third category classification is a prison measure regulated mainly by the 1979 General Penitentiary Act and the 1996 Prison rules, although some provisions about this regime were introduced by the 7/2003 Fundamental Law, which reformed the Spanish Criminal Code.

As for the legal criteria that need to be met so as to enable someone to be a third category prisoner, there are two means of progression. First, prisoners may be classified as suitable for an open regime if they have a good risk prognosis. However, in practice, the Prison Administration only decides an initial third category classification in the case of first-time prisoners with short sentences and a very good risk prognosis (Capdevila et. al., 2006). Secondly, the third level may be reached as a progression from the second prison category. The 1996 Prison Rules provide for this form of progression to the third category once a quarter of the sentence has been served and provided the prisoner is considered to be ready for resettlement. In addition to these legal criteria, the Prison Administration practice requires the following additional criteria to be met: having served half of the sentence; having previously been granted temporary leave from prison; and having a remaining sentence that would make them eligible for ordinary parole in no more than two or three years (Cid, 2005; López-Ferrer, 2004). In both cases (as a primary classification and as a progression from the second level), Spanish Criminal Code section 36, requires prisoners to pay the civil liability arising form the offence committed (a liability that is decided at sentence) or at least to make guarantees of payment according to their means. Another legal requirement established by the s.36 Criminal Code relating to classification into the third level refers to the discretionary power of the sentencing Judge to impose a minimum mandatory period of half of the sentence before classification in the third category when a sentence longer than five years is being served. This minimum mandatory period can be lifted by the prison judge[3], provided that a low risk of reoffending is predicted. For sentences longer than

3 The prison judge is a member of the judiciary who deals mainly with complaints made by prisoners against resolutions of the prison administration (disciplinary sanctions, classification, leaves, among others). The prison judge also has the power to decide in the first instance on granting and revoking parole. Decisions of the prison judge may be appealed to the sentencing judge or tothe high court.

five years imposed for offences related to terrorism, organised crime or sexual offences against victims aged under thirteen years, the minimum mandatory period before reaching the third treatment category is prescriptive and cannot be judicially lifted afterwards.

As for release on home detention curfew, prisoners allocated to the third level who carry out work or treatment activities outside the establishment are eligible to be released by this means overnight. The 1996 Prison Rules established this special regime that allows third level prisoners to replace the nightly return to prison by a home detention curfew, so they only have to visit prison for arranged interviews with their supervision agent. Generally, the home detention period, which normally lasts from 11 pm to 7 am, is monitored by electronic tagging or by police officers.

Parole

Parole allows sentenced prisoners to be released into the community with supervision before the end of a prison sentence. Supervision implies observing certain rules or conditions, among which is always a duty not to re-offend. Parole remains in force until the sentence expiry date, unless it is revoked earlier and the offender is recalled to prison. As explained below, different modalities of parole can be distinguished according to the release criteria. Mention also should be made of some cases where the type of prisoner, the number of offences committed and the length of the prison terms involved can lead to a prison sentence without parole, as provided by section 78 of the Criminal Code[4].

(i) Ordinary parole

Ordinarily, parole can be granted from the three quarter point of the sentence, provided that the offender meets the requirements of a third level classification (good behaviour and a good risk prognosis) which includes the duty to comply with any of the civil liabilities arising from the offence. Full restitution is not required but there must be a willingness to compensate the victim in line with the offender's means.

(ii) Earlier parole

The time for release on parole can be advanced to two thirds or even half the sentence if additional requirements relating to participation in treatment and continuous labour activities are met. There are no clear legal or judicial criteria to distinguish between the use of ordinary and advanced parole. The Prison Judiciary Association Agreements (2009) state that earlier parole, and in particular parole at ½ of the sentence, should be considered for exceptional cases and this is reflected in the statistics that show that parole at ½ of the sentence occurs very rarely (see statistics in Cid and Tébar, 2010a).

(iii) Humanitarian Parole

A special parole regime is provided for humanitarian reasons, for those who are 70 or more years old and for those who suffer for an incurable illness. In these cases parole can be granted at any stage of the sentence, provided that the other criteria are met. The Spanish Constitutional Court has held[5] that this type of parole is grounded on the

[4] On the Spanish legal framework see generally Vega (2001), Renart (2003), Tébar (2006a) and Cid and Tébar (2010a).

[5] Constitutional Court decision 48/1996, 25th March 1996. www.tribunalcontitucional.es

fundamental right of life and human dignity so can only be denied on the basis of a high risk for the public protection.

(iv) Parole for prisoners convicted of terrorism and offences related to organised crime
There are stricter parole rules for prisoners convicted of terrorism and offences related to organised crime. Such offenders are additionally required to repudiate their criminal activities and apologise to their victims. They can only be paroled after they have served three quarters of their sentence, since they are legally excluded from any advanced form of parole. In addition, at the time of the conviction they may be banned from parole or the minimum time required to be conditionally released may be extended, as a result of the implementation of section 78 of the Criminal Code. Later, the prison Judge may decide to raise such a measure but in any case parole will only be possible during the last eighth part of the sentence.

2. REVOCATION OF OPEN REGIME

2.1. Legal Framework and Practice

Revocation of open regime – or "regression" as the Spanish Penitentiary law calls it -- means that a prisoner who has been placed in an open facility that allows part of the day-life to be lived in the community, is returned to a closed regime, where the entire time is spend inside the prison. Moreover, regression implies the restriction of the right of home leaves during the weekend, which is part of the open regime system. Regression clearly implies an end to the process of early release in the community.

The Penitentiary Act has only one rule about the grounds of revocation of open regime. Article 65.3 states: "Regression [to a close regime] must be established when, in relation to treatment, the personality of the prisoner evolves negatively". The lack of specific rules to regulate revocation can be explained by the absence of a written statement of the rules or conditions that must be obeyed during the open regime. The prisoner is informed of the obligations attached to the open regime by means of the scheduled encounters with an early release officer.

The lack of rules with respect to revocation gives to the authorities competent to make decisions on regression a great deal of discretion on what behaviours or attitudes of the prisoner should be considered as a "negative evolution of her personality with respect to treatment". A review of the few cases that have arrived at the High Court in the last five years (2005-2010)[6] gives examples of the grounds of revocation: being accused of a new offence, being arrested by the police for a new offence, a positive test of drug consumption, leaving a therapeutic facility in the community, losing work in the community, and losing the confidence of the early release officers on her commitment to rehabilitation.

[6] Audiencia Provincial Islas Baleares (sección 1ª). Auto 367/2006, 29-06-2006 (JUR 2006/191672); Audiencia Provincial Barcelona (sección 21). Auto 866/2009, 12-06-2009 (JUR 2009/464944); Audiencia Provincial Ciudad Real (sección 2ª). Auto 2/2008, 28-01-2008 (JUR 2008/167890); Audiencia Provincial Cádiz (sección 1ª). Auto 160/2010,30-06-2010 (JUR 2010/349698); Audiencia Provincial Madrid (sección 5ª). Auto 3007/2009, 8-10-2009 (JUR 2010/20965); Audiencia Provincial Islas Baleares (sección 1ª). Auto 38/2007, 9-02-2007 (JUR 2007/126912); Audiencia Provincial Cádiz (sección 1ª). Auto 309/2008, 31 -10-2009 (JUR 2009/202866). Audiencia Provincial Madrid (sección 5ª). Auto 2440/2006, 30-05-2006 (JUR 2006/230322); Audiencia Provincial Murcia (sección 5ª). Auto 252/2009, 29-09-2009 (JUR 2009/460456); Audiencia Provincial Barcelona (sección 21). Auto 938/2009, 29-06.2009 (JUR 2009/465873). All the decisions may be accessed through the data-base: www.westlaw.es

A more complete examination of the grounds for revocation would require a review of a sample of prison files, but an analysis of the published case law from 2005 to 2010 shows that the list of possible reasons for revocation is rather large and it suggests that the Spanish system of revocation of open regime is problematic with respect to legal guarantees of prisoners.

2.2. Procedure of revocation

The procedure to revoke an open regime and to recall a person to a closed prison regime is based on the following features:

(i) Following an informal report of the early-release officer that manages the case of a specific prisoner, the Treatment Board, the formal body of the prison system that oversees the rehabilitation process, writes a statement proposing the revocation of the open regime for a prisoner. This statement contains the reasons for the proposal of revocation.
(ii) The general director of the prison system[7] makes a decision on the proposal of the Treatment Board. This decision must state the reasons for recalling and the prisoner has the right to challenge it before the prison judge. Once communicated to the prisoner, the decision of revocation is immediately enforced. In the case that the prisoner is outside the prison he would receive a call informing him about the recall and the obligation to return immediately to prison. If this procedure fails, the prison judge is informed in order to issue a warrant to be executed by the police[8].

(iii) The prisoner has the right to appeal the decision to the prison judge. In order to make the written appeal the prisoner has the right to be assisted by a lawyer but at his own expense or on a voluntary basis, since no legal right of free legal advice is granted at this stage of the process)[9]. The actors in the procedure are the prisoner and the public prosecutor[10]. Neither the law, nor the decisions of the prison judiciary Association (Jueces de Vigilancia Penitenciaria, 2009) establish the right of the prisoner to have an oral hearing in front of the prison judge in order to present reasons against the revocation. In case the prisoner asks during the procedure to see the prison judge to explain his arguments against the recall, the judge has the discretion to accept or refuse the interview (Prison Judge Benito Pérez, personal communication). At his own expense, the prisoner may present a report before the prison judge, in order to sustain the prisoner's view against revocation of the open regime, but the prison judge is unlikely to regard such a report highly in comparison with the one elaborated by the prison treatment Association (Jueces de Vigilancia Penitenciaria, 2009).

(iv) The decision of the prison judge to revoke an open regime may be further appealed to the magistrate or to the court that sentenced the offender. Either the prisoner or the public prosecutor may appeal. Here the prisoner should be assisted by a lawyer and free legal aid is provided for those with limited means.

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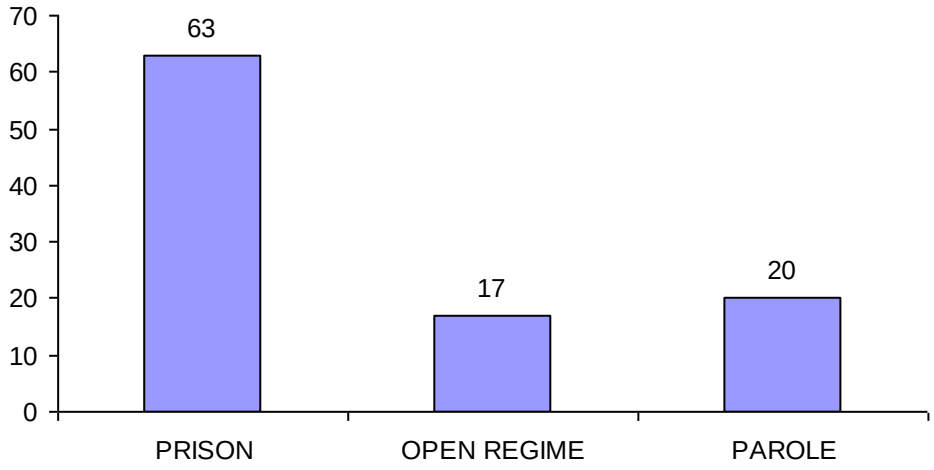
[7] Direcció General de Serveis Penitenciaris i Rehabilitació (Catalonia) and Secretaria General de Servicios Penitenciarios (rest of Spain).
[8] The procedure of communicating a recall to a prisoner is not written in the law, neither in the prison judiciary association agreements (2009), but it seems to be a practice of the prison judges (Prison Judge Benito Pérez, personal communication).
[9] The prison judiciary association has suggested that prisoners should have the right to free legal aid at least in some cases (Jueces de Vigilancia Penitenciaira, 2009, decision 151). For an academic justification, see Navarro (2002).
[10] In some places, there are public prosecutors who specialize in prison cases.

2.3 Data on revocation of open regime

Before presenting data on revocation of open regime it should be remembered that, in the Spanish penitentiary system, early release is not the most common way to be released to the community (see Cid and Tébar, 2010a). Data from Catalonia indicate that in the last 5 years (2006-2010), 37% of prisoners were released on open regime (including home detention curfew) and on parole and 63% were released from a closed regime, without any period or conditional early release. Data for the rest of Spain is not officially provided, but extrapolating from the existing data, it could deduced that the percentage of prisoners who get early release is similar to Catalonia (Cid and Tébar, 2010b).

Figure 1. Form of release. Catalonia (2006-2010) (average)



Source: Data not published, provided to the authors from: Direcció General de Serveis Penitenciaris (Catalonia) (July 2011). www.gencat.cat/justicia

What is the role and significance of revocation of open regime given that less that half of prisoners are released early? Before trying to answer this question, we should explore the possible reasons for these low rates. One possible reason relates to the fact that a proportion of prisoners do not initiate a process of early release (a process that starts with leaves and continue with open regime). Research done by one of the authors indicates that this category includes: prisoners serving short prison sentences (for as long or longer than the process of classification takes), prisoners that have served a relevant part of the sentence as a remand prisoner (that excludes the possibilities of classification) and prisoners with high levels of misbehaviour in prison (good conduct being a legal requirement for being granted early release) (Tébar, 2006b). The second possible reason relates to those prisoners that have started a process of early release but where this process has been interrupted. Data on the use of revocation of open regime in Spain (Catalonia and the rest of Spain) for the last 5 years (2006-2010) indicates that a relevant proportion of the prisoners that get open regime are recalled to prison. It is probable that for most of these prisoners, revocation implies that they will not get a second chance of accessing an open regime and will finish their sentence without any conditional release in the community.

Table 1. Revocation open regime. Spain (2006-2010)[11]

	CATALONIA			REST OF SPAIN			SPAIN		
Year	**Open regime granted**	**Open regime revoked**	**% open regime revoked**	**Open regime granted**	**Open regime revoked**	**% open regime revoked**	**Open regime granted**	**Open regime revoked**	**% open regime revoked**
2006	1644	576	35.0	7991	1076	13.5	9635	1652	17.1
2007	1525	562	36.9	8600	1318	15.3	10125	1880	18.6
2008	1695	518	30.6	8606	1718	20.0	10301	2236	21.7
2009	1820	499	27.4	10980	1622	14.8	12800	2121	16.6
2010	1989	488	24.5	12674	1708	13.5	14663	2196	15.0
2006-2010			30.9			15.4			18.1

Sources: Catalonia: http://www.gencat.cat/justicia/estadistiques_serveis_penitenciaris/
Rest of Spain: Information provided to the authors by: Mr. Virgilio Valero García. Director General de Coordinación y Medio Abierto. Secretaria General de Instituciones Penitenciarias (Ministerio del Interior) (June 2011).

3. PAROLE

3.1. Legal Criteria and Practice

Parole revocation means returning to a second category prison regime, while a new classification is decided by the Prison Treatment Board, as provided by section 201.3 of the 1996 Prison Rules. Generally the initial classification after a recall from parole would be the second category[12]. The time spent in liberty before revocation counts toward the sentence, except in the case of parolees serving a sentence for a terrorist offence.

As for the grounds for revocation, the Spanish Criminal Code (section 93.1) provides the following two general grounds: re-offending and the breach of the license obligations. The Prison Judiciary Association Agreements (2009) also considers that failing to meet the legal criteria to access parole, especially criteria related to good conduct and a positive rehabilitation prognosis, are grounds for parole revocation. These grounds of revocation are explicitly established in the cases of prisoners sentenced for offences related to terrorism[13]. In respect of humanitarian parole, in practice, on occasion, an improvement in the health of the parolee may result in a prison recall if there is an assessed risk of reoffending.

a) Re-offending

This cause of revocation is usually construed as committing a crime but not a misdemeanour, according to the Criminal Code provisions and the rule of law (Tébar, 2006a). However, committing a misdemeanour can be deemed a breach of the license conditions, depending on which type of conditions have been impose on the parolee and how they are construed by the Prison Judge.

[11] The Basic explanation for the differences rates of revocation between Catalonia and the rest of Spain are due to the fact that in Catalonia the time that the prisoner should serve in open regime before getting parole is higher than in the rest of Spain. Less time in open regime implies less possibilities of revocation. To explore further this subject : Cid (2005), Cid and Tébar (2010a).

[12] Personal communication from the Prison Judge Benito Pérez.

[13] As provided by section 93.2 of the Penal Code in these cases the Prison Judge is able to ask reports to proof if the parolee still meets the criteria required to be released during the license period. This way, it can be said that failing to meet the legal criteria required to be released is a specific cause of revocation for terrorist offenders.

When exactly re-offending may lead into parole revocation, i.e. when the sentence for the new offence is decided or before, is not easy to answer. According to our constitutional mandates regarding the rule of law (sections 9.1 and 25.1) and the presumption of innocence (s. 24), only when there is a final (i.e. unappealable) judgment, can re-offending result in parole revocation. This interpretation suggests the practical impossibility of revoking parole for this reason, since when the eventual penal sentence is definitive, the license period will have expired (Sánchez-Yllera, 1996, 523). For this reason the Prison Judiciary Association Agreements (2009) demands a new regulation of revocation that allows recalling before a definitive sentence for a new offence is decided. In practice some Prison Judges decide parole revocation when the offence is flagrant, by means of considering there has been a breach of the license conditions or that the criteria required to access parole is no longer fulfilled. In any case, according to section 93.1 of the Penal Code and the practice, notice to the Prison Judge of a definitive sentence for an offence committed during a license period will automatically lead into parole revocation, regardless of the nature of the offence, the circumstances of its commission or if it has any relationship with the former offence.

Another ground for revocation used in practice relates to imprisonment of the parolee for a new or an old offence. Traditionally the case law regarding this matter has been oscillating between revocating or suspending parole, insofar as early conditional release is obviously incompatible with imprisonment. There are no legal provisions for parole suspension. Nonetheless, it is a solution applied by some Prison Judges in those cases where imprisonment is not due to a definitive sentence for an offence committed during the license period, which would lead to parole revocation, but to other situations such as preventive imprisonment for an old or new offence or a prison sentence for deeds that took place before the early conditional release. Parole suspension in these cases is intended to avoid a decision on revocation that would require re-starting from scratch the parole process[14].

But recently the case law on this matter tends to consider that imprisonment while on parole means the loss of classification in the fourth category or parole, which in practice has the same effects as revocation[15].

B) Breaching license obligations

As for conditions that can be attached to the license, section 90.2 of the criminal Code leaves a wide range of obligations that relate to:

- Prohibitions relating to weapons, driving and professional licenses.
- Restrictions such as not going to some places or not having any contact with victims and their relatives.
- Obligations to meet the parole officer as scheduled, to undergo treatment or take training or educative programmes.
- Any other condition decided by the Prison Judge and agreed by the parolee.

[14] In this sense judicial decisions: Audiencia Provincial Barcelona (sección 9). Auto 24 julio 2006, JUR 2007/12441, Audiencia Provincial Baleares (sección 2ª). Auto 99/2005, 24 mayo. JUR 2005/14266, Audiencia Provincial Cantabria (sección 1ª). Auto 99/2003, 8 octubre, JUR 2004/56196. On this subject see further Armenta and Rodríguez (2006: 356-357), Tébar (2006a: 207) and the case law they refer.

[15] Decisions Audiencia Provincial Madrid (sección 5ª). Auto 3043/2009, 7 octubre, JUR 2010/2105, Audiencia Provincial Pontevedra (sección 3ª). Auto 3/2008, 7 mayo, JUR 2009/440504.

There are no explicit legal criteria to assess when a failure to meet the conditions attached to the license can result into revocation. This way there is a great deal of discretion in deciding revocation on these grounds. A review of judicial decisions on this subject reveals certain consensus in revoking parole as a measure of last resort and if the breach is "definitive", that is, when a clear will to breach the conditions can be discerned from the parolee's behaviour[16]. However contradictory decisions can be found, for instance in a case where revocation was decided because the parolee did not appear for a drug test, despite the treatment report stated that the intervention was successful (Audiencia Provincial Madrid (sección 5ª) Auto 2940/2009, 30th September, JUR 2940/2009).

There is no legal provision made to allow the modification of the conditions or the imposition of new ones, although this is done in practice[17]. Nor is there any provision around whether a warning is mandatory before parole revocation.

3.2 The way to revocation

(i) There is no specific legal procedure to decide on revocation. The way to recall a parolee will start with a proposal from the parole service, based on a report of the parole officer (in case of technical violation). A communication from the prison system, in case of revocation for re-offending or from the police, when there is a detention, may also result in a proposal of revocation. This proposal will state the reasons for revocation as well as other information considered relevant for the case.

(ii) The prison judge will open a procedure of recall in which s/he has to ask the public prosecutor to express an opinion in favor or against the revocation. There is no explicit legal obligation to inform the parolee or give notice about a possible revocation, but the prison judge has discretion to offer the parolee an opportunity to explain their reasoning against the revocation. The decision of the prison judge (revoking parole, continuing parole or modifying its conditions) must be notified to the parolee. The parolee will be asked to return voluntarily to prison before any enforcement action is taken by the police. The parolee must also be informed about the right to appeal. The public prosecutor also has the right to appeal any decision of the prison judge.

(iii) If the convict wants to challenge the prison judge decision before the High Court, the right to free legal advice is granted in case of a lack of economic means. The actors in the procedure are the parolee and the public prosecutor. The procedure is written and no oral hearing is granted by law. Requests for an oral hearing may be directed to the Court but it has discretion to accept or refuse. The parolee may present a report arguing for the continuation of parole at his own expense.

3.3. Data on parole revocation

As shown in table 2, rates of revocation of parole for the last five years (2006-2010) are really low compared with rates of revocation of open regime (illustrated in table 1):

Table 2. Revocation of parole. Spain (2006-2010)

	CATALONIA	REST OF SPAIN	SPAIN

[16] For instance decision from the Audiencia Provincial Sevilla (sección 4ª). Auto 4 marzo 2004. Jur 2004/126268.

[17] Personal communication from the Prison Judge, Benito Pérez.

	N. paroles granted	N. paroles revoked	% paroles revoked	N. paroles granted	N. paroles revoked	% paroles revoked	N. paroles granted	N. paroles revoked	% paroles revoked
2006	574	16	2.8	5881	194	3.3	6455	210	3.3
2007	648	21	3.2	6344	243	3.8	6992	264	3.8
2008	590	25	4.2	6364	310	4.9	6954	335	4.8
2009	587	16	2.7	8115	250	3.1	8702	266	3.1
2010	731	37	5.1	9614	276	2.9	10345	313	3.0
2006-2010			3.6			3.6			3.6

Sources: Catalonia: http://www.gencat.cat/justicia/estadistiques_serveis_penitenciaris/Rest of Spain: Information provided to the authors by: Mr. Virgilio Valero García. Director General de Coordinación y Medio Abierto. Secretaria General de Instituciones Penitenciarias (Ministerio del Interior) (July 2011).

The reasons that may explain the differences between rates of revocation of open regime (30% in Catalonia and 18% in the rest of Spain) and the rates of revocation of parole (3.6 in both jurisdictions), are twofold: on the one hand, parolees may have, in general, a better prognosis of risk than open prisoners, given that for achieving parole the person needs to have spend a relevant period in the community without reoffending (more than one year in Catalonia, according to the research of Tébar, 2006b). But on the other hand, it seems plausible that the different system of revocation between open regime and parole (discretionary in open regime and restricted to the violation of predetermined requirements in parole) and the fact that for parole some High Court decisions have lay down the principle of revocation as a last resort should also be borne in mind in seeking to understand the different rates of revocation between open regime and parole[18].

4. ASSESSING THE REVOCATION OF EARLY CONDITIONAL RELEASE MECHANISIMS

In order to assess the strengths and shortcomings of the Spanish system of revocation of open regime and parole we should start exposing the philosophical model we use as a starting point for our comments. We share the idea that open regime and parole are institutions in which two concerns should be most relevant: the concern for humanity – accepting that open regime and parole are more humane sanctions than closed prison- and the concern for rehabilitation – that takes into account the interest of society as a whole in preventing recidivism (Tébar, 2006a). Moreover, we also should take into account the criminological research on open regime and parole that, although not conclusively, seems to support the idea that at least for high-risk offenders a rehabilitation model of supervision in the community is more effective in preventing recidivism than a release without transition (see Cid and Tébar, 2010b and Dunkel et al., 2010 for an overview of research). We also claim that this philosophical model is supported by the Council of Europe recommendations -- in particular Recommendation (2003) 22, Conditional release (parole) -- and by the 1978 Spanish Constitution. Three principles of the Spanish Constitution should be mentioned: first, the fundamental right

18 One anonymous reviewer of the EJP asks why rates of revocation of open regime are higher in Catalonia than in the rest of Spain but rates of revocation of parole are similar? Rates of revocation of open regime are higher in Catalonia because Catalan prisoners spend more time in open regime before being paroled than prisoners from the rest of Spain and the more time you spend in open regime the more risk you have to commit some infraction that brings to revocation. Rates of parole are similar because, on the one hand, the level of supervision in both jurisdictions is less intensive in parole than in open regime (in most cases the only parole condition is the duty to attend the meetings with the parole officer). Additionally, while there is a lack of judiciary standard for revocation for open regime, case law has established liberal standards for revocation of parole that aptly to all parolees in Spain. The same anonymous reviewer from the EJP wonders whether the differences between rates of revocation between open regime and parole may depend on the different personnel supervising the two measures. In this case the answer is negative because the personal (social workers and social educators) are the same.

to freedom (s. 1 and 17 of the Spanish Constitution) that may be relevant when the penitentiary administration or the judiciary have to decide between closed prison or early release (open regime or parole), giving a *prima facie* reason in favour of early release measures; second, the principle that prison sentences should be aimed at rehabilitation and resettlement (s. 25.2 of Spanish Constitution) that requires us to take into account which measure -- closed prison or early release measures -- is more able to achieve the aim of rehabilitation and third, the principle of legality or rule of law and due process (s. 25.1 and 24 of the Spanish Constitution), that demands that a penal sanction should only be imposed for committing infractions stated by the law and after a procedure with guarantees of defence. This philosophical, constitutional and criminological background is the basis of the main principle that, according to our view, should regulate the whole system of revocation of early release measures: the idea that recalling from early release mechanisms should be a measure of last resort, being only applied when it is confirmed that the person has violated the conditions of the supervision and there is a clear refusal to accept the conditions proposed to reduce the risk of reoffending (See Cid, 2009 for a more detailed explanation of the philosophical foundations of sentencing).

On the basis of the philosophical background mentioned – and in particular the principle of revocation as a last resort -- we formulate the following critical reflections about the Spanish system of early release revocation.

(i) Probably the main critical point of the Spanish system of revocation concerns the lack of clear criteria for revoking open regime. When a prisoner is classified as suitable for an open regime, the conditions attached to this early release measure are not stated (neither by the law, nor by prison authorities). Lack of clear conditions to follow during open regime means that revocation is completely discretionary for the prison administration and it also means that the real possibilities of judicial review, by the prison judge and further by the sentencing judge, are very limited, because discretion can only be submitted to legal control when the task of the judge consists of verifying if the revocation decided by the prison administration is based on the law (Ferrajoli, 1989). Moreover, lack of clear conditions for open regime means that the system does not meet the ideal of certainty for the open prisoner.

(ii) A second point that deserves attention is the lack of rules to decide what should be considered as a breach of the conditions of supervision. Although there are some decisions of the high court (mainly in relation to parole) stating that in case of infraction of technical rules, revocation should only be adopted when the person refuses to continue with the supervision, the system would require a whole reform on the basis of the principle of revocation as a measure of last resort. The main principles of this reform should be: a) in case of a procedure for infraction of technical rules of supervision, the breach should not be considered as a single infraction of rules but a refusal by the early-released prisoner or parolee to continue with the conditions of supervision (that may be modified to prevent new technical violations); b) in case of a procedure for a new-offence, when the offender is not imprisoned for the new offence, the prison judge should have the possibility of maintaining the prisoner in early release when the new offence is not serious and provided the early released prisoner accepts the new conditions of supervision.

(iii) A third point concerns the procedure to revoke open regime and parole. In this aspect the Spanish system meets the constitutional requirements with respect to the right to judicial review. However, there are two main shortcomings: on the one hand, there is the lack of a right for the prisoner to participate in the hearing. It is true that prison judges have the discretion to grant to early release parolees the possibility of explaining their reasons against revocation, but the right to an oral hearing should be granted by law. The second drawback refers to the lack of probation officers at disposal of the prison judge to make reports that may help to take decisions, especially in cases in which the judge may have doubts about the reports of the prison administration.
(iv) Our final point is related to the research on desistance that one of the authors is doing at present (Cid and Martí, 2011). In this qualitative research, we have observed that after an interruption of the process of early release, the motivation of the prisoner to start again a process of change is hard to achieve and most prisoners that have been recalled to prison finish their sentences in ordinary regime and are released to society with any kind of supervision. This outcome is not only negative in respect with humanitarian grounds but also with respect to public safety considerations.

Finally the present status quo raises the importance of back-door sentencing as a concern for scholars and practitioners (Padfield and Maruna, 2006).

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