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Prison leave in Denmark: how a tradition of combining rehabilitation with discipline developed into putting access to justice at risk.

Abstract

The motivation for prison leave in the Danish penal system is based on two rationales: humanity, because the maintenance of positive contacts outside prison is expected to further a future life without crime; and discipline, because the risk of being discredited and missing out on prison leave is expected to have an effect on prisoners' compliance with the rules in prison. The Corrections Act contains certain framework provisions. The detailed regulation of prison leave is found within separate rules and guidelines. The power to make day-to-day decisions concerning the permission or revocation of prison leave lies in the hands of the prison administration. The regulation of prison leave and release on parole are interrelated, as the latter more or less directly depends on a successful period of regular prison leave. The total amount of prison leave is declining. Over the last few decades, more prison leave has been granted for occasional reasons, such as being seen by a doctor, rather than oriented in preparation for release, such as to attend to job or education. It is argued that the decline in the total amount of prison leave and the increase in the total number of rejections of parole are directly and indirectly interrelated. It is further argued that political intervention in the well-established division of power between legislation and discretionary power jeopardizes transparency in decision-making and puts access to justice for prisoners at risk.

Key-words: Prison leave; re-socialisation versus discipline; legal rights versus discretionary power, Access to Justice

Introduction

As in the other Scandinavian countries, the legal system in Denmark reflects both the ideology of the social welfare state and the principle of the rule of law (Lappi-Seppälä and Koskeniemi, 2018). Criminal law and criminal policy are, in general, no exception to that. However, the last two decades have been affected by increasing political attention paid to criminal policy, which has put original Danish welfare state-related values under pressure. For instance, the tradition of pursuing a criminal policy based on research experience and the prioritization of social and educational policy for young offenders (Dalberg-Larsen, 1994). The recent adoption of highly detailed legal regulations concerning specific groups of convicts reveals a political strategy of intervention in a space where discretionary power has been practised for decades and is regulated

by law. The identification of the groups in question turn out to be especially opaque for the public, including for those involved.

Prison leave has not been the main subject of Danish research¹. The topic is, to a large degree, seen as a purely administrative matter and, as we will see, much power in fact lies with the administration. Moreover, in spite of the relatively large amount of prison leave, there are close to no serious problems, such as reoffending, related to prison leave. It is, however, worth paying attention to this topic because it clearly interrelates with parole and, even more so, because it seems that parole and prison leave have recently been discovered as a field for restrictive policymaking. The outcome of political attention has been more legal regulation and a tendency to overrule specific decisive competences, which, in a general form, are referred to the administration by law.

After a brief introduction to the historical and structural background to prison leave and release on parole in Part 1, we define prison leave according to the current Corrections Act in Part 2. The superior rationale for prison leave is introduced in Part 2 as well. Part 3 presents the main types of prison leave, the main criteria for permitting prison leave and an overview the administrative powers to make decisions on prison leave. Part 4 explains the development of prison leave and initiates a discussion on practice. Finally, in Part 5 explores prison leave, partly due to its interconnection with release from prison and the intervention of politicians in administrative powers, before ending with a few references to prison life in general.

1. Background in brief

In 1866, the first comprehensive Danish Criminal Code was introduced, where (Almindelig Borgerlig Straffelov, 10 February 1866) all legal types of punishment were described in Chapter 2, Sections 9-34. Contact with the surrounding society was not an option, but deprivation of liberty could be executed more or less severely, for example, in relation to the type of food provided and contact with other prisoners. In 1873, a programme aimed at making progressive steps out of isolation for prisoners was introduced. The most advanced level before release was Level 3, where prisoners did not work in locked facilities and were allowed to read books (Melchiorsen, 2015).

¹ The topic is introduced in a few books mainly directed at law students and the prison administration. The most thorough presentations are offered in Engbo, *Straffuldbyrdelsesret*, from 2005, pp. 275-295, and Vestergaard: *Strafferetlige Sanktioner*, from 2017, pp. 44-46. The topic is also touched upon in Storgaard and Skov, *Probation in Europe. Denmark*, from 2017. In 2017, Schiøler and Dragsted published the Corrections Act with interpretative comments and numerous references to the underlying regulation directed at practitioners. The Danish literature where prison leave is mentioned is of an educational character or in the form of handbooks; as such, it mainly explains the regulations in relation to this subject. However, the latest revision of the regulations on prison leave is from 2019, so this paper is, to a large degree, based on contemporary legal sources themselves.

After a period of 25 years of preparation, a new Criminal Code was passed in 1930 and put into force in 1933 (Borgerlig Straffelov, 15 April 1930). In Chapters 6-8, different types of punishment were described. With a large number of amendments, the Criminal Code of 1930 is still in force in Denmark.

Both release on parole and suspended sentences were included in the new Criminal Code of 1930. Release on parole was never a general legal right in Denmark, but, since 1933, it has been a general legal right to have one's case considered for parole after a legally specified period. The wording of § 38 of the Criminal Code stated – and still states – that release on parole “cannot be inadvisable”. This term was elaborated in a Parliamentary Report of 1987, which stated that the meaning of “not inadvisable” is that only a small group of prisoners cannot be released on parole. The rejection rate at that time was 5-8%. The decisive power lies, in principle, with the prison administration; but, more recently, this has been another area of political intervention overruling administrative power.

Release on parole was and still is understood as release from prison before the full sentence is served. Specific conditions must be complied with during the parole period, which is no shorter than one year and, in most cases, two years. The parole period is always markedly longer than the remaining time of the sentence. The conditions are most often supervision by the Probation Service, undertaking treatment for addiction to alcohol or drugs, paying debts and other behaviour regulation. Recidivism during the parole period implicates a high risk of reincarceration in order to serve the remaining part of the original sentence. The remaining part should be added to the sentence for the new offence, given that it carries a custodial punishment (Storgaard, 2015, Storgaard and Skov, 2017).

Originally, a prisoner needed to have served two thirds of his/her sentence and no less than nine months before release on parole could be possible. The requirement of two thirds of the sentence remains; but, since 1982, the minimum time in prison has been two months before release on parole can be considered (but not necessarily granted).

Even if Norway and Sweden implemented their first Corrections Acts in the early 1900s, Denmark was highly reluctant about codification. Almost a century later, in 1989, a new draft of the Corrections Act was presented in a Parliamentary Report (*Report 1181 of 1989*). This was followed by 10 years of debate among politicians, professionals and academics. There were different positions in that debate. The decisive argument was not that the prisons should be changed, but the need for better transparency by means of proper legislation and moving away from more than 200 ministerial orders, departmental notices and guidelines for staff given by the Minister of Justice by the authority granted to it in Section 41 (1) of the Criminal Code (Greve, 2001). Many academics argued for this viewpoint.

The Corrections Act came into force 2000 (Lov om fuldbyrdelse af straf mv., 31 May 2000).

History has proven that the concerns expressed in the context of the second viewpoint turned out to be relevant and that, indeed, to the present, the execution of sentences, especially imprisonment, is narrowly regulated at several legal hierarchical levels, with the Corrections Act being the highest-ranking national legal source of practical relevance.

The Department of the Prison and Probation Service (the Department) falls within the remit of the Ministry of Justice and is the national administrative head for all kinds of punishment imposed by the courts. The Department is organized into four regional offices, which function as the administrative head of a number of prisons, pretrial prisons, halfway houses and probation units within a given geographical area. Specialist competences, such as legal expertise, are present in the Department (national level) and in the regional offices, but not in each of the units mentioned. Depending on the division of decisive power related to various matters, the regional offices may make decisions in the first instance or act as an appeals body for decisions made in the local institution, i.e., a prison (Storgaard and Skov, 2017).

Prison capacity in Denmark is divided into three main categories. The first category is mainly for individuals who have not yet been sentenced in court (pretrial). Pretrial prisons are characterized by a high level of security and being located close to the court houses, i.e., in the cities. By the end of 2017 (the most up-to-date data available), there were 1,597 places in local prisons (pretrial), some of which were being used for serving short sentences. Open prisons represent the second category, characterized by relatively free living conditions for prisoners. There is, for instance, no perimeter wall, and the prisoners can leave the wing during daytime in order to go to work in the prison area or to spend time in the open air. There were 1,115 open places in 2017. Closed prisons represent the third category and have a very strict regime. Over the last decade, the sectioning of different categories of prisoners from others, such as sex offenders and drug addicts, has been intensified. By the end of 2017, there were 895 closed places, with the security level being similar to that in pretrial prisons. The average utilization rate of the 3,607 places in the entire prison sector by the end of 2017 was 95%.

Over a 10-year period (2008-2017), the yearly number of unconditional prison sentences decreased from 8,500 to 7,500; but, in the same period, the total number of months of imprisonment imposed in sentences increased from 55,400 to 60,200.

For the whole period 2008-2017, more than half of all unconditional sentences lasted less than four months. In 2017, 4,300 sentences out of 7,500 were of less than four months in length (Statistik 2017). It transpires that convicts with short sentences do not enter prisons at all because the sentence is served with the time in the pretrial prison, from which there is no prison leave, taken into account.

2. Prison leave according to the Corrections Act

2a. The rationale behind contemporary prison leave

As seen above, former prison regimes were mainly based on isolation. Prison leave was not an option². Since 1965, it was possible for a prisoner to be permitted to attend education or employment outside the prison gates in the daytime if there was no risk of misusing that permission; if the sentence was of five months or more, a prisoner might be allowed to leave for the purpose of treatment or in preparation for release from prison (Greve et al., 1984). Further, it was stipulated in 1965 that prisoners in the so-called Youth Prison, where individuals below the age of 21 years were incarcerated for periods between one and three years, permission to stay out at night might be given (Koch, 1975)³.

In 2000, when the Corrections Act was finally passed, this regulation was rephrased and brought within the scope of the Act.

The Parliamentary Report, which introduced the new draft for the Corrections Act, thoroughly considered all facets of prison leave such as experiences, purposes and risks. The expert group behind the report presented prison leave as an element of the execution of a prison sentence, which serves both of the two main aims of the whole of the Department of the Prison and Probation Service. These are in summary: 1) to prepare for a future life without crime; and 2) to keep order and security in the prison. The Report argues that, during prison leave, the prisoner may learn or relearn competences that are useful in the labour market, have contact with non-prisoners and handle personal matters. It is further added that, in this way, the prisoner will develop accountability and conscientiousness. This was, according to the Report, all crucial for leading a life without crime in the future. Secondly, the Report argued that, if the prisoner handles personal matters while visiting relatives, the risk of escape might be lowered. In continuation of this, it was argued that it is of the highest importance that the prisoner is well aware that, if he/she escapes, fails to return to prison after prison leave or in any other way does not act in accordance with the prison regulation, his/her chances for new prison leave are markedly lowered. According to the Report, this was all crucial for order and security in the prison.

In the Report, the rationale behind prison leave is synthesized as follows: “partly, to a large degree, it helps to characterize the execution of the sentence borne out of human and therapeutic considerations and is thus an important factor in order to influence prisoners to live a crime-free life in the future, and partly it effectively protects against problems of a safety-related nature in the prison” (*Report 1181 of 1989*, p. 208) (my translation).

² There was a clause in Section 35 of the Criminal Code of 1930, which described a prisoner’s possibility of legally leaving the prison area during working hours if doing so was necessary in order to carry out obligatory prison work and only under the command and supervision of prison staff.

³ In the period 1965-2000, ‘going out’ and prison leave were regulated in detail by numerous ministerial orders, departmental notices and guidelines for staff issued by the Department of the Prison and Probation Service after delegation from the Minister of Justice.

In other words, the authors of the Report constructed a rationale for prison leave that appeals to humanist and future-oriented approaches by stating that part of its purpose was to raise awareness or develop accountability and conscientiousness. At the same time, a control or discipline approach was included by introducing prison leave as a privilege that may be granted, and not as a legal right parallel to other forms of contact with the outside world. The risk of not being permitted prison leave was therefore expected to work as a hidden means through which to enforce discipline in prisons.

Naturally, the Report considered the risk of a prisoner misusing the permission by breaking some of the conditions, for example, meeting with the wrong people, escaping from an accompanying staff member, or returning to prison under the influence of alcohol and/or drugs. The most serious risk, namely, that the prisoner would commit a new crime during prison leave, was of special concern. The report concluded that it is “crucial that the annual number of established misuse of leave in the form of committing new crime is roughly the same in the period from 1974 to 1987, despite the fact that the amount of prison leave during the period in question have more than doubled” (*Report 1181 of 1989*, p. 208) (my translation).

In 1989, when the Report was published, escape from prison or from a prison guard during prison leave was not debated as a crime. It was a matter of discipline in the prison. In 2002, escape from prison, including escape from an accompanying prison guard during prison leave, became punishable with up to two years of imprisonment in accordance with the Criminal Code, Section 124. However, if the prisoner is on leave without being accompanied, it is still a disciplinary matter for which he/she will receive a disciplinary measure in the prison if he/she returns too late or fails to comply with the conditions for his/her prison leave. This measure will be solitary confinement for a certain number of days and up to four weeks. Escape or failure to return after prison leave results in the imposition of solitary confinement as a disciplinary measure in only 0.5% of cases. In comparison, illegal possession of a mobile phone is the reason for solitary confinement in 45% of cases where this measure is used (Dignity, 2017).

2b. The overriding regulation of contemporary prison leave according to the Corrections Act

Prison leave is included in Chapter 9 of the Corrections Act, Sections 46-50. The title of this chapter is ‘Prisoners’ contact with society’. Apart from prison leave, receiving visitors, sending and receiving letters, access to telephones and newspapers, as well as personal contact with the media, are included.

Receiving visitors, sending and receiving letters and contact by telephone are, with certain limitations, such as optional monitoring, presented as legal rights, whereas prison leave is only a possibility for prisoners. Absence from prison due to prison leave of course counts as if the individual is serving his/her sentence.

In the Corrections Act, Sections 46-50 provide an overview of the general regulation of prison leave and the overriding requirements to be met before prison leave can be permitted.

Two conditions are explicitly attached to all permissions for prison leave, as stated in Section 48. That is, the prohibition of new crimes during prison leave and the prohibition of the breach of individual conditions for being permitted prison leave (“misuse”). Individual conditions include restrictions on contact with people or staying in certain places, wearing an electronic ankle tag, taking Antabuse, not leaving the accompanying prison guard or staying overnight in a custodial institution.

Since 2000, when the Corrections Act was implemented, a number of conditions for prison leave to be permitted is laid down in Section 46. Firstly, the purpose of prison leave must be fairly motivated by education, a specific job offer, treatment, family matters or other personal considerations. Secondly, there can be no firm reasons to assume that the prisoner would commit a new crime, escape or in any other way misuse prison leave. Thirdly, prison leave cannot be granted if there is any reason to assume that this might lead to a loss of public faith in law enforcement.

The main criteria to be considered in the mandatory “risk of misuse assessment” are, for instance, if the offence is defined as dangerous and the prisoner for that reason was taken directly from the court to prison⁴. Being convicted for a serious crime does not per se exclude a prisoner from being granted prison leave. However, as we will see below, convicts with long sentences must have served a minimum amount of time before they can apply for prison leave, while acknowledging the need for extra exhaustive assessment of the risk of misuse by the prison. Other risk factors are (attempted) escape from prison, committing a new crime or any other kind of misuse of prison leave, such as returning late or under the influence of alcohol and/or drugs. The assessment of these factors is part of the discretionary power of the prison administration.

In 2014, a new subsection was added to Section 46. The new Subsection 3 states that prison leave cannot be permitted if the police are of the opinion that a prisoner is connected to a group (‘gang’) which is in conflict with another group, and (according to the police) another member of the group has used weapons or explosives. In 2016, yet another subsection was added. The new Subsection 4 excludes prison leave if the prisoner within the most recent three months of imprisonment has been subject to a disciplinary measure for the illegal possession of a mobile phone. Exceptions to this rule may be made in rare cases.

Further specification about the regulation of prison leave is to be found in legal sources at a lower hierarchical level. The competence to give such regulation is delegated to the Minister of Justice in Section 50.

⁴ Most convicts in Denmark leave the courtroom after the trial with information about where and when they are supposed to turn up to serve the sentence.

The main source for further details is Ministerial Order no. 182 of 2 February 2019 (Bekendtgørelse no. 182 of 2 February 2019 (Udgangsbekendtgørelsen)). In the following the Ministerial Order is referred to as MO no. 182.

3. Types of prison leave, the criteria for obtaining them and related decision-making

MO no. 182 is a detailed regulation of prison leave and is only applicable in cases when the above-mentioned prerequisites in the Corrections Act are present according to the file.

The different types of prison leave have variable purposes, time lengths and conditions. A number of instructions and guidelines needs to be followed in the processing of applications for prison leave.

Depending on the type of prison leave and the individual prisoner in question, prison leave may be administered at different levels, from a prison guard to the Department of the Prison and Probation Service.

First, a few important general points will be presented in 3a below. In 3b, there follows a short description of the types and aims of prison leave and the division of power to grant specific types of prison leave between different administrative levels.

3a. General regulation of prison leave

Prisoners have to hand in an application for prison leave to the prison. The division of decisive power to grant prison leave depends on both the prisoner and his/her reason for applying for it.

In most cases, a rejection may be appealed to a higher administrative authority. For instance, if the head of the prison made the rejection, the prisoner will most often appeal to the regional office. There is no court appeal possible.

The decision about prison leave is always made at the highest administrative level⁵, if a prisoner is serving a sentence which is indefinite (life or secure, also called preventive, imprisonment), if he/she is convicted of terrorism or treason, if there is a suspicion of radicalization or a prisoner is sentenced to deportation.

The power may also belong to the head of a prison, the regional office or, in more serious cases, for instance, life sentences, the power lies with the Department of the Prison and Probation Service.

⁵ The Department of the Prison and Probation Service.

However, a major part of all permissions, rejections and revocations⁶ rest with the regional offices, where legal expertise is present. These offices are at the administrative level between the national Department of the Prison and Probation Service and the individual institution. As we will see, decisions about prison leave are also made in the individual institutions by a guard or the head of the unit (Storgaard and Skov, 2017, p 13).

Section 15 of MO no. 182 lists a number of situations where a hearing of the Commissioner of Police is mandatory before a decision about prison leave can be made. The most important examples are when the prisoner is sentenced for a serious crime, is charged with committing a crime during the actual prison time, has committed a crime during prison leave or has escaped within the most recent three years of imprisonment. This also applies to prisoners who had a rapid relapse into new criminal behaviour since their latest release and foreigners who are to be deported upon release. For prisoners registered as gang-related, the hearing of the Commissioner of Police is also mandatory. This regulation is generally applicable if not included in one of only a very few exceptions, such as hourly-restricted daytime leave or, for instance, a picnic with other prisoners and staff members. Considering the general composition of the prison population, a hearing of the Commissioner of Police must take place in a large number of cases.

In cases involving a mandatory hearing of the police, prison leave cannot be permitted by the regional office if the Commissioner of Police refuses. In the majority of cases of disagreement between the regional office and the Commissioner of Police, the latter has the last word. Consequently, the prisoner receives a rejection of his/her application from the regional office unless the regional office refers the decision or the prisoner appeals the decision to the Department. Only the Department has the formal power to decide against the Commissioner of Police, although it rarely does so.

3b. Types and aims of prison leave and the division of administrative power

Below, the main types of prison leave are divided into three categories according to their main purposes, which are defined as follows: mainly release-oriented, mainly humanistic/release-oriented and mainly oriented towards occasional needs⁷.

Regular prison leave for the purposes of education, training or treatment (i.e., drug treatment) may be permitted, mainly when it is considered appropriate for the preparation of release (MO no. 182, Sections 44-49). Regularity may be on a daily basis or, for instance, twice a week and there must be an appointed contact person in the receiving institution or workplace. To obtain permission for this type of prison leave, the sentence must be of five months in length or more.

⁶ Permission for regular prison leave may be revoked in the case of the failure to turn up at the right time after granted prison leave, the failure to comply with individual conditions imposed in accordance with Section 48, or new information indicating reasons to assume that the prisoner will misuse granted prison leave.

⁷ Identical systematization is followed in Figure 3.

Depending on the total length of the sentence, one quarter or one third of the full sentence must be served before it can be permitted.

Normally, the competence to permit this type of prison leave resides with the head of the institution when the length of the sentence is eight years or less and with a legal expert in the regional office if the sentence is longer⁸.

Another type of release-oriented prison leave is being stationed in a halfway house⁹ (MO no. 182, Sections 50-54). The main purpose here is for work or educational reasons and, typically, stationing can only take place if the purpose cannot be achieved by the use of regular prison leave (above), for instance, if a particular job opportunity is located far away from the prison. Stationing is defined as preparation for release.

By July 2013, stationing in one's own home whilst wearing an electronic ankle tag for up to six months of the final time of the sentence was introduced (MO no. 182, Section 55). The sentence must be of at least one year in length and this option is meant to specifically meet needs oriented towards family and resocialization. Prisoners stationed in their own homes are under strict supervision and control by the Probation Service. This variant of stationing is similar to what other countries refer to as a back-door solution for electronic monitoring (Storgaard, 2017). It is unclear, however, whether this back-door solution in fact works as a step prior to ordinary parole or as an alternative to it.

The competence to permit stationing belongs to the regional offices.

Prison leave may be permitted for visiting particular close persons, normally parents or spouses (MO no. 182, Sections 35 and 38). Such prison leave may be permitted for one time only or on a regular basis. It depends on the length of the sentence and the regime of the prison as to how much time must be served before prison leave for visits may be granted. The absolute minimum is 30 days in an open prison and 10 weeks in a closed prison. If the sentence is of five years in length or more, one third of the sentence must be served before prison leave for visits may be granted.

If prison leave for visits is granted on a regular basis, the regularity is every three weeks and the duration is from 4 p.m. on Friday to 9 p.m. on Sunday. The regularity can in fact make it possible for the prisoner to rebuild and stabilize contact with relevant relatives and develop competences in handling personal matters in preparation for release.

⁸ Regular prison leave for these purposes is normally reserved for the last part of the period of imprisonment. If the sentence is of eight years or less, the duration of the period with regular prison leave of this type cannot exceed three months or one year if the aim is education. In closed prisons and if the sentence is of more than eight years, this type of leave may be permitted for up to one year in length, even if it is work-related.

⁹ A so-called pension, which is an open institution belonging to the Prison and Probation Service. Residents are obliged to inform staff about their whereabouts and to stay in the houses overnight.

In open as well as closed prisons, the decisive power is in the hands of the leader of the institution, provided that the general preconditions in the Corrections Act are met.

The last main group of prison leave is oriented towards meeting occasional needs (MO no. 182, Sections 31, 40 and 78-81). Prisoners may be granted occasional prison leave if they are not permitted regular prison leave (above) and/or on highly specific occasions of different types, such as to visit a close relative who is seriously ill, attend a funeral of a close relative, to attend court or to be examined by a doctor. Occasional prison leave may also be granted in order to meet with the Probation Service to arrange for supervision or find accommodation upon release. Finally, a picnic with a group of prisoners and staff members may be allowed under this type of prison leave.

The decisive competence and requirements with regard to time spent in prison before occasional prison leave can take place vary. To a large degree, a prison guard may make a decision as long as the general conditions in Section 46 of the Correctional Act and the specific requirements about time spent in prison are met and if there is sufficient documentation to justify the request (*Manual for Prison Staff*, unpublished; Schiøler and Dragsted, 2017).

4. Amount of prison leave¹⁰

Within the most recent 25 years, the amount of prison leave in Denmark has oscillated between almost 40,000 and 64,000 applications granted. Due to counting methods, these numbers seem high compared to the numbers of prisoners and prison places. Up until 1987, permission for regular prison leave to attend education or training was counted once, meaning that, if a prisoner was allowed to study on a university course with scheduled lectures three days per week over 10 weeks, this would count as one prison leave event. Since 1987, prison leave has been counted on a day-by-day and a person-by-person basis, meaning that, using the same example, the number of leave events would now be 30. The impact of this change on the statistics has resulted in an increase from 1,000 to 22,000 registrations of regular prison leave for the purpose of education or training from 1986 to 1987 (Kriminalforsorgen i tal, 1989, p. 15).

Figure 1: Amount of prison leave (abs) 1993-2018

¹⁰ All numbers are from the yearly statistical report issued by the Prison and Probation Service in 1989, 2007, 2010 and 2017. In some cases, numbers and percentages are repeated for the same year in more than one yearly report. One year is adjusted slightly.

In Section 46 (2) of the Corrections Act, the main and general criteria for granting prison leave are listed. The criteria are concentrated on the seriousness of the committed crime, the frequency of crime, and the ability and willingness to abide with the conditions for the prison leave. As can be seen in Figure 2, misuse of prison leave, such as returning to the prison under the influence of alcohol, returning late or escaping from the accompanying guard, has never been a significant problem. New crime has been registered in only 0.1 – 0,2% of all permitted prison leave.

Figure 2: Misuse of prison leave with and without new crime as a percentage of all prison leave

The purposes and specific requirements for granting prison leave are defined in MO no. 182. In Figure 3, the vast majority of prison leave can be narrowed down to three groups. The first group

(Sections 44-49 and 50-54) comprises the types of prison leave that specifically focus on preparation for release from prison. That is, regular leave in order to attend education or employment and for stationing in a half-way house with the same intention. The second group (Sections 35 and 38) focuses on visiting relatives or other intimates based either on one-time permission or on permission for regular visits. Finally, the third group (Sections 31, 40, 78-81) is a collection of a number of one-time prison leave events for specific purposes, such as visiting a seriously ill relative, attending the funeral of a close relative, being seen by a doctor or attending a meeting in court.

There is strongly increasing trend in one-day prison leave events for specific purposes. There is also a tendency towards relatively fewer regular prison leave events for rehabilitative purposes, such as improving levels of education and other job-related skills. The share of the total amount of prison leave dedicated to visiting relatives has tended to reduce as well.

Figure 3: Development in the purpose of prison leave as a percentage of all prison leave granted in each year¹¹

It is clear that the absolute amount of prison leave is declining (Figure 1). It makes sense to include the trend concerning the amount and the length of sentences in the evaluation of this development. Since 2001, the number of sentences served in prison has oscillated between 7,000 (in most years) and up to 10,500 in 2005-2006 and 2011-2012. In 2017, the number of sentences was close to the same as that in 2000 (7,000-7,500). The number of imposed prison months, however, peaks at 73,300 in 2013, when the number of sentences started to decrease. In 2017,

¹¹ Figure 3 corresponds to the representation of prison leave under 3b above, except for being stationed in one's own home, which has only been granted between 60 and 80 times per year since it was introduced 2013.

when the number of sentences was equal to the number of sentences in 2000, we see the imposition of 10,000 more prison months compared to 2000.

Figure 4: Sentences registered in the prisons according to the¹² imposed months per year

Even though there is not one year where the length of at least half of the sentences is less than four months, Figure 5 depicts a markedly stronger decline in short sentences than in longer sentences between 2005 and 2015. As a matter of fact, the number of sentences of 48 months or more increased from 155 to 230 in the period 2001-2017.

Figure 5: Number of sentences registered in the prisons according to the length of the sentences

¹² All data regarding prison sentences refer to receptions of convicted persons in the prisons. It is *not* identical to the number of sentences imposed in court in the same years, *but* to the number of individuals with a sentence of this specific length *served in prison* each year.

There is no clear and unambiguous explanation for the partly reversed tendencies in the developments in sentencing and prison leave over a period of some 20 years.

According to Figure 1, the amount of prison leave was relatively stable over a period of 20 years from 1993 to 2013.

It makes sense to assume that the amendments to the Corrections Act in 2014, concerning armed gang conflicts (Section 46, Subsection 3), and in 2016, concerning prisoners' illegal possession of mobile phones (same section, Subsection 4) (see above in 2b), played a role in the decrease in the absolute scale of prison leave from 2014 onwards.

According to Figure 5, we have seen an increase in longer sentences, which, on the one hand, supports the assumption that gang members partly explain the decrease in prison leave. This assumption is based on Section 81a of the Criminal Code, which makes it legal to double the length of a sentence for defendants who are members of violent gangs. The judge in court, based on information from the prosecutor (and the police), establishes this membership, which potentially influences the length of the sentence and indisputably determines the chances of prison leave and parole.

On the other hand, longer sentences by implication should increase the chances of more prison leave, bearing the requirements of minimum times to be served before any kind of prison leave can be granted in mind.

There were slight variations between an average of 3,500 and 4,000 prisoners per day, per year, in the period 2013-2017, which to some degree may have influenced the number of prison leave events as well.

Figure 4 shows a decrease in imposed prison months as well as in the number of sentences from 2014 onwards. Based on the significant attention paid to armed gangs by the media and policymakers, one should expect the opposite. One reason for this may very well be that the number of gangs, gang members and gang-related crimes is smaller than the aforementioned attention suggests and that the general decline in registered crime is stronger than the possible increase in the number of citizens who are registered as being connected to a gang and convicted of a crime.

Until now, there is no public access to the criteria that are used to determine whether an individual is as gang member; nor are there statistics on how often Section 81a of the Criminal Code is quoted in court sentences.

5. Discussion

Although the above introduction to prison leave is simplified, it represents a true and not overstated picture of a complicated tool in the Danish prison system.

Since 2005, there has been a downward trend in the amount of prison leave granted, which has been markedly stronger during the most recent four to five years (Statistik 2017 and Statistik 2018).

Lately, there has been a slight decline in the number of prisoners and a decline in the number of months in the imposed prison sentences that are executed by the prison and probation system. But none of this unambiguously explains the decline in the amount of prison leave granted. In addition, this latter decline cannot be interpreted as a reaction to increasing trends regarding the misuse of prison leave, as this has always been very low and even declined in recent years. From 2004 to 2017, only 0.1% of prison leave misuse could be related to new crime, while, in 2018, the rate increased to 0.2 %.

In terms of time, there is a correlation between the highly significant decrease in prison leave since 2014 and two specifically directed restrictions on prison leave, which were introduced in 2014 and 2016, respectively.

The amendment from 2014 concerns gang-related conflicts and is identical to a simultaneously introduced amendment to Section 38 (5) of the Criminal Code, where release on parole is prohibited in identical cases.

Historically, and based on preparatory works, it is intended that prisoners, in the main, should be released after they have served two thirds of their sentence. The rationale behind the idea of an almost automatic release on parole after serving two thirds of a sentence has much in common with the rationale behind prison leave: firstly, to minimize the harm caused by being imprisoned (humanity) and, secondly, to secure a legal fundament for supervision, understood as control and support after release (discipline) (*Report 1099*, pp. 216-217, Storgaard, 2015, 2017).

According to Section 38 (1-4) of the Criminal Code, it is mandatory that an individual assessment must be made as to whether or not a prisoner should be released on parole after having served two thirds of the time stipulated in the sentence.

In accordance with the original idea behind release on parole, the main codified criterion in this regard is *not* that parole should be advisable, but that it should *not be inadvisable* (Engbo, p. 346). According to the Section 38 (4) of the Criminal Code, the administrative authority must explain why release on parole is not advisable if that is the case.

Since 2015, the interrelation between prison leave and parole has been further stressed in new guidelines below the level of codified law¹³, where prison leave as part of the basic conditions for being released on parole is set out. Firstly, misuse of prison leave, even without a criminal offence being related to the misuse, always jeopardizes ordinary release on parole. Further, it seems to be a precondition that prison leave must have been permitted during prison time in order for release on parole not to be defined as inadvisable. For instance, regarding young prisoners below 21 years, Instruction no. 9766, Point 10, states that: “It will normally be a precondition for release on parole that the prisoner has been able to successfully prepare for release in the form of prison leave to spend time with family and possibly regular leave for education or work, and in turn stationing.” Concerning prisoners with long sentences, the statement from 2015 explains in detail how successful preparation for release on parole must be carried out. The instructions include a long period of preparation starting with short-term leave accompanied by a staff member and ending with regular leave for education or work and stationing.

The requirements for release on parole are incompatible with the developments illustrated in Figure 3 concerning an increase in one-day occasional prison leave and a decrease in release-related prison leave.

Due to this interconnection between prison leave and release on parole, the decline in prison leave (see Figure 1) indicates that so-called ordinary release on parole is under pressure. Figure 6 shows the trend in percentage terms concerning rejections of “ordinary” parole after two thirds of a sentence. This development is almost the exact reverse of the trend in prison leave (Figure 1).

Figure 6: Trend in rejected “ordinary” releases on parole

¹³ Contained in an official statement issued by the Department of the Prison and Probation Service of 30 July 2015 with detailed instructions about release on parole (Redegørelse om praksis for prøveløsladelse og genindsættelse) and more recently Ministerial Order no. 855 of 28 June 2017 (BEK nr 855 af 28/06/2017) and Instruction no. 9,766 of 11 September 2018 (VEJ nr 9766 af 11/09/2018).

With the implementation of Section 38 (5) of the Criminal Code in 2015, a mandatory individual assessment no longer applies to prisoners who match those in the group that was excluded from prison leave in the amendment to Section 46 (3) (above) of the Corrections Act in 2014. These amendments were introduced in spite of a pre-existing general regulation and the distribution of discretionary power to the administration with the sound intention to prevent prison leave and parole in situations where there is a reasonable risk of new crime.¹⁴ This is an example of political intervention in prison administration, which removes the legally defined general discretionary power from the administration. The new regulation leads to rigid decision-making and to less thorough preparation for the release of a certain group of prisoners, who are seen as potentially more dangerous and more at risk of committing new crime than others. From 2014 to 2018, the number of prisoners who were evaluated for parole but finally released without parole increased from 587 to 1,003 (Statistik 2018). Release after having served the full sentence excludes the authorities from taking on any duties of supervision or other conditions such as not seeing gang members. Most of all, the result of this stronger resolve from the political side is more administration, less goal-oriented preparation for release at the individual level and more time behind bars.

Based on year-long cooperation with professionals working in the prison sector, it is my clear impression that prison leave, as well as release on parole, should be seen as valuable to the execution of prison sentences. There exist two main opinions: the first is that prison leave and release on parole are appropriate because they demonstrate humanity and contribute to stimulating positive contacts outside the prison, which might be important in establishing a

¹⁴ That is, Section 46 (3) of the Corrections Act for prison leave, and Section 38 (4) of the Criminal Code for release on parole.

future free of committing further crime; the other opinion points out that both elements are important in connection with the atmosphere in prison, because concerns in relation to being denied prison leave or release on parole discourage prisoners from misconduct whilst being incarcerated. These two standpoints are similar to the rationale in both the preparatory works before the introduction of prison leave and in those concerning release on parole.

The literature on access to justice is mainly concerned with practical matters such as access to courts and to legal aid. There tends to be a focus on the period before and during a court procedure, whereas access to justice for criminally convicted individuals, who are serving a prison sentence, is markedly less highlighted.

In comparison to citizens who are not imprisoned, prisoners face a large number of restrictions. Apart from being deprived of their liberty, which is the main content of their sentence, multiple other restrictions are imposed, such as restricted access to ordinary ways of communication with the public, for instance, via the media, monitoring of visits, letters, phone calls etc. Prisoners also face strong limitations in terms of their options to complain and appeal.

Prison regulation is not framed by law alone but based on numerous supplementary regulations, guidelines and instructions. The various legal sources are complicated or impossible to gain access to, such that one can hardly figure out to what degree they are binding for decision makers. In addition to being based on complicated combinations of different types of regulation, decision-making concerning prison leave involves a large amount of discretionary power. This creates obvious risks of failure to identify a problem as a legal one, which is a main point in the access to justice literature (Albiston and Sandefur, 2013).

This study has indicated that there is a need to develop the scope of access to justice studies. Access to justice should not only focus on the time prior to any court procedure. Research needs to be more specific about what the two key concepts of *access* and *justice* in fact mean in general, as well as in relation to prisoners. Even if a prisoner in principle has the right to see and read all prison regulations, this does not guarantee that he/she will be able to analyse, compare and grasp the correct hierarchy with regard to their diverse nature. Inspired by the question formulated by Deborah Rhode (Rhode, 2013), as to whether justice is a matter of law-related processes and assistance or whether it simply includes resolutions of legal as well as social problems, this study points out that decisions need to be justifiable, not only legally but in the interests of the public and society, as well as human dignity. Transparency in decision-making is an unavoidable demand in the determination of what is legal and securing access to justice for prisoners. It is argued that hasty decisions at the political level create the basis for unjustifiable decisions.

Access to justice scholarship has been described as being delineated into two distinct theses (Leitch, 2013). The practical thesis entails a focus on the practical means through which people can achieve access to justice, for instance, courts and legal counselling/legal aid. The democratic

thesis, according to Leitch, has been far less elaborated in research until now. It concerns broader questions regarding participation and the means to affect justice as an end in itself. In relation to prison leave, the democratic thesis calls for transparency concerning actual legal regulations as a first step. It has been argued above that decision-making about prison leave is characterized by a lack of transparency; the same is true for access to information about whether a person is registered as a gang member prior to the rejection of an application for prison leave. In addition, public access to the full amount of regulations is limited and decisions on prison leave are not made in public in the courts and cannot be appealed to the courts either.

Against this background, it is concluded that, certainly in the case of Denmark, there is a need for further studies on the interplay between legal regulation and decision-making in the context of prison leave and related topics. Access to justice research may very well provide a useful framework for such studies and further establish a basis for comparative studies in the future.

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