HISTORY AND TENDENCIES IN THE DEVELOPMENT OF CRIMINAL PROCEDURE LAW IN THE SCANDINAVIAN COUNTRIES, AND IN NORWAY IN PARTICULAR[1]

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ABSTRACT

In the Scandinavian countries, the law of criminal procedure is based on legal principles developed more than 100 years ago. Criminal cases are decided by independent courts in which lay persons also participate. The courts act on the initiative of the public prosecutor (accusatorial system), and the defendant has a right to be represented by a defence counsel, also at the pre-trial stage. Criminal trials are held in public, the proceedings are oral and the court makes a free assessment of the evidence presented to it. The procedure has many adversarial elements, but the judge has to ensure that the case is fully clarified before it is concluded. In recent years, it has been permitted for the police to use covert investigation methods, including audio surveillance of private rooms. Permission to use covert methods can only be given by a court under conditions stipulated in law, and an independent lawyer is appointed to represent the interests of the affected individuals. In the last two decades, the European Convention on Human Rights has, through its dynamic interpretation by the European Court of Human Rights, had a considerable impact on Scandinavian legislation and practice. This has contributed to revitalising the fundamental principles upon which the law of criminal procedure in Norway, Denmark and Sweden has been developed.

ÖZET

İskandinav ülkelerinde ceza muhakemesi hukuku, 100 yıldan önce geliştirilmiş hukuk ilkelerine dayanmaktadır. Bu ülkelerde ceza davalarına kişilerin de iştirak ettiği bağımsız mahkemeler bakmaktadır. Mahkemeler, savcının inisiyatifinde hareket etmekte (itham edici sistem) ve davalının duruşma öncesinde savunma avukatı tarafından temsil edilmeye hakkı bulunmaktadır. Ceza davaları kamusal olarak sürdürülür, işlemler sözlüdür ve mahkeme sunulan deliller hakkında bağımsız bir değerlendirme yapmaktadır. Bu prosedürün birçok iki taraflı unsuru vardır, fakat hakimin, davanın sonuçlanmadan önce tam anlamıyla açıklığa kavuştuğunu garanti etmesi gerekmektedir. Son yıllarda polislere, özel odalarda ses gözetimi dahil olmak üzere; gizli soruşturma yöntemleri kullanma izni verilmiştir. Gizli yöntemleri kullanma izni, kanunda öngörülen şartlar altında

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sadece bir mahkeme tarafından verilebilir ve etkilenen bireylerin çıkarlarını temsil etmek için bağımsız bir avukat atanır. Son yirmi yılda, Avrupa İnsan Hakları Mahkemesi tarafından Avrupa İnsan Hakları Sözleşmesi'nin dinamik yorumlama yoluyla, İskandinav mevzuatı ve uygulamaları üzerinde önemli bir etkisi olmuştur. Bu, Norveç, Danimarka ve İsveç'de geliştirilen ceza muhakemesi hukuku üzerinde temel ilkelerin canlandırılmasına katkıda bulunmuştur.

Anahtar Kelimeler: İskandinav hukuku, itham edici system, jüri sistemi, yargı bağımsızlığı, gizli soruşturma yöntemleri, insan hakları.

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Introduction

The Scandinavian countries are Norway (4.8 million inhabitants), Denmark (5 million) and Sweden (9 million). These countries have much in common, both historically and culturally. Between 1396 and 1536, the three countries were united, as they had the same king or queen. From 1536 to 1814, Norway was in a union with Denmark alone. In 1814, Norway separated from Denmark and adopted a constitution of its own. In the same year, however, Sweden and Norway entered into a loose union, which lasted until 1905. Unlike its Scandinavian neighbours, Norway has not joined the European Union. People in Scandinavia can understand each others' languages. The legal systems are also very similar, the Norwegian and Danish systems in particular. In order to limit the scope of this article, I will primarily focus on Norwegian law and confine the comparison with Danish and Swedish law to some basic similarities and differences.

1) Legal Sources and Underlying Ideas

The Norwegian Constitution was adopted already in 1814, when Norway separated from Denmark. At the time, it was a modern constitution inspired by constitutions in North America, France, Germany and other European states. It was a true offspring of the Enlightenment, the European intellectual movement of the 17th and 18th centuries. This movement had already led to a humanisation of criminal law and penal sanctions in many European countries.

One of the Enlightenment ideas that shaped the Norwegian Constitution was the separation of state powers between the legislature (Parliament), the executive (the King and his Government) and the judiciary (the courts). The recognition of some fundamental rights and legal principles

based on the idea of human rights was also important. Among these principles were the prohibition on torture (Section 96), the principle that 'no one may be convicted except according to law, or be punished except after a court judgment' (Section 96), and the principle that 'no law must be given retroactive effect' (Section 97).

Similar rights and principles became cornerstones of the Danish Constitution of 1849, and they have been further developed until the present Constitution of 1953. The separation of state powers also gradually gained ground in Sweden in the nineteenth century, while the idea of adopting a catalogue of fundamental rights was not realised until the general constitutional reform of 1974.[3]

During the first decades under the Norwegian Constitution, criminal procedure continued to be fragmentarily regulated by pieces of legislation and administrative decrees. However, several committees were appointed from the 1850s onwards, tasked with developing a completely new code of criminal procedure. The first general Criminal Procedures Act was adopted in Norway more than 30 years later, in 1887 (in force from 1890). One main reform was the participation of juries and lay assessors in the courts. Another important feature was the establishment of a new, separate prosecuting authority. This made it possible to abandon previous elements of inquisitorial procedure and adopt a clear-cut accusatorial system in which the courts deal with criminal cases solely on the basis of other bodies' investigation and prosecution.

A similar reform took place in Denmark in 1916, when the Danish Procedures Act was adopted (in force from 1919). The accusatorial system and the participation of juries and lay assessors were also key elements in Denmark. In Sweden, the accusatorial system was implemented through the Swedish Procedures Act of 1942, while the participation of lay assessors had already been the rule for generations.

After more than two generations of Norwegian lawyers had been educated in and worked on the basis of the 1887 Act, there was a need for a general revision of the rules. A new Criminal Procedures Act was adopted in 1981. While this Act did not lead to such fundamental changes as

[3] The Swedish Constitution comprises four different constitutional acts. The most important is the Swedish Instrument of Government, which, in Ch. II, sets out a series of individual rights and freedoms. A further outline of the historical development in Sweden is given by *Nergelius 1996* Ch. 16.

the 1887 reform, it represented a necessary modernisation of the rules. In recent years, the codes of criminal procedure in the Scandinavian states have frequently been subject to minor, partial revision. An important motivating force in this context has been the European Convention on Human Rights (ECHR), which also functions as a separate legal source influencing practice under the national rules (see 8 below).

2) The Independence of the Courts

In Norway, the independence of the judicial power is an unwritten principle underlying the Constitution. It is reflected, for instance, in Section 88, which provides that decisions by the Supreme Court are final. In the Danish Constitution, Section 62 expressly states that 'the administration of justice shall always remain independent of executive authority'. The Swedish Constitution contains a similar rule.[4]

The procedure for appointing and dismissing judges is also of practical importance in relation to the issue of independence. Although Scandinavian judges are *appointed* by the government, there is a long tradition for using professional skills as the main criterion when new judges are chosen and for disregarding their political opinions. In order to further secure judicial independence, however, separate appointment bodies were established in Denmark in 1999, in Norway in 2001 and in Sweden in 2008. The Norwegian Judicial Appointments Body consists of three judges, two lawyers appointed by the Government and two public representatives appointed by the Parliament.[5] Its main task is to make formal recommendations on which applicants are best qualified to become judges. Normally, the Government must choose one of the applicants that the appointments body has recommended. The Danish Judicial Appointments Council and the Appointments Proposals Board for the Swedish Judiciary have similar advisory functions.[6]

Once a judge is appointed, the Government has to respect his independence. He or she is entitled to hold the position until the normal age of retirement. As stated in Section 22 of the Norwegian Constitution, a judge 'may not, except by court judgment, be dismissed'. A similar pro-

4 See the Swedish Instrument of Government Ch.11 S. 2.

5 See the Norwegian Courts Act (NCA) of 13 August 1915 S. 55a.

6 See the Danish Procedures Act (DPA) Ss. 43a-43d and the Swedish Government Regulation 1988:318. A reform of the Swedish system, which will strengthen the role of the advisory board, has been proposed, see the Swedish bill, Prop 2009/10:181.

vision can be found in Section 64 of the Danish Constitution. In Sweden, on the other hand, a judge can be dismissed by administrative decision, but he can appeal the decision to the courts.[7] However, the grounds for dismissal are mainly limited to the commission of crimes and grave breaches of professional duties. That a judge's decisions are frequently amended upon higher review is, for instance, not a valid reason.

3) Participation of Juries and Lay Assessors

An important part of the Norwegian 1887 reform was the introduction of trial by jury, inspired by England and by Norway's own history.[8] The idea was that, in order to protect the freedom of citizens and ensure due process protection, the guilt of the defendant should be determined by his peers and not by professional judges alone. All serious criminal cases should start directly in the Court of Appeal and be tried before a jury of 10 lay persons. However, because it would be too expensive and time consuming to use the jury system in all cases, less serious crimes should be tried before a District Court comprising one professional and two lay assessors (a mixed court).

An important change took place in 1995, when it was decided that all cases have to start in the District Courts, which in the most serious cases are composed of two professional judges and three lay assessors. Compared with jurors, who exclusively decide the question of guilt, the lay assessors decide on all aspects of the case together and on an equal footing with the professional judge(s). The verdict of a District Court can be appealed to the Court of Appeal, with a request for a complete review of the case, both as regards the facts and the application of the law. It is only when an appeal is brought against the assessment of evidence in relation to the issue of guilt and the case concerns a crime that can be punished by more than six years' imprisonment that trial by jury is now used.[9] Otherwise, the Court of Appeal is composed of three professional judges and four lay assessors.[10] Because the lay assessors are also in majority when trial by jury is not used, lay participation is still an important part of the Norwegian system of criminal procedure.

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7 See the Swedish Instrument of Government Ch.11 S. 5.

8 For a more detailed examination of the Norwegian jury system, see *Strandbakken, IRPL 2001* pp. 225-252. See also *Husabø 2009* and (for Danish law) *Renckendorf 2009*.

9 See the Norwegian Criminal Procedures Act (NCPA) of 22 May 1981 No 25 S. 352.

10 See NCPA S. 332.

There is also a long tradition of lay participation in the courts in Denmark. It is even provided for in the Constitution that 'laymen shall participate in criminal proceedings' (Section 65 (2)). Traditionally, Danish juries have been composed of twelve laymen. However, a major reform of the jury system took place in 2008. Lay persons still participate both in the District Courts and in the Courts of Appeal, but now they always share responsibility with professional judges. If the prosecutor enters a claim that the defendant be sentenced to imprisonment of four years or more, the District Court is composed of a panel of three professional judges and six jurors. At least two of the professional judges and four of the six jurors must find the defendant guilty; otherwise, he must be acquitted. In the Court of Appeal, there are nine jurors, at least six of whom (and two of the professional judges) must find the defendant guilty. Less serious cases are decided by one professional judge and two lay assessors in the District Courts and by three professional judges and three lay assessors in the Court of Appeal.[11] Sweden has no similar tradition of using juries, but lay assessors also participate in deciding both the question of guilt and sentencing in Sweden. A District Court is normally composed of one professional judge and three lay assessors, and the Court of Appeal of three professional judges and two lay assessors.[12]

4) The Two Parties

In Norway and Denmark, the accused has always had the status of a party in the main hearing of a criminal case. While criminal cases in the medieval age were initiated by the victim, the state gradually took over this role in the eighteenth century.[13] In Norway until 1887, the accusatory role rested with the ordinary public administration, mainly the King's regional representatives and the Ministry of Justice.[14] With the 1887 reform, a separate prosecuting authority was established within the executive. This meant that the two-party system was better organised. The courts' dominant role in pre-trial interrogations was also replaced by that of an objective third party. A similar reform took place in Denmark through the 1916 Procedures Act.

11 See DPA Ss. 7 and 12.
12 See the Swedish Procedures Act (SPA) of 18 July 1942 Ch. 1 S. 3b and Ch.2 S. 4 (2).
13 See *Robberstad 1999* Ch. 4 and 5.
14 See *Holme 1985*.

The Norwegian prosecuting authority is headed by the Director of Public Prosecutions, who can only be instructed by the King in Council.[15] Most cases, however, are handled either by the regional Public Prosecutors or by the Prosecution Authority in the Police.[16] The main tasks of the prosecutor are to charge the suspect, present evidence and argue the case before the court. Moreover, the prosecutor has an important role in the pre-trial stage, for example in controlling the police investigation and petitioning the court to have a person taken into custody, for searches and seizures etc. It is an important principle in the Scandinavian countries that both the police and the prosecuting authority shall remain objective, which means that they shall collect and assess evidence favourable to the suspect as much as evidence that counts in the suspect's disfavour.[17]

A suspected person acquires full status as a party to the proceedings from the moment he is charged. Pursuant to Norwegian and Danish law, he is considered as having been charged when the prosecuting authority states that he is charged, the prosecution against him is instituted in court or it is decided to carry out an arrest, search or seizure or to take similar measures against him.[18] A charged person has a right to be present at all court meetings, at the main hearing as well as at the pre-trial stage. He is usually also obliged to attend the main hearing in person.[19]

The right to be represented by a defence lawyer at the public expense was acknowledged in Denmark-Norway already in the eighteenth century. However, the right was limited to serious criminal cases (felonies) and the suspect could only demand a counsel after the indictment was issued. In the Norwegian Criminal Procedures Act of 1887 and the Danish Procedures Act of 1916, this right was expanded to also cover the pre-trial stage. For example, a suspect was given the right to be represented by a defence counsel if the prosecution asked for pre-trial detention.[20] As stated in the Norwegian Criminal Procedures Act of 1981, 'the person charged is *entitled to* have the assistance of a defence counsel of his own

15 See NCPA S. 56 (2).
16 See NCPA Ss. 64-67. Denmark's prosecuting authority is organised in a similar way, see DPA Ch. 10. In Sweden, the prosecution authority is totally separated from the police, also at district level, see SPA Ch. 7.
17 See NCPA S. 226 (3), DPA S. 96 (2) and SPA Ch. 23 S. 4.
18 See NCPA S. 82. A similar rule is applied in Danish court practice, see *Smith 2008* pp. 184-189.
19 See NCPA S. 280, DPA S. 853 and SPA Ch. 21 S. 2.
20 See DPA S. 730 and SPA Ch. 21 S. 3a.

choice at every stage of the case'.[21] This Act also extended the right to have a defence counsel at the public expense to most cases involving minor offences (misdemeanours), which is also the rule in Denmark.[22] At the main hearing stage, it is even mandatory to have a defence counsel in most cases in Norway and Denmark (but not in Sweden).[23]

The victim of a crime is also regularly involved in criminal procedure. The victim may be a central witness for instance, and his claim for compensation for criminal injuries is submitted by the prosecutor and decided as part of the criminal case. In recent decades, the position of the victim has been strengthened in Scandinavian criminal procedure, in particular by giving the victims of serious crimes a right to be represented by a lawyer at the public expense.[24] Notwithstanding this, a victim does not normally have the status of party.[25]

5) Adversarial Elements of the Procedure

As already mentioned, the criminal procedure established in Norway in 1887, and later on also in Denmark and Sweden, is an accusatorial system in which the judge shall not initiate any criminal investigations or criminal cases. As expressed in the Norwegian Criminal Procedures Act of 1981, 'the courts shall act only on the application of a person who is entitled to prosecute, and shall cease to act when the said application is withdrawn'. Furthermore, 'the court cannot go beyond the matter to which the indictment relates', although it is 'not bound by the particulars as regards time, place, and other circumstances'.[26]

The present Scandinavian model of criminal procedure also contains the main characteristics of an adversarial system. The procedure is a dispute

21 See NCPA S. 94.

22 See DPA S. 731. In Sweden, the threshold for being entitled to a defence counsel is somewhat higher, see SPA Ch. 21 S. 3a. If the suspect is convicted, he may in all three countries be required to pay the salary of the defence lawyer and other costs, see NCPA S. 436, DPA S. 1008 and SPA Ch. 31 S. 1.

23 See NCPA S. 96 and DPA S. 731. For Swedish law, see *Lindell 2005* pp. 184-185.

24 See NCPA Ss. Ch. 9a, DPA Ch. 66a and the Swedish Act 1988:609.

25 The victim has a limited right to institute a private prosecution, in particular if the public prosecutor decides not to prosecute a case, see NCPA Ch. 28, DPA Ss. 725-727 and SPA Ch. 20 S. 8 (1). This right is, however, of little practical importance in the Scandinavian countries. In Sweden, the victim has also a right to acced to a public prosecution, see SPA Ch. 20 S. 8 (2) and become a formal (third) party to the proceedings.

26 See NPA Ss. 38 and 63. Similar rules are found in DPA Ss. 718, 721 and 883 (3) and SPA Ch. 20 S. 1 and Ch. 30 S. 3.

between two equal parties, the prosecutor on the one hand and the charged person and his defence lawyer on the other. Basically, the two parties shall be given an equal opportunity to present his or her case ('equality of arms').[27] Scandinavian judges have a more active role, however, than in the archetypical adversarial procedure we are familiar with from the Anglo-American legal culture in particular.

Taking the Norwegian system as an example, the charged person is normally first examined by the court administrator. Thereafter the prosecutor and the defence counsel can question him.[28] He has the right to remain silent, however.[29] Both parties call witnesses. After the party who has called a witness has conducted his or her examination, the other party has an equal right to cross-examine the witness.[30] Thereafter, the judges can also ask questions. Evidence shall normally first be produced by the prosecutor and then by the defence counsel.[31] However, in its official capacity, the court shall ensure that the case is fully clarified, and for this purpose it may decide to obtain new evidence and to adjourn the hearing.[32] In other words, the judge is also responsible for ensuring that the factual basis for the conviction is sufficiently explored.[33]

It is a necessary prerequisite for an adversarial procedure that the defendant is given access to information that may be used against him, and that he be given sufficient time to prepare his defence. As a point of departure, the prosecuting authority must (on request) provide the defendant and his counsel with all the information it has that is relevant to the case.[34] At the pre-trial stage, however, several exceptions are made, in particular in order to protect the secrecy of an ongoing investigation.[35] After the indictment is issued, the exceptions are far more limited, but even then information that will not be used in evidence by the prosecutor may be

27 See *Hov 2010* pp78-79, *Smith 2008* pp. 284-285 and *Lindell 2005* pp. 32-33 and 369-370.
28 See NCPA S. 91.
29 See NCPA Ss. 90 and 232.
30 See NCPA S. 135.
31 See NCPA S. 291.
32 See NCPA S. 294.
33 A similar obligation applies to Danish and Swedish judges, see DPA Ss. 867 and 874 and SPA Ch. 35 S. 6.
34 See NCPA S. 242 (1). For Danish law, see DPA S. 729a (3).
35 See NCPA Ss. 242 and 242a. For Danish law, see DPA Ss. 729a (4) and 729c and the discussion by *Smith 2008* pp. 285 ff. Pursuant to Swedish law, the defence counsel's access to police information etc. is limited to information that is entered in a particular pre-trial protocol, see SPA Ch. 23 S. 21 (4).

withheld in order to protect national security interests or the security of particular persons.[36]

6) Other Basic Principles

The decisive part of the criminal procedure is the main hearing in court. Here, the procedure in the Scandinavian countries has for generations followed some basic principles.

Firstly, criminal trials are held *in public*.[37] This has two purposes: to avoid malpractice in the courts and to improve public trust in the administration of justice. There are certain limited exceptions, however, allowing the court to hear a case in camera, in whole or in part, when this is absolutely necessary to protect the privacy or security of witnesses or other individuals or to safeguard vital national interests (for instance in a case concerning espionage). However, even in such situations, the judgment must be delivered in open court.[38]

Secondly, the proceedings at the main hearing are *oral*.[39] This means that written pleadings cannot be used, although the parties are allowed to read from documents that are relevant as evidence.

Thirdly, *evidence* should be produced *directly before the court*. This is a basic principle underlying many rules in the Norwegian, Danish and Swedish legislation.[40] It should also be mentioned that witnesses are obliged to testify before a court,[41] but not before the police.

Fourthly, there is in principle a *free assessment of evidence*. This is explicitly stated in the Danish and Swedish legislation. When the present Norwegian Criminal Procedures Act (1981) was adopted, it was considered to be so self-evident that it was superfluous to codify it. Taken together, these principles are important in relation to guaranteeing due process protection and upholding public trust in the court proceedings. Together with the principle that a defendant may not be convicted when doubts about his or her guilt remain (*in dubio pro reo*),[42] it ensures – as

36 See NCPA Ss. 264 and 242a. For Danish law, see DPA S. 729c.
37 See NCA S. 124, DPA S. 28a and SPA Ch. 5S. 1.
38 See NCA S. 124 (4), DPA S. 28a (2) and SPA Ch. 5 S. 5 (2).
39 See NCPA S. 278 and SPA Ch. 46 S. 5. For Danish law, see *Smith 2008* pp. 610 ff.
40 See NCPA Ss. 290 and 296-300, SPA Ch. 30 S. 2. For Danish law, see *Smith 2008* p. 610 ff.
41 See NCPA S. 295, DPA S. 168 and SPA Ch. 36 S. 1.
42 See *Andenæs/Myhrer 2009* pp. 160-161, *Smith 2008* p. 37 and *Lindell 2005* pp. 399-400.

far as possible –that innocent people are not convicted of criminal offences.

7) The Use of Covert Investigation Methods

During recent decades, the range of investigation methods available to the police has been gradually expanded in the Scandinavian countries, as elsewhere. This trend is closely connected to technical developments and has been accompanied by a wish to defeat organised criminal groups which take advantage of new technology.

In Norway, the most important amendments were adopted in 1999.[43] Bugging and recording of telephone calls (wiretapping) was allowed in connection with the investigation of all types of serious crimes, as were similar kinds of control of computers. Another important step was that the police were empowered to control traffic data that telecommunications providers have stored for commercial purposes. Secret searches were also allowed in the most serious cases. In the other Scandinavian countries, a similar expansion of police methods had already taken place some years before. Since 1985, Denmark had also allowed the police to use covert audio surveillance of private rooms,[44] and in 2005 and 2007 this was also accepted in Norway and Sweden in connection with certain particularly serious crimes.[45] The typical conditions for the use of coercive investigation methods in the Scandinavian countries can be exemplified by the regulation of wiretapping in Norway.[46] Firstly, there must be reasonable grounds to suspect a person of a crime of certain gravity, and, secondly, the use of the measure must be of material importance to clarification of the case. Thirdly, the measure should not be a disproportionate intervention in view of its purpose and the rights and interests affected. The police must seek permission from a court, which assesses whether the conditions are met. In urgent cases, however, the prosecutor can grant preliminary permission, which shall promptly be brought before a court.

When the police want to use a covert measure, the suspect is, for obvious reasons, not informed about the court hearing and is thus deprived of the right to be heard in person. To compensate for this, the Scandinavian countries have recently adopted a particular procedure. An independent

43 See the Act of 3 December 1999 No 82, amending NCPA Ch. 15 to 16b.
44 See DPA S. 780 (1) No. 2.
45 See NCPA S. 216m and the Swedish Act on Covert Audio Surveillance of 22 November 2007.
46 See NCPA Ch. 16a (Ss. 216a to 216k).

lawyer is appointed to represent the interest of the affected individuals before the court.[47] The lawyer shall be informed about the request for a covert police measure and invited to court hearings. He is entitled to submit written or oral statements before the court decides on the matter, as well as to appeal the decision.

This solution has the advantage that an independent professional can question the evidence and arguments presented by the prosecutor. However, this ombudsman of individual interests has the drawback of not knowing the case in such detail as the suspect himself (and, through him, a normal defence lawyer) is assumed to do. Although this legal safeguard could still be improved, it cannot fully compensate for the lack of openness and contradiction at the pre-trial stage.

8) The Impact of Human Rights

As mentioned above, the idea of human rights was already reflected in the Norwegian and Danish constitutions from the nineteenth century. However, a human rights ideology was revitalised through the human rights conventions adopted in the aftermath of the Second World War. The Scandinavian countries ratified the European Convention on Human Rights (ECHR) of 1950 already in 1953, and they were also quick to ratify the UN Covenant of 1966 on Civil and Political Rights. At the time, however, the governments considered national law to be in compliance with the international conventions. Due to the increase in case law from the European Court of Human Rights (ECtHR), however, from the end of the 1980s the ECHR began to have an impact on criminal procedure law in the Scandinavian states. This impact was reinforced when the ECHR was formally incorporated into national legislation in the 1990s.[48] During the last two decades, the ECHR, as interpreted by the ECtHR, has been the most influential source of amendments of legislation and (in particular) court practice in the field of criminal procedure. A core provision with regard to criminal procedure is ECHR Article 6, which basically declares the right to a 'fair trial'. This provision has been interpreted and developed by the ECtHR in a large number of cases, and the Scandina-

47 See NCPA S. 100a, DPA S. 784 and SPA Ch. 27 Ss. 26-30.

48 The ECHR was incorporated into Danish law in 1992 (Act of 29 April 1992 No 285), into Swedish law in 1994 (Act 1994:1219) and into Norwegian law in 1999 (Act of 21 May 1999 No 30).

vian courts have gradually adapted to this case law. Here, only a few examples of the impact on Norwegian law can be mentioned.[49]

The principle of the impartiality of judges is expressly stated in Article 6 (1). In a Danish case from 1989, this principle was interpreted by the ECtHR as prohibiting the same judge who had decided pre-trial detention of the suspect from also being a judge at the main hearing.[50] The reason why this was a problem was that, in order to decide to keep the suspect in detention, the court had to believe that the suspect had most likely committed the criminal act he was accused of. This interpretation of Article 6 ECHR has not only resulted in an amendment of Danish law,[51] but also in a change of practice in Norway, preventing a judge who has considered the probability of guilt in connection with a pre-trial decision, from also presiding at the main hearing.

An important factor in connection with this issue is the presumption of innocence, which is expressed in Article 6 (2) ECHR. It states that 'everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law'. This principle has also influenced Norwegian law in other respects. In cases where the accused is acquitted, for instance, he no longer needs to prove his innocence in order to be awarded compensation for pecuniary and non-pecuniary losses he has suffered as a result of the prosecution.[52]

The right to cross-examine adverse witnesses is stated in Article 6 (3). It has been interpreted by the ECtHR as giving an accused person a certain right to object to a witness statement being documented in court if he or his defence counsel has not had an opportunity at any stage to cross-examine the witness. In Norwegian law, it has meant that the courts no longer accept that, in cases where an important witness is not present in court, a police report reproducing his testimony can be read out in court. If the defence lawyer was not present when the witness testified before the police and the conviction is solely or to a decisive degree based on this testimony, such documentation is considered to violate the right to a fair trial under Article 6 ECHR.

49 For a more thorough analysis and further references, see *Matningsdal, SSL 2007* pp. 399-418. See also *Jebens 1997* pp. 583-597.

50 See ECtHR, Hauschildt v. Denmark, Application No. 10486/83, and judgement of 24 May 1989.

51 See DPA 60 (2).

52 See now NCPA Ss. 444-446.

Let me also touch on a currently much debated issue, namely whether the Norwegian jury system is compatible with the right to a fair trial under the ECHR. In a Belgian case from 2009, the European court had overruled a judgment based on a jury trial on the grounds that the judgment did not give the accused sufficient information about why he was found guilty.[53] In Belgium, as elsewhere, juries simply answer 'guilty' or 'not guilty' to particular questions. In a plenary decision, the Norwegian Supreme Court has held that, given some improvements of court practice, the Norwegian system is not contrary to Article 6 ECHR.[54] However, the demands of the Supreme Court raise several practical problems, and it remains to be seen whether Norway will have to change its jury system in order to arrive at a procedure that both complies with the ECHR and functions well in practice.[55]

It should be added that other human rights conventions have also had an impact on Scandinavian criminal procedure. One example is the impact of the UN Torture Convention in relation to restricting the use of isolation during pre-trial detention.[56] Another example is the right laid down in Article 14 (5) of the UN Covenant on Civil and Political Rights to have a criminal conviction reviewed by a higher tribunal. When Norway in 1995 and Denmark in 2008 decided that every criminal case shall start in a District Court, with a right to appeal to the Court of Appeal (see above at 3), these states' reservations in relation to the UN Covenant could be withdrawn.

The last decade's development of more efficient cooperation on criminal matters within the EU is also based on the fundamental presumption that all Member States respect the human rights expressed in the ECHR.[57] In particular with regard to the mutual recognition of other state's decisions in this field, such as arrest warrants and financial penalties,[58] it is important that the other Member States also respect these minimum standards. It must be admitted, however, that the principle of mutual recognition means that Denmark and Sweden have to effectuate decisions adopted on

53 See ECtHR, *Taxquet vs. Belgium*, Application No. 926/05, judgement of 13 January 2009.
54 See the Norwegian Supreme Court's judgment of 12 June 2009, Rt. 2009.950.
55 The Norwegian Government appointed on 21 May 2010 a commission to assess the future of the jury system. The commission is requested to submit a report by 1 June 2011.
56 See *Andenæs/Myhrer 2009* p. 282.
57 See the Treaty on European Union Art. 6.
58 See Official Journal of the European Union 2002 L 190/1 and 2006 L 76/16.

the basis of other procedural principles than those that prevail in Scandinavian law.[59]

Conclusion

The most fundamental changes in criminal procedure law were adopted already in 1887 in Norway and some decades later in Denmark and Sweden. However, it took a long time to get there. In a book called 'Law and culture in the nineteenth century', the Norwegian criminal law professor Francis Hagerup explained it like this:[60]

'There are several reasons why it has taken some countries a long time to implement a criminal procedure that both satisfies the requirement for judicial independence and safeguards citizens' individual rights. In part, this is because an accusatorial procedure with public responsibility for the interests of the accused is very demanding on state finances and in part because, more or less unconsciously, people have found it difficult to rid themselves of the old misconception that every accused person is also guilty. The humanistic view that the state is just as interested in avoiding the conviction of an innocent party as it is in convicting a guilty person has only gradually won ground.'

In the ninety years since this was written, Scandinavian criminal procedure law has developed a great deal. This development will inevitably continue, as new times always require the reconsideration of previous legal solutions. In particular, we must expect that the human right standards developed by the European Court of Human Rights and other international bodies will continue to challenge our law and practice in this field. On the other hand, we cannot exclude the possibility that the rule of law standards that have gradually won ground will themselves be challenged as a result of political pressure for greatest possible efficiency in the repression of crimes. However, in the long run, these standards are fundamental to the humanity and moral legitimacy of criminal law.

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[59] As Norway is not an EU Member State, it is not bound by the EU framework decisions on mutual recognition of different kinds of decisions in criminal matters. A treaty that connects Norway to the European Arrest Warrant is not yet ratified by alle the Member States. However, the Nordic states have adopted a separate system of Nordic Arrest Warrants, which will prevail between these states, see further *Mathisen, NJIL 2010* pp. 1-33.

[60] *Hagerup 1919* p. 89 (translated from Norwegian).

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