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INSTITUTE FOR
HUMAN RIGHTS

FORENSIC PSYCHIATRY

IN A HUMAN RIGHTS
PERSPECTIVE



FORENSIC PSYCHIATRY. IN A HUMAN RIGHTS PERSPECTIVE.

Authors: Tinne Steffensen, Mette Gaardsted Frandsen og Nikolaj Nielsen.

Responsible: Department director, Maria Ventegodt

Equal Treatment Department

The full report can be found (in Danish) at:

<https://menneskeret.dk/udgivelser/retspsykiatri-menneskeretligt-perspektiv>

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Wilders Plads 8K

DK-1403 Copenhagen K

Phone +45 3269 8888

www.humanrights.dk

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SUMMARY

INTRODUCTION AND BACKGROUND TO THE REPORT

In Denmark, as a rule, people with a mental illness cannot be held responsible for a criminal offence if they were of unsound mind at the time of the offence. Therefore, they are not punishable according to the Danish Criminal Code, and they are exempted from punishment through fines or imprisonment.

However, the phrase 'not punishable' (in Danish "straffri") is somewhat misleading, as people with a mental illness who commit a criminal offence are subject to other, often far-reaching sanctions. Instead of a punishment, mentally ill offenders can be sentenced to a psychiatric measure, i.e. they are sentenced to placement or treatment. Measures can be minor restraint, such as supervision by the Danish Prison and Probation Service and outpatient treatment, but most often measures include a possibility for compulsory admission to a psychiatric ward or other institution.

Over the past 40 years, forensic psychiatry in Denmark has experienced considerable growth, and this has caused concern and puzzlement. The number of patients subjected to a psychiatric measure has increased almost tenfold since the 1980s, and today, more than 4,000 forensic psychiatric patients have been sentenced to placement or treatment.

Based on the growth in forensic psychiatry, this report examines how forensic psychiatric patients are protected from excessively long or intrusive sentences, and how patients' rights can be strengthened.

LOSS OF RIGHTS FOR SOME OF THE MOST VULNERABLE INDIVIDUALS

A large part of the group of persons subjected to psychiatric measures live on the margin of society. Many of them are homeless, were placed in care away from their home when they were children, have little education, are struggling with abuse and long-term, serious mental illness.

Self-determination is a fundamental principle in ordinary psychiatry, but forensic psychiatric patients do not enjoy the same protection of their right to self-determination. When people are sentenced to placement or treatment, they face uncertainty about when they risk being detained and committed to a psychiatric ward. Firstly, compulsory admission to a psychiatric ward is possible without

meeting the conditions in the Danish Psychiatric Act concerning danger or risk of serious health impairment. Secondly, being sentenced to placement or treatment can involve hidden coercion during admission as well as during outpatient treatment, because the convicted person may feel under pressure to consent to treatment in order to have the judgement repealed.

PEOPLE WITH LONG-TERM MENTAL ILLNESS RISK SANCTIONS LASTING MUCH LONGER THAN THOSE FACED BY OTHER OFFENDERS

As far back as in 2006, the Danish Institute for Human Rights called attention to the lack of proportionality between offences and sanctions for mentally ill persons who have committed a crime and have been sentenced to a psychiatric measure. The problem concerning differential treatment - that people with long-term mental illness receive longer sentences - is even more pressing today. It is a massive human-rights challenge for Denmark, because disproportionately long-term measures may constitute discrimination of people with long-term mental illness.

Almost all sentences to psychiatric measures issued in 2017 include an option for compulsory admission (97%), while a considerable percentage are of indeterminate duration (40%). The percentage of indeterminate sentences to a psychiatric measure has been constant since 2000, despite a decline in the percentage of crimes categorised as crimes involving a risk of injury to other persons. During the same period, the percentage of crimes committed while the convicted person was undergoing psychiatric treatment increased, primarily in the form of violence or threats against public employees.

Most sentences to psychiatric measures concern various forms of violence, but theft and other property crime account for approx. 10% of all sentences to psychiatric measures every year. In practice, sentences to psychiatric measures with maximum periods of less than five years are rare - even for minor offences such as property crimes. The usual punishment for property crimes, where the offender is not mentally ill, is a fine or, in exceptional cases, a short-term conditional sentence.

Apart from being long-term, also for less serious crime, sentences to psychiatric measures differ from normal sentences in that they can be extended, solely on the grounds of "exceptional circumstances". An analysis of extended sentences shows that sentences for property crimes, for example, have been extended in several cases. This also applies in cases where no other crime has been committed while serving the sentence. The key purpose of a sentence to placement or treatment is - through treatment - to prevent a person from committing similar, repeated crime, known as recidivist crime, due to the mental illness. Nevertheless, we have found several examples of sentences being extended on the grounds of treatment needs, without referring to a risk of recidivism.

Consequently, in our opinion, the requirement for "exceptional circumstances" offers very poor protection against a sentence to placement or treatment being extended.

WHEN GENERAL PSYCHIATRY FAILS, PATIENTS END UP WITH A SENTENCE TO TREATMENT

Very often, forensic psychiatric patients are general psychiatric patients who have not received the right help in due time. A sentence to placement or treatment is then the last resort, and it may even be a way of getting the treatment patients have not received so far.

An examination of court orders for 96 extended sentences in 2018 shows that uncertainty regarding continued treatment and support after the expiry of a sentence to treatment or placement is often a key factor when justifying extensions of sentences. The practice of sentencing more people to psychiatric measures on the grounds of inadequate treatment in the general mental health system is objectionable, and a lack of any other options for treatment and support should not lead to an extension of psychiatric measures.

People with treatment needs who are not deemed to pose a danger to others should be offered help, but treatment should take place in the general mental health system and not by extending a sentence to treatment beyond what is reasonable.

LONG CASE-PROCESSING TIME AND LACK OF INFORMATION FOR GUARDIAN REPRESENTATIVES

Any person sentenced to a measure with the option of admission will have a guardian representative appointed. The task of the guardian representative is to keep abreast of the situation of the convicted person and to ensure that stays at hospitals or other institutions, as well as other measures, are not extended for longer than necessary. This includes assisting the convicted person to request that the judgment be changed or repealed.

Our guardian representative interviews and questionnaire surveys indicate that information about the appointment as a guardian representative prior to the judgement is inadequate. Furthermore, a large number of guardian representatives state that they lack information about admissions and discharges of their clients, even though they are entitled to receive such information. Finally, several guardian representatives point to long case-processing times of up to one year after requesting that a judgment be changed or repealed. Results suggest that the work of guardian representatives is made unnecessarily difficult, and that ultimately, this has a negative effect on due process.

Information from the guardian representatives is backed up by information in the court orders on extension we have examined. We are not able to derive the exact case-processing time on the basis of our material. By examining dates of medical assessments of the convicted person and dates of court hearings, it is possible to arrive indirectly at case processing times for sentences to psychiatric measures. In the report, we describe examples of case processing times from

medical assessment to court hearing of between seven and nine months. If, for example, deprivation of liberty by compulsory admission is maintained for longer than necessary due to case processing times, this entails a risk of violating the prohibition against discrimination and of infringing the right to personal freedom.

Furthermore, the European Court of Human Rights has confirmed several times that any decision to maintain deprivation of liberty on the basis of an outdated psychiatric report in itself constitutes an infringement of the right to personal freedom.

CONCLUSIONS

We can conclude that several trends point in the same direction. The number of people receiving a sentence to a psychiatric measure, either as a new sentence or as an extension of an existing sentence, is increasing. Sentences are longer overall. This trend has not been accompanied by a parallel increase in the percentage of people sentenced to a psychiatric measure who commit crimes involving a risk of injury, a factor which would otherwise have justified the development.

These trends go counter to the intention of introducing time restrictions on sentences to psychiatric measures in 2000. The very purpose of this was to prevent disproportionately long sentences. Thus, the amendment has not had the desired effect that offenders sentenced to psychiatric measures serve shorter sentences.

No crime should go unnoticed, but sanctions should be proportional to the offence - also when the offender is a person with a mental illness. However, in this study, we have shown that a sentence to placement or treatment is often considerably longer than an ordinary punishment for the same crime would be. Furthermore, sentences to psychiatric measures are often extended on the grounds of treatment needs, rather than on the grounds of new criminal activity or the risk of recidivism.

The results of this survey pinpoint a number of human-rights issues in relation to persons protected under the UN Convention on the Rights of Persons with Disabilities due to their long-term mental illness.

Thus, the problems concerning more frequent use of sentences to psychiatric measures and long sentences for minor offences described by the Danish Institute for Human Rights in its 2006 report on measures for the mentally ill, have become even more severe and affect more people. The Danish Institute for Human Rights assesses that there is a need for comprehensive reform of the forensic psychiatric system, including a break with the principle of imposing very long-term measures even for minor criminal offences.

This survey also suggests that convicted persons are sometimes subjected to psychiatric measures for longer periods of time, due to uncertainty about treatment options in the general mental health system and about options for support and

housing. This entails a risk of violating the prohibition against discrimination and of infringing the right to personal freedom, particularly in situations in which deprivation of liberty is maintained for longer than necessary.

RECOMMENDATIONS

The Danish Institute for Human Rights assesses that the regulations in the Danish Criminal Code with regard to psychiatric measures should generally be revised so that Danish law better reflects international standards for equal treatment of people with disabilities and standards for respecting basic freedoms. A revision of the regulations should be based on solid preparatory work.

On this basis, the Danish Institute for Human Rights recommends:

- 1) that the Ministry of Justice and the Ministry of Health implement a reform of the forensic psychiatry area, including an amendment of the provisions on measures in Part 9 of the Danish Criminal Code.

The amendment should aim to ensure:

- that psychiatric measures are only used in cases concerning crimes that would lead to imprisonment in the ordinary penal system.
- that the duration of a psychiatric measure is not considerably longer than the duration of a prison sentence, had it been imposed in the ordinary penal system.

Guardian representatives have a key role and responsibility to ensure that no measures are extended in time or scope beyond what is necessary.

As guardian representatives are to play a key role in protecting the rights of the convicted person, it is essential that guardian representatives receive guidance and are informed about their role, and that they agree to take on the task before they are appointed as guardian representatives. As described in chapter 5 of the report, this is far from always the case today.

The Danish Institute for Human Rights recommends:

- 2) that the police and the prosecution authority ensure that, prior to being appointed as guardian representatives, relatives receive guidance and thorough briefing about the nature of the task, including the possibility for their client to have a guardian appointed by the authorities if the relatives do not wish to take on, or cannot cope with, the role as guardian representatives.

Another important part of being a guardian representative is to keep abreast with the client's situation. Therefore, the Executive Order on Guardian Representatives states that hospitals and employees have a duty to inform guardian representatives about admissions and discharges. Based on interviews and questionnaire surveys with guardian representatives, we can conclude that guardian representatives are often not informed when their clients are admitted to or discharged from hospital.

Therefore, the Danish Institute for Human Rights recommends:

3) that the regions strongly stress to hospital wards that they have a duty to inform guardian representatives about admissions and discharges.

The data in this report does not allow us to establish with certainty whether there is a problem with case processing times when requesting that judgments be changed or that cases on extension be processed. Within the last two-three years, 19% of guardian representatives have experienced waiting times of 10 months or more after requesting that a judgement be changed. Where sentences were extended, we have seen cases in which more than seven months passed from the time of the medical or social assessment to the case being heard in court. These findings indicate more general problems with case-processing times.

On this basis, the Danish Institute for Human Rights recommends:

4) that the Ministry of Justice take steps to investigate how widespread long case-processing times are, and how to ensure that updated medical assessments underpin changes in sentences to psychiatric measures.

