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Spain: Parot Doctrine After the ECHR Decision

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SUMMARY The "Parot Doctrine" was adopted by Spain's Tribunal Supremo (Supreme Court) in a 2006 decision in the case of Henri Parot, a member of the separatist group ETA. The decision affirmed that remission for work done in prison was to be deducted from the total sentence rather than from the thirty-year prison limit set by Spain's 1973 Penal Code. The decision marked a complete departure from established jurisprudence, which, since 1994, had considered the thirty-year maximum term established under the 1973 Penal Code to be a new and autonomous sentence, to which prison benefits were applicable.

The Parot Doctrine was recently challenged before the European Court of Human Rights (ECHR) in the case of another ETA member. The final decision from the Grand Chamber of the Court reaffirmed the ECHR decision, which considered the Parot Doctrine in violation of the European Convention on Human Rights. Groups representing victims of terrorism have protested, expressing concerns about the release of ETA terrorists and common criminals and the effect it will have on Spanish society.

I. Parot Doctrine in the 2006 Tribunal Supremo Decision

Henri Parot, a member of the armed Basque separatist group ETA, was arrested in Spain in 1990. He was convicted by the Audiencia Nacional (AN)[1] of participation in terrorist acts and 150 murders and attempted murders, among other counts.[2] He was sentenced to consecutive terms of thirty years of imprisonment for each count.[3] Added together, his sentence would have resulted arithmetically in more than 4,000 years in prison[4] under the 1973 version of the Penal Code (Código Penal, CP),[5] but that Code also sets thirty years as the maximum term of imprisonment.[6]

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[1] Spain's Audiencia Nacional is a special high court with jurisdiction that includes terrorism and international crimes cases. Its decisions may be appealed to the Tribunal Supremo (Supreme Court) or the Tribunal Constitucional (Constitutional Court). The Tribunal Supremo is the court of last resort in matters that do not fall under the competence of the Audiencia Nacional or the Tribunal Constitucional, the latter of which has exclusive jurisdiction over matters involving constitutional review.

[2] José Cerezo Mir, *Reflexiones Críticas sobre Algunas Manifestaciones de la Moderna Tendencia a Incrementar el Rigor en la Exigencia de Responsabilidad Criminal*, REVISTA PENAL No. 22, at 20–21 (July 2008), http://www.uhu.es/revistapenal/index.php/penal/article/view/358/349.

[3] S.T.S. Sala Penal No. 197/2006, Feb. 28, 2006, , Henri Parot Navarro s/ Acumulación de Condena, http://www.juecesdemocracia.es/pdf/sentencias/STS_Parot.pdf

[4] Joan J. Queralt, *Terrorismo y Castigo Penal: Cumplimiento Íntegro de las Penas y Doctrina Parot*, INTERSEXIONES No. 1, at 127 (Sept. 2010), http://intersexiones.es/Numero1/05Queralt2010.pdf.

[5] Decreto 3096/1973, de 14 de septiembre, por el que se publica el Código Penal (CP), texto refundido conforme a la Ley 44/1971, de 15 de noviembre [Decree 3096/1973 of September 14 Publishing the Penal Code, Revised According to Law 44/1971 of November 15], BOLETÍN OFICIAL DEL ESTADO [B.O.E.], Dec. 12, 1973, https://www.boe.es/ datos/pdfs/BOE/1973/297/R24004-24291.pdf.

[6] *Id*. art. 70.2.

Penitentiary benefits, such as credit for work in prison, were supposed to be applied to the thirty-year maximum term regardless of the actual number of years of imprisonment to which a person was sentenced beyond such limit. This rule was established in a 1994 Tribunal Supremo (TS) decision, which stated that, in the case of multiple sentences, the maximum of thirty years of imprisonment constituted a new and autonomous criminal sanction, and therefore the reduction in prison time was to be applied to the new thirty-year sentence and not to each of the sentences individually.[7]

Parot was supposed to be released in 2020, when the thirty-year limit would have been reached. However, because the reduction of his sentence for work in prison was applied to the thirty-year maximum term pursuant to the 1994 TS decision, he was going to be released much earlier.[8]

Under these circumstances, and upon the request of the Ministerio Fiscal,[9] the AN decided to recalculate Parot's term of imprisonment so that it would extend up to the full thirty years. This decision was appealed by Parot but reaffirmed by the TS in 2006, reversing previous judicial interpretations of article 70.2 of the 1973 CP by establishing that the whole sentence should be completed, starting with the more serious sentence first, applying the penitentiary benefits and reductions for work or good conduct to each of the sentences individually.[10] Once the first sentence was completed, the following one should begin and so forth and so on, until the thirty-year limit was reached according to article 70.2 of the 1973 CP. After thirty years of imprisonment, all penalties included in the whole sentence were extinguished.[11]

The 2006 Parot decision—and what came to be known as the "Parot Doctrine"—marked a complete departure from prior jurisprudence, which, as noted above, had considered the thirty-year maximum term established under article 70.2 of the CP to be a new and autonomous sentence to which prison benefits were applicable.[12] Since the 2006 TS decision in the Parot case, the maximum term of thirty years is no longer considered a new, autonomous, and independent punishment. Rather, it is simply viewed as a maximum limit of imprisonment, because the court maintains that the language of article 70.2 does not state otherwise, reflecting a literal interpretation of the provision. As a consequence, each conviction maintains its individuality.[13]

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[7] CARLOS MIR PUIG, DERECHO PENITENCIARIO: EL CUMPLIMIENTO DE LA PENA PRIVATIVA DE LIBERTAD 109 (Libros Jurídicos, Barcelona, 2d ed. 2012).

[8] Cerezo Mir, *supra* note 2, at 20–21.

[9] The Ministerio Fiscal is the public prosecutor.

[10] Cerezo Mir, *supra* note 2, at 20.

[11] ENRIQUE SANZ DELGADO, REGRESAR ANTES: LOS BENEFICIOS PENITENCIARIOS 165–68 (Universidad de Alcalá, Ministerio del Interior, Dirección General de Instituciones Penitenciarias, 2006), http://www.interior.gob.es/file/53/53007/53007.pdf.

[12] Cerezo Mir, *supra* note 2, at 20.

[13] MIR PUIG, *supra* note 7, at 109–10.

Some sectors of the legal community view this dramatic change in the TS's interpretation as somehow influenced by the social and political pressure on the court by Spanish society, which showed great concern for the imminent release of an extremely dangerous multiple murderer.[14]

Critics have raised many objections to the Parot Doctrine, chief among them the fact that the court, by changing its jurisprudence, is retroactively applying a new set of rules to the detriment of convicted felons, who committed crimes and were convicted under the laws and judicial interpretations that allowed them to be released earlier than thirty years through the pre-Parot Doctrine formula for recalculation of sentences. In their view, the TS in the *Parot* decision was rendering a retroactive judicial decision unfavorable to the convicted individual in violation of the legality principle.[15]

II. Del Río Prada v. Spain

The Parot Doctrine has been considered and rejected by the European Court of Human Rights (ECHR) in Strasburg in the case of another ETA member, Inés Del Río Prada.

Del Río Prada began serving a prison sentence in Spain in February 1989 for multiple counts of murder and acts of terrorism. She was given prison sentences that, if served successively, would have amounted to more than 3,000 years of incarceration.[16] The AN added all of her sentences together and determined that the term to be served was the maximum legal sentence of thirty years. In April 2008, however, penitentiary authorities allowed for the remission of the sentence for work done in prison, deciding that Del Río Prada should be released in July 2008.[17]

Following the 2006 decision in *Parot*, the AN asked penitentiary authorities to revise the release date calculation by applying the Parot Doctrine, allocating remission of Del Río Prada's sentences to each sentence individually and not to the thirty-year maximum sentence. In June 2008, on the basis of this recalculation, the AN ruled that the applicant should be released in June 2017 and not in 2008. The TS reaffirmed the AN decision.[18]

Del Río Prada appealed the TS decision to the ECHR, which in July 2012 ruled against Spain, condemning the application of the Parot Doctrine to Del Río Prada, whose sentence was extended nine years by the retroactive application of a change in the court's interpretation of the law.[19] The ECHR considered Spain's retroactive application of the Parot Doctrine to be in

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[14] Cerezo Mir, *supra* note 2, at 21.

[15] Queralt, *supra* note 4, at 133–34.

[16] Mónica Ceberio Belaza, *Estrasburgo Zanjará si la 'Doctrina Parot' es un Castigo Justo o Rretroactivo*, EL PAÍS (Mar. 21, 2013), http://politica.elpais.com/politica/2013/03/20/actualidad/1363811351_388928.html.

[17] *Id.*

[18] *Id.*

[19] Case of Del Río Prada v. Spain, App. No. 42750/09, Judgment of the ECHR (Third Section) (July 10, 2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112108; *see also* Ángel Colmenar Launes, *La Determinación de la Pena en la Fase de Ejecución Penitenciaria*, REVISTA DE ESTUDIOS PENITENCIARIOS No. 256–2016, at 38–39, http://www.interior.gob.es/file/59/59086/59086.pdf (commenting on the decision).

violation of the fundamental right to freedom under article 7 of the European Convention on Human Rights, which reads as follows:

> Article 7 – No punishment without law
>
> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.[20]

According to the ECHR decision, EU Member States are free to change their criminal policies and reform the punitive criteria for crimes, but that authority does not allow for violation of the principle of nonretroactivity under article 7 of the Convention.[21] Therefore, what was challenged in this case was not the legality of the Parot Doctrine itself, but its retroactive application to the inherent detriment of the prisoner, because the TS decision in Del Río Prada's case amounted to a de facto increase in the penalty already imposed.[22] The ECHR ordered Spain to release Del Río Prada as soon as possible and to pay her €30,000 (about US$40,772) in damages for the wrongful extension of her incarceration.[23]

In July 2013, Spain appealed the ECHR decision to the Grand Chamber of the ECHR, withholding Prada's release until the Grand Chamber's final decision was rendered. With regard to monetary reparations, Spanish officials stated that Spain would not pay the €30,000 in reparations because that amount should be deducted from the civil damages caused by the crimes perpetrated by Prada.[24]

III. Grand Chamber's Final Decision

The final decision of the Grand Chamber of the ECHR was rendered on October 21, 2013.[25] The decision noted that, although the provisions of the 1973 Criminal Code applicable to remissions of sentence and the maximum thirty-year term of imprisonment were relatively ambiguous, the prison authorities and the Spanish judges in general treated that maximum term as a new, independent sentence susceptible to adjustments, such as reducing the sentence for work done in prison. The Grand Chamber concluded that, at the time Del Río Prada committed her crimes and when the decision to combine her sentences was adopted (November 30, 2000), applicable

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[20] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, *entered into force* Sept. 3, 1953, 213 U.N.T.S. 222, *as amended by* Protocols No. 11 and 14, http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm (emphasis added by author).

[21] Colmenar Launes, *supra* note 19, at 39.

[22] *Id.*

[23] Decision on Case of Del Río Prada v. Spain, App. No. 42750/09, Strasbourg, Oct. 21, 2013, http://estaticos.elmundo.es/documentos/2013/10/21/sentencia2.pdf.

[24] *El Gobierno se Rebela contra el Fallo del TDH por la 'Doctrina Parot'*, PÚBLICO.ES (July 10, 2012), http://www.publico.es/439487/el-gobierno-se-rebela-contra-el-fallo-del-tdh-por-la-doctrina-parot.

[25] Decision on Case of Del Río Prada v. Spain, App. No. 42750/09 (Oct. 21, 2013).

Spanish law, including court decisions, were established with a sufficient degree of precision to give Del Río Prada a reasonable expectation as to the scope of the penalty imposed and the manner of its execution.[26] According to the Grand Chamber, the defendant could not have foreseen that the TS would change its jurisprudence in 2006 and that such change would be applied to her case, extending the length of her imprisonment by nine years.[27]

The Grand Chamber also noted that the new 2006 interpretation by the TS and its retroactive application to the remission of sentences already imposed had an impact not only on the execution of Del Río Prada's sentence, but also on the nonretroactivity principle of article 7 of European Convention on Human Rights.[28] According to the Grand Chamber, Del Río Prada's time in prison since July 3, 2008, also constituted a violation of the right to freedom and security guaranteed by article 5, section 1 of the European Convention on Human Rights. As a result, the court ordered the Spanish government to release Del Río Prada as soon as possible.[29]

It further concluded that the national court should not have applied retroactively the new criminal policy adopted after the crimes in question were perpetrated and to the detriment of the convicted individual.[30] The Grand Chamber agreed with the defendant that the Supreme Court's departure from its earlier jurisprudence in the *Parot* case resulted in the retroactive application of an additional sanction that could not be understood as a simple measure related to the execution of the sentence.[31]

Legal scholars critical of the final decision point specifically to two arguments: first, that the Grand Chamber departed from its own previous jurisprudence, which maintained that penitentiary benefits were not part of the criminal sanction itself but of the execution of the sanction and therefore not affected by the nonretroactivity principle;[32] and second, that in this decision, the European court extended the application of the nonretroactivity principle of legislation to court decisions, meaning that legislation and court decisions are treated equally according to the Grand Chamber's decision. However, in the Spanish legal system, a civil law system, court decisions are not a primary or direct legal source; rather, legislation is the primary source of law. In theory, the nonretroactivity principle applies only to legislation and not to court decisions. The interpretation by the ECHR in this case pertains more to common law systems in which case law is the primary source of law, and not to civil law systems like that of Spain, according to the critics.[33]

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[26] *Id.* §§ 55, 58.

[27] *Id*. § 59.

[28] *Id*. § 62.

[29] Communiqué de Presse del Secretario del Tribunal TEDH 306 (2013), ECHR (Oct. 21, 2013), http://ep00.epimg.net/descargables/2013/10/21/766054204e2d862062f63db80a56b1d2.pdf.

[30] Decision on Case of Del Río Prada v. Spain, App. No. 42750/09 (Oct. 21, 2013), § 60.

[31] *Id*. § 62.

[32] Francisco Javier Nistal, *El Final de la "Doctrina Parot"*, CRIMINALOGÍA Y JUSTICIA (Dec. 10, 2013), http://cj-worldnews.com/spain/index.php/es/derecho-31/derecho-penal/item/2682-el-final-de-la-%E2%80%9Cdoctrina-parot%E2%80%9D.

[33] *Id.*

IV. Repercussions of the Grand Chamber's Final Decision in Spain

In compliance with the Grand Chamber 's ruling, which the Spanish government is obliged to apply as a signatory to the European Convention on Human Rights, Del Río Prada was released from prison on October 22, 2013, by a TS order.[34] In the same order, the TS decided that the compensation the Grand Chamber ordered the government to pay to Del Río Prada would be applied as compensation that Del Río Prada should have paid to the victims of her crimes. According to the court's order, the Spanish State has advanced the compensation and therefore, it is a debt the ETA member has incurred with the state.[35]

The first common criminal who benefited from the Grand Chamber's decision was a serial rapist who was released on October 24, 2013, and who was expected to be in jail until 2025 under the Parot Doctrine.[36] Other serial rapists[37] and murderers have also been released as a result of the Doctrine.[38] Less than a week after Del Río Prada was released, another imprisoned ETA member, Juan Manuel Piriz López, was released pursuant to an appellate decision by the AN enforcing the ECHR Grand Chamber's decision, which the court declared to be applicable not only to Del Río Prada but to all cases that are currently under similar circumstances.[39] According to news reports, nearly fifty-one ETA members have filed release petitions before Spanish courts based on the ECHR's decision.[40]

Twelve out of the sixteen members of the Criminal Section of the TS issued an *Acuerdo* (ruling) on November 12, 2013, in order to clarify how Spanish courts will enforce the ECHR Grand Chamber's final decision with regard to the sentences of those persons currently incarcerated under the now superseded 1973 Penal Code.[41] The ruling concluded that the Grand Chamber's

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[34] *Ines del Río Sale de Prisión Tras Cumplir 23 Anos y 3 Meses*, PUBLICO.ES (Oct. 22, 2013), http://www.publico.es/476487/ines-del-rio-sale-de-prision-tras-cumplir-26-anos-y-3-meses-de-condena.

[35] *La Audiencia Nacional Bloquea la Indemnización de 30,000 Euros a Del Río para Destinarla a sus Víctimas*, EL DERECHO (Oct. 22, 2013), http://www.elderecho.com/actualidad/audiencia_nacional-doctrina_parot-indemnizacion_0_601500128.html.

[36] *El Violador Reincidente García Carbonell Sale de Prisión en Barcelona tras 18 Anos*, EL PAÍS CATALUNA (Oct. 24, 2013), http://ccaa.elpais.com/ccaa/2013/10/24/catalunya/1382638514_760684.html.

[37] *El "Violador del Portal" Sale de Prisión 17 Anos Después de la Condena*, CADENA SER (Nov. 14, 2013), http://www.cadenaser.com/espana/articulo/violador-portal-sale-prision-anos-despues-condena/csrcsrpor/20131114csrcsrnac_14/Tes.

[38] *Masivo Acto de Repulsa en Almagro contra un Violador Liberado por la Doctrina Parot*, EL MUNDO (Feb. 1, 2014), http://www.elmundo.es/espana/2014/01/31/52ec07b922601d69718b4587.html.

[39] *La Audiencia Interpreta que la Sentencia de Estrasburgo es de Aplicación a Otros Terroristas*, RTVE (Oct. 28, 2013), http://www.rtve.es/noticias/20131028/audiencia-interpreta-sentencia-estrasburgo-aplicacion-otros-terroristas/778881.shtml.

[40] *La Audiencia Nacional Cree que la Sentencia de Del Río es "de Aplicación" a Todos los Casos "Semejantes"*, EL DERECHO (Oct. 29, 2013), http://www.elderecho.com/actualidad/doctrina_parot-tribunal_europeo_de_derechos_humanos-excarcerlacion_0_603750195.html.

[41] Acuerdo de la Sala General de lo Penal del Supremo sobre la "Doctrina Parot" tras la Sentencia del TEDH [Accord Issued by the General Penal Section of the Supreme Court on the "Parot Doctrine" After the ECHR Decision] (Nov. 12, 2013),

decision should also apply to those serving sentences rendered before February 2006 and convicted under the 1973 Penal Code in cases similar to that of Del Río Prada, with penitentiary benefits to be recalculated according to the maximum limit of thirty years. Each of these cases is to be sent back to the sentencing court for a revision of the imprisonment calculation according to the new standards.[42]

The TS further called on the Spanish legislature to pass legislation providing an adequate process for the enforcement of ECHR decisions.[43] With this decision the TS assigned the enforcement of the ECHR sentence to the AN in the case of terrorists and to the provincial courts in the case of common criminals. These decisions will be subject to appeal before the Penal Section of the TS.[44]

In practice, the November 12 TS ruling means that almost eighty-two criminals affected by the Parot Doctrine who are still wrongfully in prison may have their sentences commuted and recalculated, according to news reports.[45] Groups representing victims of terrorism have complained to the Council of Europe that Spain has liberated nonrepentant ETA terrorists and rapists with a high risk of recidivism, subjecting the Spanish society to undue distress. The complaint further states that the ECHR Grand Chamber's decision did not indicate that it should be extended to other convictions but only intended to address Del Río Prada's case, and that the massive release of criminals after the Grand Chamber's ruling is unfair and incorrect.[46]

The Spanish government is currently working on legislative proposals that would prevent those convicted of terrorism to qualify for public office at the national or local government levels,[47] or to qualify for government assistance once they are released if they have not paid compensation to their victims or expressed remorse for their crimes.[48]

Despite all the social fears and apprehensions, however, the release of almost seventy ETA terrorist has, with few exceptions, been carried out without terrorists advocating terrorism or claiming victory, according to a recent *El País* editorial.[49]

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http://www.poderjudicial.es/cgpj/es/Poder_Judicial/Sala_de_Prensa/Notas_de_prensa/Acuerdo_de_la_Sala_General_de_lo_Penal_del_Supremo_sobre_la__Doctrina_Parot__tras_la_sentencia_del_TEDH.

[42] *Id*.

[43] *Id.*

[44] *El Supremo Respalda la Excarcelación de Etarras y Finiquita la "Doctrina Parot"*, EL PAÍS (Nov. 12, 2013), http://politica.elpais.com/politica/2013/11/11/actualidad/1384202027_106142.html.

[45] *Id.*

[46] *Covite traslada a la UE la "Inadecuada" Aplicación de la Sentencia de Estrasburgo*", ABC (Nov. 27, 2013), http://www.abc.es/espana/20131127/abci-parot-covite-estrasburgo-201311262113.html.

[47] *La Abogacía del Estado Busca Cómo Impedir que los Ex Presos Sean Concejales*, EL PAÍS (Jan. 11, 2014), http://politica.elpais.com/politica/2014/01/10/actualidad/1389387440_464144.html.

[48] *Justicia Alega que no Impugnó la Excarcelaci"on de Etarras Porque Fue Legal*, EL PAÍS (Feb. 5, 2014), http://politica.elpais.com/politica/2014/02/05/actualidad/1391599222_902011.html.

[49] Editorial, *An Orderly End to ETA*, EL PAÍS (Feb. 6, 2014), http://elpais.com/elpais/2014/02/06/inenglish/1391700373_202709.html.