Punishment Without Conviction?

Scandinavian Pre-trial Practices and the Power of the "Benevolent" State

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Published in Peter Scharff Smith and Thomas Ugelvik (eds.), *Scandinavian Penal History, Culture and Prison Practice*. *Embraced by the Welfare state?*, London: Palgrave 2017.

It is August 2015 and I am sitting in East Jutland prison in Denmark in the middle of a focus group interview with long-term prisoners several of who have sentences running in double digits. This is one of the most modern high-security facilities in all of the Danish penal estate and the prisoners we talk to have generally been imprisoned for many years. I am together with two American research colleagues who are asking the prisoners about how they experience punishment in the Danish penal system. [2] The prisoners respond by talking about two things: the lack of contact with their families and, especially, their experiences sitting in a remand prison awaiting their trial. Directly questioned "what is punishment?" one prisoner simply answer "B and B", which refers to the special restrictions on visits and correspondence which the Danish legal system allows during pre-trial (field notes 2015).[3] The reason is not that these inmates have recently left remand imprisonment; it is simply because they seem to have had their worst and toughest prison experience there before they were even sentenced. Their current stay under maximum security conditions feels much less like punishment to these prisoners.

Such a reaction comes as no surprise to me after having surveyed and interviewed numerous prisoners and prison staff in the Danish system—during remand, as sentenced prisoners, and later post-release— and after having studied Danish remand practice for several years. As one Danish remand prisoner simply concludes, "Those, who have not yet been sentenced, they live under very poor conditions—much worse than those, the sentenced prisoners live under" (Interview, remand prisoner). In the words of a former Danish prison governor, "we

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[2] I helped Keramet Reiter, Lori Sexton and Jennifer Sumner plan and conduct this research visit as part of their study of imprisonment in Denmark. They write about this and other prison visits in Denmark elsewhere in this volume.

[3] B and B means "Brev- og besøgskontrol" which translates into "control/surveillance of correspondence and visits."

cannot begin to under- stand the humiliation, which it is [remand imprisonment]. One has to ask permission for everything, even to be allowed to go to the bathroom."[4]

As I will show in this chapter remand imprisonment is in fact the toughest and most restrictive prison experience in Denmark save for what is offered in a very limited number of special isolation units, most notably the small 24-cell prison called "Politigårdens fængsel" (the "Police station prison"[5]) and the "E unit" at East Jutland[6], which could be termed as the closest we come to anything resembling Supermax conditions in a Danish context. As will be described later, there are in fact several important examples of Scandinavian pre-trial practices which seriously challenge the notion of Scandinavian penal exceptionalism. At first glance such practices seem to have little to do with the "welfare" logic of Scandinavian welfare states but they illustrate the relatively far-reaching social control efforts inherent in these strong, ambitious and powerful states.

The purpose of shedding light on a number of Scandinavian pre-trial practices is by no means to criticize Scandinavian prison practice in general nor is it meant as an attempt to roll back the entire literature on Nordic penal exceptionalism. But it is an important empirical corrective to a literature which has generally ignored the fate and conditions of up to 1/3 of the Scandinavian prison populations and it is a way of highlighting aspects of Scandinavian practice which lie very far from the values and ideologies often associated with penal exceptionalism. These pre-trial interventions also make for an interesting case where punitive practices appear without any clear connection to the allegedly egalitarian logic of the welfare state. I could also have chosen to focus on several other Scandinavian prison practices which reveal much more liberal and humane intentions and practices than those described in this chapter. Some of these practices are addressed in detail elsewhere in this volume like, for instance, the principle of normalization (Engbo), the importance of open prisons (Fransen), the system of self-catering (Minke and Smoyer), and the ongoing attempt to balance "hard" and "soft" prison policies and practices (Reiter, Sexton and Sumner). In fact, I have myself worked extensively with reform projects together with the Danish prison service and have thereby become directly involved in influencing and creating Scandinavian prison practices—especially in connection with projects aimed at improving the situation and treatment of children of imprisoned parents. These projects might very well have been supported and enhanced by Scandinavian penal culture and are themselves interesting case studies in that regard. But that is a different story which I have discussed elsewhere (Smith 2014, 2015).

[4] Ole Hansen cited in "Remand imprisonment is a punishment before conviction"; in: *Bladet Kriminalforsorgen*, no. 8, June 2011, p. 9.

[5] Although bearing such a name the facility is not for police detention—it is a prison administered by the Danish Prison and Probation Service which happens to be physically located in the same building as the Police headquarters in Copenhagen.

[6] Along with even smaller isolation units at other prisons.

Scandinavian Exceptionalism and the Forgotten Remand Prisoners

Although remand prisoners suffer from poor conditions in many parts of the world one would perhaps expect that advanced and rich welfare states with inclusive and expansive social policies would have a different approach. Indeed, the problems associated with Scandinavian pre-trial practices are unlikely to be a product of insufficient resources or bureaucratic inefficiency as is the case in countries where criminal justice systems often suffer from a number of very basic flaws and structural problems (Open Society Justice Initiative 2014). In any case, empirical research has uncovered several peculiar examples of how Scandinavian pre-trial practices grant authorities very significant powers and routinely restrict the rights of the accused in ways which look quite remarkable also when compared with other jurisdictions.

It seems important if seemingly benevolent Scandinavian states routinely restrict the rights of untried citizens even more than those of sentenced prisoners. The principle of "presumption of innocence" is after all a very basic rule of law and human rights principle which is firmly rooted in a tradition going back to 18th-century enlightenment philosophy (see for example Beccaria 1998). European human rights standards in this area clearly underline that in "view of both the presumption of innocence and the presumption in favour of liberty, the remand in custody of persons suspected of an offence shall be the exception rather than the norm" (COE, Recommendation Rec(2006) 13, §3.1). This means that "remand in custody shall only be used when strictly necessary and as a measure of last resort; it shall not be used for punitive reasons" (COE, Recommendation Rec(2006)13, §3.3). This approach means that there should always be a presumption in favor of release during pre-trial which has been confirmed in several judgments by the European Court of Human Rights (ECHR) (Havre 2014, p. 5). Indeed, national criminal codes in democratic countries will often have provisions designed to limit the use of remand custody.[7] Furthermore, several European countries have not only ratified but also incorporated the European Convention on Human Rights into national law, which is the case in Norway, Sweden and Denmark. In reality, however, it can be very difficult for a judge to decide against the police in such matters and say that, for example, the risk of flight is not present as argued by the prosecution and, in any case, there is no guarantee that Scandinavian court practice actually follows the European human rights guidelines in this area. As I will return to below the result is that remand imprisonment is a routine practice used extensively in Denmark and by no means only as an "exception" or as a "last resort". In a thorough legal analysis and discussion of the Norwegian use of remand imprisonment, it has similarly been found that Norwegian court practice is out of sync with European human rights principles. According to this study, Norwegian courts simply "overlook" that the individual right to freedom and to human rights protection should be the main rule and that intervention and restrictions in the form of remand imprisonment should be the exception (Havre 2014, p. 318), a critique which seems

[7] Concerning Denmark see the Administration of Justice Act §762, para. 3 and §765. Regarding the Norwegian case, see Havre (2014, p. 12 ff).

to fit well with the argument that "limited" and "weak individual rights" might characterize Scandinavian states (as Barker argue in the case of Sweden; Barker 2012, p. 15 f.).

Nevertheless, most of the existing international literature has almost completely ignored the way that Scandinavian states allow police, courts and correctional services to operate before a sentence is passed. One illustration of this is the way that "out of cell time" in Scandinavian prisons has been praised as an example of humane prison practices. In one account it is for example argued that "prisoners in the Nordic countries [...] are likely to be out of their cells considerably longer than those in Anglophone systems" (Pratt and Eriksson 2013, p. 13). The homepage of the Swedish Correctional Service is used as a source to document this (a very trustful approach to scrutinizing prison conditions one might add) as it states that prisoners are woken at 7.00 am and lockdown is not until 8.00 pm in closed prisons and 10.00 pm in open prisons. But is this really the case throughout the Swedish prison estate? In fact, one quarter of the entire Swedish prison population—the remand prisoners—are left completely out of this equation although around two-thirds of these are subjected to "restrictions" which generally means solitary confinement and staying alone 22–24 hours in the cell (Åklagarmyndigheten 2014; Smith et al. 2013). This in other words means that around 1/8 of the entire Swedish prison population is kept in solitary confinement as I will return to below. A remarkable situation which of course cannot simply be ignored if one wants to meaningfully compare out of cell time and quality of prison life across jurisdictions.

In Norway, by contrast, the general situation is very different since many remand prisoners are treated just as sentenced prisoners and are often allowed to mix on the wings. This very likely means that untried prisoners generally have much better and more liberal conditions in Norway than they do in Denmark and Sweden—although the practice of mixing sentenced and untried prisoners actually run counter to the general human rights standards in the area.[8] Regardless, although the use of pre-trial solitary confinement has been brought down significantly in Norway, around 12–15 % of all remand prisoners are still placed in solitary confinement for the purpose of protecting the police investigation (Smith et al. 2013, p. 11). Importantly, this severe "Scandinavian way" of treating untried prisoners is not found in most other European countries. Still, a thorough study among remand prisoners in Oslo prison describe how these inmates have access to communal areas and activities although, nevertheless, "remand prisoners are locked up alone in their cells much of the day" (Ugelvik 2011, p. 48). An ambitious project at Oslo prison called "Quality in remand work" ("Kvalitet i varetektsarbeidet") was carried out some 10 years ago and clearly aimed at improving that particular problem. Nevertheless, the National Preventive Mechanism under the Norwegian Ombudsman confirm that this problem still exist and describe how prisoners— especially in the first phase of their imprisonment—often risk being locked up alone 22 hours or more in

[8] See for example the European Prison Rules (CoE, Committee of Ministers, Recommendation Rec(2006)2), rule 18.8a, which clearly state that states "need to detain (...) untried prisoners separately from sentenced prisoners" (concerning possible exceptions see rule 18.9). Concerning living conditions for Norwegian remand prisoners, see Ugelvik (2014).

their cells. Such prisoners are in other words effectively in solitary confinement despite not being officially placed in any form of segregation or isolation (The Ombudsman, 5 April 2016[9]).

While it is certainly true that many Nordic prisons have very open regimes (exemplified especially by the widespread use of open prisons) this is not at all the case when it comes to remand imprisonment in Sweden and Denmark—and in Denmark 34 % of the entire prison population was made up by remand prisoners in 2015.[10] Empirically speaking, it is a significant shortcoming in much of the literature on Scandinavian exceptionalism that up to around 1/3 of the national prison populations and the conditions they are subjected to have been left out of consideration. Perhaps this lack of interest has something to do with the fact that the welfare state perspective has been important in much of this research (Cavadino and Dignan 2006; Pratt 2008a, b; Pratt and Eriksson 2013; Lappi-Seppälä 2007). One could argue that focusing on the welfare state (in a positive light) might turn attention towards sentenced prisoners where one would expect to find values and practices associated with the egalitarian and universalist welfare policies found in Scandinavia—such as a focus on rehabilitation and treatment as part of the process from sentence to release instead of purely punitive rationales with accompanying bleak and austere prison conditions.

Remand Practice and Welfare State Values

The positive values and practices often associated with Scandinavian and Nordic welfare state regimes are their universalist policies—that is benefits for all citizens (e.g. insurance for everyone and not only "means tested" interventions); their egalitarian policies and attempts to create equality; and along with that a focus on solidarity and being inclusive, thereby not excluding or marginalizing specific groups or individuals from mainstream society (Esping-Andersen 1995, p. 27 f.; Hilson 2013, p. 87; Lappi-Seppälä 2007, pp. 8 and 13; Kautto et al. 1999, p. 10 ff.) As discussed elsewhere in this volume it has been argued by several observers that these Scandinavian and Nordic welfare state values and policies have helped secure and maintain low prison population rates, humane prison conditions and a general commitment to rehabilitating and reintegrating offenders into society (see Smith and Ugelvik, this volume). In other words, such research suggests that "social and economic security, equality in welfare resources and generous welfare provision should contribute to lower levels of punitivity and repression" (Lappi-Seppälä 2007, p. 8).

If we are looking for inclusiveness, equality and solidarity in penal systems one could argue that it makes sense to focus on how and to what degree sentenced prisoners are treated and reintegrated into society, while the primary concern with untried prisoners would normally

[9] https://www.sivilombudsmannen.no/aktuelt/aktivitetstilbud-og-tiltak-for-a-motvirke-isolasjon- article4346-2865.html

[10] The official 2015 statistics are currently not available, but the author has been supplied this information in an e-mail from the Danish Prison and Probation Services 26 January 2016.

be to establish whether they are guilty or not. In legal terms, one could even argue that untried prisoners fall completely outside the field of penology since they have not been subjected to punishment, a sanction or a penalty (Morgenstern 2013, p. 193). In rights based terms, one could also argue that submitting remand prisoners—who have not yet been found guilty of a crime—to rehabilitation and treatment for criminal behavior would be unjust and perhaps even abusive (this is for example why remand prisoners in Denmark are allowed but not required to work, whereas sentenced prisoners have a duty to work or take an education). In other words, why look for rehabilitation, attempts at social re-integration, or punitive intentions for that matter, at this stage of the criminal justice system? However, the problem with such a line of reasoning is that it does not take actual remand prison conditions and other pre-trial practices into consideration including the way that these are sometimes misused by authorities and often perceived as punishment by those on the receiving end (Morgenstern 2013, p. 194). In fact, the time spent in remand imprisonment will often constitute some or even all of the prison sentence which many receive after their trial and thereby pre- trial imprisonment becomes de facto punishment, something which seems to be a significant problem in Denmark and Norway (Havre 2014, p. 177 f. and 318 f.; Smith and Jakobsen, forthcoming).

From a legal point of view, there certainly is a significant difference between remand imprisonment and the imprisonment of sentenced prisoners. In Denmark the latter is regulated through the Act on the Execution of Sentences ("Straffuldbyrdelsesloven"), while remand imprisonment is regulated by the Administration of Justice Act ("Retsplejeloven"). Apart from the ever-present security aspect the Act on the Execution of Sentences stipulate rehabilitation of offenders as an important objective and so does the "Program of Principles" of the Danish Prison and Probation Services (Engbo 2005, p. 46). Both these sources of law clearly state that sentenced prisoners should receive help and support in order to be rehabilitated and reintegrated into society—but this is not an objective in the same way when it comes to remand prisoners. The reasons for depriving the latter of their liberty are primarily based on the logic and rationale that the police will need to detain and restrict the communication of accused individuals in order to investigate their possible crimes and secure the pursuit of justice.

This does not mean that the welfare provisions of the Scandinavian welfare states are invisible during remand. The administrative Remand Imprisonment Regulations (known as "Varetægtsbekendtgørelsen") states that the Prison and Probation Service shall support remand prisoners in order to reduce the negative impact of imprisonment (§30), and remand prisoners of course have access to medical treatment (§31). The extent to which the latter is sufficiently available given the frequency of (mental) health problems among prisoners is, however, a discussion in itself. One area where significant ground has been gained in remand prisons is drug treatment which can clearly be understood as being part of a general welfare policy—although prison-based drug treatment can also be perceived as being part of a disciplinary discourse aimed at criminalizing social problems rather than

empowering individuals (Kolind, this volume. See also Bruhn, Lindberg and Nylander, this volume). In any case a Danish remand prisoner has a right to receive drug treatment (§32) and an impressive 1,069 remand prisoners completed a so-called pre-treatment program for drug abusers in 2014 (Løppenthin 2015, p. 21). But despite such initiatives the reality is that most of a remand prisoners' day is typically spend locked up in the cell. With the notable exception of especially drug treatment there is generally very little focus on rehabilitative interventions. However, another well-known but sometimes downplayed trait of the Scandinavian welfare state regimes is clearly present pre-trial, perhaps especially so in Sweden and Denmark: that is the extensive willingness of these states to intervene deeply and with great strength into the lives of their citizens.

Scandinavian Pre-sentence Practices—A Few Examples

There are several examples of how Scandinavian state power can be deployed with significant force and somewhat limited regard to rule of law and human rights principles even before a pre-trial detainee is placed in a remand prison. We see this with certain police practices and the legal context within which they take place. For example, and quite interestingly, the history of the Danish police complaints mechanism illustrate how the Danish state has been extremely reluctant to introduce basic democratic and rule of law principles into the complaints handling process. In fact, it was up until 1996 the case that all complaints over police conduct had to be delivered to a police station, and while the State Attorney in 1996 took over complaint handling from the local Police Commissioner, it was in practice still often police officers who investigated colleagues and complaints over police conduct still had to be handed in at a police station (Amnesty International 2008, p. 13 ff.). After decades of discussions and criticisms, a new system with an independent complaints handling mechanism was introduced in 2012, although this model and its decisions has already been criticized for lacking a critical approach.

Another example of extensive police powers in Scandinavian states is the use of police detention cells in Norway. Here solitary confinement is automatically used during police custody—before and very often also after the detained person has been before a judge. The cells, which are used for all kinds of police detention, are typically more or less similar to security and observation cells in prison—that is strip cells with no real furniture, no accessible light source for the prisoner etc.—and are some- times even without windows. In principle, people detained by the police should be transferred to a regular prison within 48 hours, but this deadline does not apply if there is a shortage of prison space. As a result, 20–40 % of those who are later transferred to remand imprisonment have been in solitary confinement for more than 48 hours in police custody and occasionally for periods up to 10 days (Smith et al. 2013, p. 12). There is no warrant for solitary confinement and no assessment is made of the need for isolation—it is simply the way that the system works when the police take a citizen into custody. This particular use of solitary confinement likely

involves systematic violations of the ECHR and indeed the Norwegian state was in 2014 found in breach of article 14 (ad art. 8) in the ECHR in a case about the effects of solitary confinement in police detention in Oslo (Stamnes v. Norway 2014). In comparison, the use of solitary confinement during police detention seems to be an unknown problem in Denmark, where suspects are normally put before a judge and transferred to a regular remand prison within 24 hours (Smith et al. 2013, p. 12). In Sweden however, solitary confinement also regularly occur during police custody normally for up to 4 days. This practice routinely involves even detained children (Barnombudsmannen 2013).

Historically the use of solitary confinement in remand prisons during pre-trial has been widespread in Norway, Sweden and Denmark and has been termed a "peculiarly Scandinavian phenomenon" (Evans and Morgan 1998, p. 247) which since the 1990s has attracted significant international human rights criticism (Smith 2012). The official purpose of this practice is to avoid collusion—that is to prevent the detainee from influencing the investigation. I have described this practice and its history in detail elsewhere (Smith 2006, 2011; Smith and Koch 2015). The purpose of the following paragraphs is to briefly describe the current magnitude of this practice in Sweden where solitary confinement during remand imprisonment continues to be used with a very high frequency. In 2014 the office of the Swedish prosecution for the first time gathered thorough statistics on the actual use of restrictions during remand. The result was astonishing and revealed that 70 % of all remand prisoners during 2013 had "restrictions" and these inmates where thereby typically locked up in solitary confinement (6,558 out of 9,415 remand prisoners). Among the 15–17 years old, the percentage was 82 and thereby even higher (Åklagarmyndigheten 2014, p. 91). Remand prisoners make up around 25 % of all prisoners in Sweden and as already mentioned this means that around 1/8 of the entire Swedish prison population is placed in solitary confinement (and then we haven't even begun to count all the other forms of solitary confinement used for sentenced prisoners). I wonder if it is possible to find a similar situation in any other prison system in the world?

We are, however, not dealing with a new phenomenon but rather a very old practice which has historical roots in the 19th century (Smith 2005, 2006; Horn 2015). That children are subjected to these methods have also been publicly known for some years. When the CPT visited Sweden and went to Gothenburg remand prison in 2009, for example, they were "particularly concerned by the fact that all juvenile prisoners interviewed [...] had been subject to restrictions (in particular no association with other prisoners and no visits) for two to three months". CPT described such practice as "draconian" and observed that prisoners were damaged by the effects of solitary confinement (CPT 2009). Furthermore, in 2013 the Swedish Children's Ombudsman described in a report how children are routinely put in solitary confinement, both during police custody and during remand imprisonment in Sweden, and that they are treated in a "completely unacceptable" manner that denotes a "systematic and far-reaching failure to observe detained children's basic human rights" (Barnombudsmannen 2013).

Danish Remand Practice

Like Sweden, and Norway for that matter, Denmark has had a history of extensive use of solitary confinement during the remand phase—that is, solitary confinement used according to the Administration of Justice Act in order to protect the ongoing police investigation (there are several other forms of solitary confinement used in prisons). But unlike in Sweden this has been a heavily debated issue nationally since the late 1970s and during the last four decades this practice has been gradually reformed in Denmark. Accordingly, the Administration of Justice Act has been changed in this specific regard four times during this period—in 1978, 1984, 2000 and 2006. The reforms have had a very gradual but significant impact and while more than 40 % of all remand prisoners were placed in solitary confinement during the latter part of the 1970s this percentage has recently dropped below one (Smith 2005; Smith and Koch 2015). Accordingly, in 2014 a mere 0.7 % of all remand prisoners were placed in this particular kind of court ordered solitary confinement (to protect the police investigation) with an average duration of 19 days.[11]

Seen from the point of view of creating humane Scandinavian prison practices this development is a very significant achievement. But the question of course remains which remand regime you will actually find if you go beyond these figures and traverse the walls into a Danish remand prison. In fact, and in spite of the above-mentioned reforms, there is still a significant probability that you as a pre-trial prisoner will sit in your cell for up to 23 hours a day and sometimes alone. There is in other words still a lot of isolation in the Danish remand prison system. In reality prisoners are not guaranteed much more than an hour of social interaction with other prisoners during the daily exercise (unless they are in court ordered solitary confinement where exercise is solitary). Work, education and exercise can for some remand prisoners result in social contact with the other inmates but this is far from always the case. Thanks to the work of private entrepreneurs and a sufficiently flexible attitude within the Danish Prison and Probation Service there are a number of very innovative initiatives in this area, including for example a cooking school at Vestre prison (remand), which has been very well evaluated (Minke and Balvig 2015). Typically, however, to the degree that any work is available at all it will often be solitary and take place in the cell. In some places and for some remand prisoners an hour or so of indoor exercise will allow contact with one or two other inmates but often this will not be the case. In some of the big remand prisons there are more available activities with somewhat better opportunities for social contact but a typical day for many remand prisoners will be spent mainly alone in the cell. A contributing factor is the remand prison buildings which are typically constructed as isolation prisons—due to the above-mentioned history of this practice—why they simply do not have proper facilities for communal activities.

[11] See: http://www.anklagemyndigheden.dk/nyheder/Sider/Fald-baade-i-antallet-af-langvarige-varetaegtsfaengslinger-og-i-antallet-af-varetaegtsfaengslinger-i-isolation.aspx

Furthermore, if you compare the situation of remand prisoners with sentenced prisoners the access to meaningful activities and possibilities for making future plans are extremely limited. No "sentence plans" with rehabilitative and/or re- integrative interventions will be prepared during this phase and most remand prisoners have little idea of when their case will be settled and when they will get out or get a sentence.[12]

The primary tool for social interaction in the Danish remand prisons which keep the majority of inmates from ending up in outright solitary confinement is the possibility of time-limited cell community—that is spending some time in a cell together with a fellow prisoner. In this regard, the Danish Prison and Probation Service do a significant job in quite difficult circumstances to ensure that a lot of prisoners are allowed a limited amount of social contact. The concept of cell community is however practised in different ways with very diverse results. First of all, there is a large group who are not at all part of a cell community—according to a survey of 230 remand prisoners this group constitute between 27 % and 30 % of all remand prisoners. Those who are allowed cell community have an average of 3.3 hours community. If one compares these figures with the remand prisoner's opportunities for access to social interaction outside the cells (which can include work, exercise, yard time, education and other program activities), then it is possible to estimate the overall level of isolation experienced in Danish remand prisons. In the survey of 230 remand prisoners such an analysis revealed that 6 % were in de facto solitary confinement (22–24 hours of solitude in the cell), while nearly 18 % would spend 20–24 hours alone in the cell each day—regardless of whether or not they are placed in any kind of official isolation (court ordered solitary confinement, disciplinary solitary confinement or other forms of administrative isolation). Mainly due to the practice of time limited cell community the rest of the remand prisoners would have access to a bit more social contact but the vast majority would still experience being locked up in their cell for the major part of the day. In addition a large quantity of the inmates at some point or another during their remand imprisonment actually experience being officially placed in solitary confinement in the form of disciplinary sanctions, other forms of administrative isolation or even so-called voluntary isolation. In the above survey, 31.7 % had experienced on average 31 days in various forms of official solitary confinement during their current remand imprisonment.

Taken together, the relatively high levels of isolation, the lack of meaningful activities and the uncertainty of the whole situation creates anxiety and place remand prisoners in a kind of limbo. Accordingly, boredom and lack of agency are recurrent themes when inmates are asked.[13] One remand prisoner simply state that "to little happens and you are locked up to much of the time" (Survey, respondent no. 83). A remand prison officer agrees and states that "too many sit behind a closed door 23-hours a day" (Survey, prison staff). A female

[12] The above is based on information gathered during an ongoing research project on remand imprisonment in Denmark (by Peter Scharff Smith and Janne Jakobsen), which is based on surveys, interviews (prisoners and staff) and other field work.

[13] Survey and interviews conducted 2013–15 by Peter Scharff Smith and Janne Jakobsen.

remand prisoner in her 30s vividly describe the complete lack of agency and feeling of helplessness which she experience every day on remand: “Everything is taken care off instead of you being able to do it yourself. You are not supposed to do anything at all and you do not have a say in anything. You have no responsibility—you have no agency. Your identity is being peeled off” (Interview, remand prisoner).

Contact with Relatives and the World Outside

“The worst part of being in remand prison is definitely the social violence, the social isolation. You are torn away from everything. You can’t keep in touch with your family—the visits are rare and under surveillance, the letters take forever to arrive, you can’t make a phone call. You are isolated from the life you had before. It is of course the same in a prison, but it is on completely different scale when you are in a remand prison. It is more absolute” (Interview, former remand prisoner).

The possibilities for remand prisoners in Denmark to keep in contact with their relatives and with people on the outside are extremely poor. They may write letters but do not, as a rule, have access to telephones and they have a right to receive visits for only half an hour a week (minimum). Most prisoners also experience great trouble in communicating via ordinary mail because they are subjected to special restrictions. For the majority of remand prisoners, visits can only take place once a week and will last for up to an hour or only the 30 minutes that they have a right to. In addition, a majority of the remand prisoners are subjected to special restrictions which mean that visits are conducted under surveillance of a police officer (or occasionally a prison officer) and often only allowed during mid-day, when most people work and children attend school. Taken together, these circumstances result in a very low overall frequency of visits. According to a 2011 survey study from the Danish Prison Service, 41 % of remand prisoners had never received visits from their family and 74 % had not received visits from friends. Furthermore, data covering 1,164 remand prisoners revealed that they had received on average only 1.6 visits from their family during, on average, 116 days in remand prison. A small group of 14 % had received visits from their family 4 times or more, while the rest had received less or no visits at all from their family (Clausen 2013, p. 147, table 4.68).

Special Restrictions—the “Correspondence and Visit Control” Regime

“I was subjected to Correspondence and Visit control the first year. It does something to you, mentally. It is difficult to recover from” (Interview, remand prisoner)

Besides the few and short visits, the only method of communication with families and friends which remand prisoners in Denmark have a legal right to, is sending and receiving

letters. However, remand prisoners can be subjected to "Correspondence and Visit control" (Bekendtgørelse om ophold i varetægt § 44 og § 62; Administration of Justice Act §§ 771 and 772). This type of control is very restrictive but is nevertheless being applied without any official statistics being produced regularly. Figures obtained from the Prison Service in 2010 and in 2013 show that around 70 % of all prisoners in the category "custody before sentence" (i.e. remand prisoners) were subjected to this type of control on the specific dates where the data was gathered. In the above-mentioned survey of 230 remand prisoners, 84 % of the respondents who answered this question (4 % did not answer) claimed that they were or had been subjected to correspondence and visit control during their current imprisonment on remand. These remand prisoners had on average been subjected to such control in 141 days. Significantly lower, but still very high, percentages are found in a recent dataset from a different source, namely the police, which state that 2.567 remand prisoners were subjected to correspondence and visit control during 2015, which corresponds to 45 % of all remand prisoners.[14] In any case, we are clearly not dealing with a tool, which the police only use in particularly substantial or difficult cases—it is a routinely applied measure. When a remand prisoner is subjected to correspondence and visit control, it means that all visits will be conducted under close surveillance by a police- or prison officer who will be present in the visiting room, during the entire visit. The police officer shall ensure that the remand prisoner does not speak about his or her case, which means that the remand prisoner may not tell the visitor what has happened and what he or she is accused of, which can be very frustrating for both prisoner and family. In the survey of 230 remand prisoners, 84 % (of those who answered) responded that they find these types of visits uncomfortable and an even higher percentage responded that adult visitors and visiting children found the situation uncomfortable. According to a female relative, most of the police officers controlling the visits "are ok. They just sit and read and the like. They just look up from the newspaper if they think that you are talking about something they don't want you to. I had to adjust to it. They hear everything you say. And some of them look at you in a strange way, like: why do you bother with that fool?" (Interview, remand prisoner's relative). Lasse, a 24-year-old remand prisoner, recounts: "Some of the police officers keep a distance, don't interfere. Others sit at the end of the table and meddle in the conversation. And there is not any physical contact at all. Not even when people have children. That's sick, if you're not allowed to give your kid a hug" (Interview, remand prisoner).

Correspondence will also be subject to a special control regime if you are subjected to "B and B". This means that the prisoners' letters will be read by the police, something which many of the remand prisoners experience as very uncomfortable. Furthermore, this control regime means that letters will often be delayed for around three weeks, which obviously makes this type of correspondence extremely problematic and typically completely inadequate in a stressful situation of emotional and often economic crisis for prisoners and their families. A woman, whose husband was held in remand, recounts: "The most

[14] The Ministry of Justice (Retsudvalget 2015–16, L80 endeligt svar på spørgsmål 4), 26 January 2016.

frustrating thing about the letters is that it takes such long time, before you receive an answer, when you write. You think: has he received the letter? Why haven't I heard anything?" (Interview, prisoner's relative).

Remand prisoners are for the most part subjected to correspondence and visit control in order to protect the police investigation while in a few cases the risk of flight or new crimes being committed are listed as motivation for the restrictions. Like the reasons for using remand imprisonment, we are dealing with methods, motives and mechanisms which have nothing to do with any kind of welfare provisions or welfare logic. Nor is the logic punitive as such although the result is. It is simply a matter of granting the police power to conduct its business without interference. Whether or how these restrictions work as a police investigation tool has never been studied or evaluated and the Danish state has so far showed little interest in applying a serious principle of proportionality and balancing act in this area. When asking prisoners, they often do not understand why restrictions should be necessary in their case and there is a common understanding that the use of these measures is merely a matter of harassment or outright pressure. One remand prisoner even recounts that he experienced being teased with a possibility of having more contact with his family if only he would confess: "The police use Correspondence and Visit control as a way to break me. Because then I can have more visits. The police officer who is connected to my case—I told him that I think that it is poor manners to keep the children away from me for so long. What I am told is: 'confess, and it will get easier' " (Interview, remand prisoner). The prisoners are quite often supported in this criticism by both prison staff and defence lawyers. A high-ranking Prison Service staff member for example states that "Correspondence and Visit control is used as leverage by the police" (interview). If that is the case we are not dealing with welfare ideology, nor rule of law principles or modern power technology in a Foucauldian sense for that matter, but simply traditional sovereign state power applied against an often weak and vulnerable group of citizens. The Danish police has never admitted using restrictions coercively during remand, unlike in Norway where a senior police officer in 1993 in fact acknowledged "the use of such psychological pressure" in front of a visiting delegation from the CPT (CPT/Inf(94)11 pkt 13; Horn 2015).

Telephone Access

A remand prisoner in Denmark does not have a right to telephone his or her family or friends unless ordinary mail correspondence is impossible for one reason or another (Bekendtgørelse om ophold i varetægt § 72). In practice this often translates into a complete ban regardless of whether or not the remand prisoners are subjected to "B and B" restrictions. For many remand prisoners this means that they can sit on remand some- times more than a year without ever being allowed to make or receive phone calls to/from family and friends. However, the rules are interpreted somewhat differently from one remand prison to another and there seems to be a certain regional difference in this area. A prison

officer working in a remand prison in Jutland describe that "the rules are clear here: no phone calls before sentencing and the enforcement order has been received—meaning up to numerous months after the verdict has been delivered. Phone cards can be purchased when the sentence has been received, and the phone can be used for 10 minutes a week." The same prison officer has worked in a remand prison on Zealand, and explains that back then the prisoners were "simply given a hands-free extra phone and were allowed to sit and talk for a longer duration without surveillance and without having to pay" (Interview, prison staff). Since then, tighter rules have been implemented in the remand prisons on Zealand as well, but there are still differences and some remand prisons allow a few phone calls to family members to some of the prisoners who are not subjected to correspondence and visit control.

In interviews and surveys, remand prisoners support the above—that it is typically not possible to use the phone and that it is sometimes allowed in certain places. One remand prisoner describe that she can call her children once a week, while another explains "NEVER IN REMAND" (Survey respondents no. 138 and 40). The latter, an 18- year-old remand prisoner, describe that he was not even allowed to call his parents, when he was imprisoned on remand. Prison officers explain that prisoners are very frustrated by this policy. One staff member "believe that we risk forcing remand prisoners to choose not to appeal their verdict or confess to something they haven't done, in order to start serving their sentence faster and thereby gain the right to phone privileges" (Interview, prison staff). A manager in the Prison Service does not at all believe, that there is a constructive explanation to the restrictive phone policy: "Why aren't they supposed to be allowed to make phone calls, especially those who aren't subjected to Correspondence and Visit control? It is a political question. They just aren't allowed to make phone calls!" (Interview, prison staff).

Remand Imprisonment and Prisoner Rights in Different Jurisdictions

It "has been observed that living conditions in pre-trial detention facilities throughout Europe are often worse than those in prisons for sentenced prisoners" (Morgenstern 2013, p. 195). In that sense it comes as no surprise that remand prisoners in Denmark also face worse conditions than sentenced prisoners. But although we lack proper comparative empirical research in this area there seems to be a culture and tradition of applying especially strict and arguably quite radical restrictions during remand in the Scandinavian states. The Scandinavian history of pre-trial solitary confinement is a well-known example of this (Smith 2012) which has clearly not been addressed adequately especially in Sweden. That a democratic country choose to place 70 % of its remand prisoners in strict isolation and thereby at least around 1/8 of its entire prison population is remarkable to say the least. Although Norway seems to be a rather different case in some ways (remand prisoners are allowed to use a phone and are often allowed to be with sentenced prisoners) we still see clear and significant remnants of the Scandinavian isolation heritage also here exemplified

by 12–15 % of all remand prisoners being subjected to pre-trial solitary confinement (to protect the police investigation) as well as the previously mentioned practice of solitary confinement in police detention. As shown in the above, despite the extensive Danish reform of the system of pre-trial solitary confinement remand prisoners still face high levels of isolation and minimal contact with the outside world.

Although remand prisoners in many parts of the world are often treated badly, this Danish (and certainly also Swedish) obsession with restricting the communication of remand prisoners—and thereby their rights to for example privacy and family life—seems to differ from what one will find in many other western countries. In England and Wales, the "Prison service order No. 4600" stipulate that unconvicted prisoners have "a number of special rights and privileges" and are entitled to for example: (a) Having "items for cell activities and hobbies handed in by relatives or friends, as well as to purchase them from private cash or pay"; (b) "Carry out business activities"; (c) "Send and receive as many letters as he/she wishes"; (d) "Receive as many visits as he/she wishes, within reasonable limits." In addition, remand prisoners are allowed to use a phone. There is no scope in these rules for restricting a remand prisoner's contact with the outside world like what we find in Denmark and Sweden.[15] We know from the monitoring work of HM Inspectorate of Prisons that remand prisons "are afforded considerable discretion" when "implementing the 'mandatory requirements' in PSO 4600" which "risks diluting the entitlements of unconvicted prisoners to the extent where they can be treated much the same as convicted prisoners" (HM Inspectorate of Prisons, thematic report,

p. 25). In practice, remand prisoners in England and Wales are allowed a minimum of three visits per week, and in some establishments a daily visit, and while 37 % of the remand prisoners in a survey had "problems accessing phones" (HM Inspectorate of Prisons, thematic report) this is still a very different situation from simply not being allowed to phone anyone at all. In other words, the problem in England and Wales seems to be that while remand prisoners have special rights and privileges they are in practice sometimes being treated just as sentenced prisoners. In Denmark, on the other hand, remand prisoners long to be treated as sentenced prisoners and receive the same privileges, rights and benefits as those who have already been found guilty of a crime.

Forceful State Interventions—Individual Rights, Trust and the Power of the Welfare State

Conditions for sentenced prisoners in the Scandinavian countries and especially the use of open prisons have often been praised by foreign criminologists and other visiting observers. The conditions for, and the treatment of, remand prisoners is however often forgotten when the Scandinavian penal and criminal justice systems are put under scrutiny by criminologists

[15] Special rules and regimes can apply in certain cases involving terrorism—but that goes for a minority of prisoners.

despite the fact that they account for up to 1/3 of all prisoners.[16] As shown in the above, a careful study of Danish remand practice along with examples from especially Sweden and to some extent Norway, illustrate that a number of important pre-trial practices are still often characterized by strict isolation and very limited contact with the outside world in a way, which has very little to do with the typical image of Scandinavian or Nordic penal exceptionalism. But these practices arguably reveal another common trait of the Nordic welfare states, namely their willingness to intervene extensively into the private lives of their citizens. In the words of Henrik Stenius "all the doors are open" to state intervention in the Nordic countries: the doors "to the living room, the kitchen, the larder, the nursery, not to mention the bedroom—and they are not just open: society marches in and intervenes, sometimes brusquely" (Stenius quoted from Hilson 2013 p. 88).

In my opinion, the willingness to use significant and very intrusive state power against those who we are supposed to "presume innocent" should be understood alongside other well-known examples of extensive social control and social engineering in Scandinavia and the Nordic states. This includes, for example, the eugenic policies which in many ways were spearheaded by the Social democratic Scandinavian countries. Denmark was the first European nation to introduce a eugenic sterilization law in 1929 and in Sweden preventive eugenic social policies were championed by welfare state reformers in order to create "a better human material" (Smith 2014, p. 29 f.). Such policies were not motivated by punitive intentions but illustrate how the strong Scandinavian welfare states are willing to deploy state power very forcefully against their own citizens as long as it is done with a welfare agenda that promise securing a path towards a better society. History has shown us the obvious dangers of such policies and the way they tend to ignore individual rights. Indeed, as suggested elsewhere in this volume these countries might exhibit a special "culture of intervention" (Andersson). In that sense, Scandinavian states may not be Big Brother but rather Big Mother states which want to create good citizens and rich societies and are not afraid to wield considerable power to do so.

The question and role of individual rights and the culture surrounding such rights is likely to be a key issue in this context. In an analysis of Swedish history and the Swedish welfare state it has for example been argued that one of the prices paid for creating a strong welfare system with a capacity to free citizens of their social bonds, and in that sense create an impressive level of individual autonomy, has been to subordinate the individual to society in a way which make people vulnerable to state intervention. According to this interpretation, the increased level of individual autonomy secured through the state has not corresponded with a similar development of strong individual rights securing citizens against the state (Berggren and Trägårdh 2013, p. 368). Along the same lines Vanessa Barker argue that in Sweden "weak individual rights compounded by an ethno- cultural basis of belonging create the conditions that make individuals, particular those cast as outsiders or 'others,'

[16] Human rights mechanisms have been more critical and more aware of some of the problems in this area.

vulnerable to intrusive uses of state power" (Barker 2012, p. 16). The practices described in this chapter are clearly examples of how the rights of individuals are restricted in significant ways which, for example, allow the use of solitary confinement (a radical and harmful intervention) and other isolation-like regimes, as completely normal practices which the strong Scandinavian welfare states routinely apply against individuals not yet found guilty of any crime.

One can speculate whether or not the Scandinavian states are sometimes able to make these powerful interventions and shows of force more or less unquestioned because of the high levels of trust in the police and the justice system exhibited in these states (Justitsministeriet 2014; Lappi-Seppälä 2012, p. 105), and because of their own self-understanding as being predominantly humane, democratic, benevolent and fair (Christoffersen and Madsen 2011; Engbo and Smith 2012, p. 42 ff.; Nilsson 2012). This is not to say that the high levels of trust are primarily a negative penal force - on the contrary there is very good reason to believe that trust in fellow citizens and authorities can be a strong force in creating and maintaining relatively peaceful societies and relatively mild penal arrangements (of which there are clearly also many and important examples in the Scandinavian countries). But too much trust is not necessarily a good thing and sometimes there is a danger of "trusting without testing"—for example by continuing problematic practices instead of scrutinizing them. In any case, when assessing Scandinavian penal practice we clearly have to incorporate remand and other pre-trial practices into our analysis as a reminder of what these states are capable of and as an important part of the penal, welfare and criminal justice cultures they have created.

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