FORSETE
Rets- og kriminalpolitisk tænketank

1. May 2024

(rev.)

Mail: Almut.SCHROEDER@coe.int

Material for the CPT's visit to Denmark in 2024

Dear Almut Schroeder,

The Justice and Criminal Policy Think Tank Forsete looks forward to the CPT's visit to Denmark in 2024. We are aware that information has been forwarded to you from the coalition of Danish NGOs in the form of UPR midterm report February 2024 as well as the parallel report from Danish NGOs to CAT November 2023. Forsete contributed information about remand imprisonment, prison capacity and occupancy and the deportation centre, Kærshovedgård.

As the CPT has requested further information on the situation of persons deprived of their liberty, I now forward supplementary material about 1) imprisonment conditions of those sentenced to deportation, 2) release of people sentenced to deportation after security detention or life imprisonment, 3) denied applications for parole and 4) pre-trial imprisonment.

1. Imprisonment conditions for those sentenced to deportation

Among those serving a sentence in Danish prisons in 2022, 20 % had foreign citizenship, according to the Danish Prison and Probation Service (DPPS) statistical report for 2022. A number of these will be deported at release, and their conditions while serving the sentence were significantly impacted by Act no. 429 of 3 May 2017, which curtailed access to, education and treatment programmes during incarceration. The reasoning behind the law was, that as they are to be deported, they do not need to be reintegrated into Danish society.

According to the comments to the law, it will be possible in individual cases and after concrete assessment to offer education as well as treatment to those sentenced to deportation if this is important for serving the sentence or for adaptation in the home country.

Since imprisonment conditions are markedly different for those sentenced to deportation and other sentenced prisoners, Forsete recommends, **that the CPT investigates the extent to which use is made of the law's option to offer education and treatment to those sentenced to deportation.**

2. Release of those sentenced to deportation after security detention or life imprisonment

People sentenced to security detention or life imprisonment usually go through a release process of approx. 10 years starting with a few accompanied leaves per year. A prerequisite for starting the release process is that the inmate has served at least ten years of the sentence and that a conscientious assessment of the risk of abuse has been carried out.

The release process is to be the same, whether a person is to be deported or not. However, before the release process is initiated for the group who are going to be deported, the DPPS is to assess whether the inmate might escape and thus evade the sentence or the subsequent deportation.

Since it will be very difficult for the individual to prove that they are not tempted to flee, this additional requirement risk might have the effect that the release process of deportees will start later than that of people who are not to be deported. This would have the effect that people who are to be deported would be treated worse than Danish citizens sentenced to security detention or life imprisonment and thus this would be in violation of the prohibition of discrimination in Article 14 of the European Convention on Human Rights in conjunction with Article 5.

Forsete recommends that the CPT makes inquiries about how the DPPS ensures that people sentenced to deportation will not serve longer than those who are not to be deported solely because of their nationality.

3. Denial of parole

The share and number of people released on parole on 2/3 time (cf. section 38.1 of the penal code) has fallen significantly in recent years from 80% (approx. 2,800 inmates) in 2011 to 63% in 2020 (approx. 2,000 inmates).[1]

While release on parole is presupposed when the Court decides on a sentence, the sentenced person does not as such have a *right* to parole. To obtain parole, there cannot be a significant risk of recidivism for a non-trivial crime which cannot be limited by supervision and any special conditions, cf. the parole guidelines section 5 and 6.[2]

One reason for the rise in denied parole may be a development in a more burdened prison population. However, another reason seems to be a series of administrative restrictions, which include disciplinary penalties for rule infractions that are not related to the risk of recidivism in the risk assessment. For example, included disciplinary penalties for possession of mobile phones (where there is no information that they have been/or are intended to be used for a new crime); for inappropriate behaviour or language; for violating the 2016 smoking ban; and for positive urine test for cannabis (where cannabis is not related to the crime that the individual was sentenced of). [3] [4]

Thus, the denial of parole function may function as an additional punishment for disciplinary offences and may even end up prolonging the sentence.

[1] Besvarelse af spørgsmål nr. 1548 (Alm. del) fra Folketingets Retsudvalg 2020-21

[2] Vejledning om løsladelse af dømte, der udstår fængselsstraf (løsladelsesvejledningen) VEJ nr 9736 af 28/06/2022

[3] Jævnfør Direktoratet for Kriminalforsorgens skrivelse af 28.6.17 sagsnr. 17-40-0114 om ændringer i normalreaktioner i sager om vold og trusler om vold samt upassende sprogbrug og adfærd.

[4] Direktoratet for Kriminalforsorgens notat af 12.1.23 om skærpet fokus på sikkerhedsvurderingen af dømte med misbrugsproblemer

Forsete recommends that the CPT ascertain whether the inclusion of disciplinary punishments for infractions not related to future crime in the parole decision has the effect that double punishment is imposed. A risk is that parole becomes a reward for good behaviour while serving the sentence rather than the presupposed part of serving the sentence that is indicated by the guidelines regarding parole.

4. Pre-trial detention, restrictions, and de facto solitary confinement

Forsete recommends that the CPT address the following issues of concern:

- Assess the causes of the historic and current overuse of pre-trial detention.
- Develop concrete methods to lower the use of pre-trial detention.
- Bring an end to the extensive use of de facto solitary confinement.
- Limit the extensive use of restrictions on visits and correspondence.
- Secure next of kin reasonable possibilities to visit pre-trial detainees.
- Implement measures so that pre-trial detainees are not discriminated compared to prisoners serving a sentence.

General facts about Pre-trial detention in Denmark

There has been a peculiar and remarkable overuse of pre-trial detention in Denmark which has gotten much worse in recent years when compared to most other European countries including the other Nordic countries.[5]

Pre-trial detention in Denmark compared to the other Nordic countries:[6]

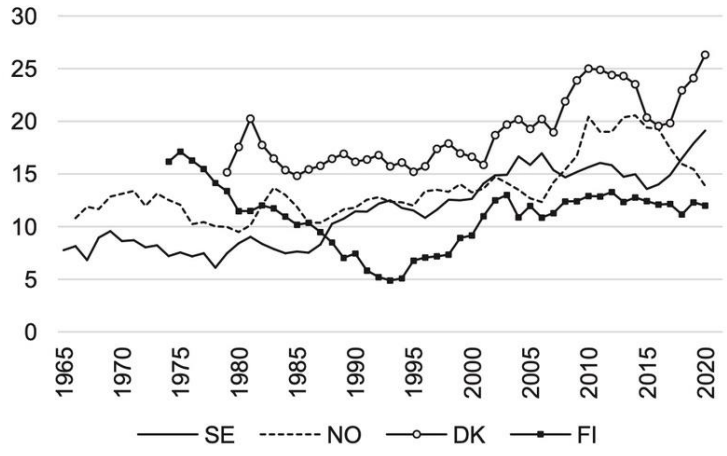

Figure 1. The Nordic countries' remand populations per 100,000 population.

Notes: Swedish figures are not directly comparable with the other Nordic countries; Finnish figures constitute an underestimation due to the exclusion of remand prisoners held in police custody between 1974 and 1994.

[5] This overuse is documented by the figures/tables presented here. See also CPT, Report to the Danish Government on the visit to Denmark by the CPT from 3 to 12 april 2019. CPT/inf (2019) 35, para. 29.

[6] Remand populations are a function of the number of individuals imprisoned on remand and the length of remand placements, and then measured pr. 100.000 population. See Lönnqvist, E. (2023) Prisoners of process: The development of remand prisoner rates in the Nordic countries, *Nordic Journal of Criminology*, Vol.24, Iss.2.

Number of pre-trial detainees (remand prisoners) in relation to the total number of prisoners in the Nordic countries in 2022 (percentages):[7]

Denmark	Sweden	Norway	Finland	Iceland	European median
41	28	23	22	18	21,7

Remarkably 60 % of time spent in pre-trial detention takes place after the police investigation has been concluded and charges have been made.[8] Furthermore, processing time at the courts have risen dramatically in recent years. In criminal cases the court processing has almost doubled from 4,4 months in 2018 to 8,4 months in 2022.[9]

Despite this situation, the available alternatives to pre-trial detention are almost never used by the courts/prosecution. For example, surrogate detention according to Section 765 of the Administration of Justice Act is used almost exclusively for young people under the age of 18 and mentally deviant people over the age of 18.[10] This practice seems not to meet the requirements of the Administration of Justice Act and the ECtHR's art.5, according to which detention should be considered as a last resort and only if the purpose cannot be achieved with less intrusive means.

Restrictions and de facto solitary confinement during pre-trial detention

The extensive use of pre-trial solitary confinement in Denmark (and the other Scandinavian countries) has been a long-standing issue where CAT and CPT have criticized Denmark and the other Scandinavian countries extensively over the years. On the surface, Danish authorities have responded successfully to these critique through legal changes and reforms that have brought the use of court ordered pre-trial solitary confinement down to a minimum (used in less than 1 % of all cases of pre-trial detention). However, in reality, a majority of pre-trial detainees experience de facto solitary confinement due to lack of staff and often also to a lack of communal spaces in the old remand institutions.

The result is in other words remarkable and most unfortunate: after decades of debate and criticism Danish authorities finally acknowledged that the use of pre-trial solitary confinement is unhealthy, unjust, and dangerous and as a result almost abolished the use of court ordered pre-trial solitary confinement.[11] Yet today, most pre-trial detainees in Denmark are still subjected to pre-trial solitary confinement. As a result, pre-trial detention has been labelled "Denmark's harshest punishment" even though the detained individuals have not been sentenced yet.[12]

[7] https://menneskeret.dk/status/faengsler-frihedsberoevelse#toc-vores-vigtigste-anbefalinger¨.
[8] Besvarelse af spørgsmål nr. 382 (Alm.del) fra Folketingets Retsudvalg, 3.4.2023, tabel 3.
[9] https://domstol.dk/aktuelt/2023/3/fortsat-lange-sagsbehandlingstider-i-2022/
[10] Kessing, P.V. (2023) Varetægtsfængsling og menneskeret, *Ugeskrift for Retsvæsen*, B/145.
[11] Smith, P.S. (2006) The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature, *Crime and Justice*, Vol 34, no. 1.
[12] Peter Scharff Smith and Janne Jakobsen (2027) Varetægtsfængsling- Danmarks hårdeste straf? Jurist- og Økonomforbundets forlag.

In addition to the continuous use of isolation Denmark has a long-standing practice of restricting the correspondence and visits of pre-trial detainees - a measure labelled B&B. This creates a regime making it exceedingly difficult to maintain meaningful contact with family members and children. Today more half of all placements in pre-trial detention have additional restrictions on correspondence and visits.[13] Such measures are supposed to be based on specific individual circumstances, but practice indicate that they are applied more or less automatically. To make matters worse, there can be a long visit waiting list and visits are often cancelled due to lack of space and staff, sometimes on the day of the visit.

On behalf of Forsete,

Bodil Philip

Former prison governor, member of the board of Forsete

[13] 2018: 58,0% correspondence restrictions and 67,9 % visit restrictions; 2020: 65,7%/65,6 %; 2022: 62,9%/62,8 %. https://menneskeret.dk/status/faengsler-frihedsberoevelse#toc-vores-vigtigste-anbefalinger