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REFORM TRENDS IN SCANDINAVIA

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The events of September 11, 2001 had a significant impact on criminal procedures in Europe, including Scandinavia. Three days after the attacks in New York, the heads of European countries in the European Union assembled and decided that they would join the War Against Terror.

At that meeting, the mutual acceptance of the European “arrest warrant” was discussed. The arrest warrant procedure requires a European country that apprehends a suspect wanted for a crime in another European country to hand over the suspect. The country where the suspect was apprehended has no right to evaluate whether the suspicion is valid. Likewise, a valid request from a judge in another European country will require the suspect to be handed over.

The commission had been working on this arrest warrant procedure for some time, but nobody expected the European Union to accept this procedure in the foreseeable future due to two main obstacles. One was the obstacle of “double penalty,” meaning the offense is punishable in both the country where the person is wanted and the country handing over the suspect. The other principle was the familiar ban on extraditing a country’s own citizens, which is a closely held value in Scandinavia. Each of these principles conflicts with the European arrest warrant, and they had been holding up the EU’s acceptance of the procedure. However, the heads of states wanted to show that they were really “doing something” about crime and terrorism, so the European arrest warrant went into effect. Now we do have to extradite our own citizens if there is a judicial request from another European country. The Danish judge is not allowed to evaluate the proof of the alleged criminal.

A list of offenses subject to the European arrest warrant was drawn up. Some of these offenses are difficult to swallow. For example, racism is on the list, but not all countries have the same evaluation of what can be considered racism. In some European countries, a person can be punished for saying “The Holocaust did not occur,” or for reading Hitler’s *Mein Kampf*; whereas the Scandinavian countries place a high value on freedom of speech and do not punish such acts.

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The changes in Danish law have been much more pronounced than in the other Scandinavian countries. One reason is that a right-wing party was elected in Denmark in the fall of 2001. Denmark traditionally had a socialdemocratic government supported by one or two smaller parties, but now we have a right-wing government supported by one extremely right-wing party. In opposition these parties had been asking for harsher sentencing for criminals and more control in policing crime. Now the newly elected government is in power, and harsher sentencing for criminals has been accepted.

The first move were acts to combat terrorism. Following UN Security Council Resolution 1373, concerning the fight against terrorism, the Danish government proposed several laws that instituted the crime of "terrorism," which may be punished with life imprisonment. Danish terrorism laws now punish financial support of terrorist groups. Furthermore, Danish citizens can be extradited for involvement in acts of terror. These points are problematic because "terrorist organization" is undefined. Furthermore, it has not been differentiated from a "patriotic organization." Members of a resistance movement may be labeled a "terrorist organization," even if they are fighting for political freedom or trying to overthrow a government that was not democratically elected.

The Danish government has not defined the activities that would classify a group as a terrorist group. A number of Palestinians living in Denmark questioned government officials as to whether they could legally continue to send money to their relatives in Palestine. The government did not give a definitive answer, but stated that the courts would have to sort it out. This is not an appropriate response to citizen's questions; people need reliable advice about whether specific acts constitute a crime.

The United States and the European Union have each defined "terrorist organization," but these definitions are not the same. It is dangerous when countries do not agree on a simple definition; it creates a vacuum. People do not know whether they are committing crimes.

The government decided to do even more to combat crime. Denmark's traditional legislative process for changes in criminal law involves a committee consisting of civil servants, judges, academics, prosecutors, and defense lawyers to review pending legislation. They create a balanced proposal for possible changes within the criminal justice system. However, to make this process faster and to make sure the committee would produce a proposal stressing law and order the new Danish government established a committee that consisted of prosecutors, police, and civil servants. The government wanted to increase the weapons available to the police to fight terrorism and organized crime.

The newly-created committee recommended that civilians should be allowed to work undercover for the police. Up till then the police in Scandinavian countries had informants, but the police was not allowed to ask a civilian to commit a crime. Undercover work involving criminal behavior (like for instance setting up a drug-deal) had to be done by a police agent; When the police work undercover it is important to minimize the risk of instigating crimes that otherwise would not be committed. The reasoning behind the law was that a police officer, unlike a civilian, could control for that risk.

The new government argued that to effectively control crime that risk had to be taken. In a number of situations, there is a need for undercover citizens. For instance, in a drug-dealing investigation, a police officer could not work undercover; drug dealers are often very careful and very distrustful. In order to set up a deal the person working undercover has to be personally familiar with the drug dealers. The government decided a "civilian agent" would introduce the police officer and ask for a drug sample. The work of the civilian agent is not limited to cases like that. The law text is general. The civilian agent can be used, if his assistance is "insignificant."

The new committee wanted to limit the rights of the defense counsel to access documents. In Denmark, we have a long-established adversarial system, which we inherited from England. Our adversarial system has been in existence for more than one hundred years and, up until a year ago, we had been very careful to ensure the "equality of arms" that the defense counsel had the same opportunities as the prosecutors. For instance, the prosecution must hand over all material documents to defense counsel, even if the prosecution does not plan to use them. Some evidence may be held back pre-trial if it was necessary for other purposes; for example, if it was necessary to solve the crime. However, when the case went to trial, everything had to be presented at trial.

Danish police however, had trouble making deals with international colleagues. Foreign officials were unwilling to hand over documents to the Danish police because the Danish police would have to share the information with the defense counsel. Therefore, foreign police would withhold the evidence. This complicated the investigation: The Danish police could not access some material documents because of the mandate to share it with defense counsel.

The Danish government introduced a new rule that would continue to mandate materials handed over in a specific case be shared with the defense, but materials that were discovered in the course of investigating another case would not. Finally, the committee came up with the idea that

documents withheld from defendant during pretrial could also be withheld at trial. This meant that documents etc. held back indefinitely from the defendant could also be withheld from the defense counsel. To protect the rights of the defendant, another defense counsel looks at the material and argues its relevancy to the judge. This other defense counsel has no relation to the case; he does not even have a right to talk to the active defense counsel. Of course, this is a difficult position; it is very hard to know what is important without being familiar with the case.

News of this bill caused an uproar. Not only academics and defense attorneys, but also judges went to the government. The judges pointed out that if these laws were enacted, they would no longer be able to secure a fair trial for defendants. A retired president of the Supreme Court went so far as to call the laws unjust and Kafkaesque. I thought that this reaction from Danish judges, who normally refrain from political comments, was very strong and would have to have an impact. The judges asked the government to hand this bill over to one of the usual committees, consisting of people with diverse viewpoints. But the government remained steadfast. The government did remove the provision from the bill that prevented judges from viewing the material that the police wanted to withhold from the defense counsel. They realized that this went too far, so now at least the judge can see the evidence withheld from the defendant.

These laws have not been passed in other Scandinavian countries; only the Danish government has gone this far. The arrest warrant, however, is the same in all European Union countries, including Finland and Sweden. Norway is not a member of the European Union. The anti-terrorism laws are very similar in Norway and Finland to the changes in Denmark. Sweden has hardly moved at all—they are very civilized in this respect.

One more quick issue is plea bargains. Plea bargaining seems like a terrible idea to Scandinavians. Allowing a plea bargain where an accused gives information about a different crime in exchange for a lesser sentence does not seem fair to Scandinavians. But, a year ago, there was a person involved in a narcotics ring. He gave substantial information about these other people to the authorities, and the prosecution requested a lesser sentence in return. The Supreme Court ruled that it is precarious to render lesser sentences in such an instance, because it limits the opportunities for a fair trial for his co-conspirators. It agreed however, that in certain cases with very serious crime, that are particularly hard to unravel it may be extremely important to get this kind of information. Plea-bargaining would perhaps be appropriate in such cases. Once this sentence was handed down in 1998, the government passed a new law allowing shorter sentences for

informants. However, this is only in Denmark; other Scandinavian countries have not passed similar laws.

In closing, I will say that I am not terribly afraid of the threat of terrorism; I am afraid though of what the fear of terrorism is doing to our criminal justice system.