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Preventive detention: Retribution, rehabilitation and conditional release with a special focus on the 22 July case - “Hard cases make bad law”

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Short note on background and context

- 22 July 2011 (the 22 July-case) Anders Behring Breivik - in the bombing of the Government's headquarter in Oslo and the subsequent shooting of participants at the Labour Party's youth camp at the island of Utøya – killed altogether 77 people.
- Anders Behring Breivik changed his name to Fjotolf Hasen – Breivik.
- Breivik was 24 August 2012 sentenced to preventive detention for terror – time frame 21 years and minimum term 10 years.
- This sentence the most severe sentenced that could be applied at that time.



Preventive detention

- A punishment – retribution in the time frame and minimum term.
- Norway upholds the utilitarian value of punishment
general deterrence – individual deterrence.
- The purpose of preventive detention – protect the society of new serious crimes.
- Potentially time-unlimited punishment, the time frame may be prolonged as long as there is an obvious risk of new serious crimes.
- The minimum term regulates when the detainee may apply for parole – i.e. a safeguard for retribution.
- The only reason for the detainee to stay imprisoned after the minimum term – an obvious risk of new serious crimes, risk assessments – individual deterrence.



Preventive detention – changes in the law 2015

- Raised the max. minimum term to 14 years – coordination with parole from fixed-term sentences.
- Max. time frame and minimum term raise to 30 and 20 years for severe terrorism, genocide, crimes against humanity and certain war crimes.
- Coordinated with the rise in the max fixed-term penalty to 30 years for these crimes. Proportionality with other countries, Norway not a safe heaven for terrorist.
- Retribution more prominent – what about the 22 July case?



Parole in the 22 July-case

- Breivik may apply for parole up to a year before the minimum term is served
ECHR Art. 5 no. 4: “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”
- According to case law of parole from preventive detention – the court will discuss rehabilitative issues vs. risk assessments.
- The court may very well criticise the Correctional Service for not fulfilling the criteria of facilitating for rehabilitation.
- If the court declines the application, Breivik may apply to be released again one year after a sentence that declines the release is final. The regularity of the judgement of the lawfulness of the detention is legally established.
- What will happen in the long run?



New changes in the law?

- Criteria for parole from an ordinary prison sentence:
The Correctional Service should not permit parole if it is inadvisable (utilrådelig).
Factors of consideration in this judgement are: behaviour during imprisonment, reason to believe the prisoner will commit new crimes when released.
Implicit in the concept 'if advisable', a consideration of the public's general sense of justice and a concern for the victims.
- These criteria interpreted as stricter than the criteria for parole from preventive detention - obvious risk of new serious crimes.
- A new proposal from the Government: to change the criteria for parole from preventive detention to (almost) the same criteria as a fixed-term sentence for reasons of injustice.



Result of eventual new changes

- The retributive aspect even more prominent in the body of law of preventive detention.
- Keep Breivik and other detainees imprisoned beyond the minimum-term on grounds of retribution?