The View from Elsewhere:
Scandinavian Penal Practices and International Critique

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Abstract.

While the Scandinavian model of detention has been favorably received in comparative criminology, its reception in the international human rights community has been ambiguous. Initial reviews by international bodies of Scandinavian practices were positive: "*models* to which most other countries should aspire'. However, an increasing chorus of critique of particular detention practices from UN and Council of Europe human rights has clouded the picture. These negative appraisals deserve consideration. This chapter *describes* the evaluations of Scandinavian detention and punishment practices by UN bodies and provides a *comparative* analysis by contrasting them with reviews of four other Western European states. The chapter also argues that *causal* explanations based on the welfare state are important but need to be balanced by theories which foreground politics and the interplay between agency and structure.

Introduction

International organs review rights performance regularly and while one may dispute their objectivity, their access to relevant information has risen significantly in recent years. Through this material we have engaged in a longitudinal, comparative analysis of penal exceptionalism in Scandinavia. We contrast in particular the findings of the Committee against Torture (CAT) for Norway, Sweden and Denmark against four Western European states (Belgium, United Kingdom, Germany and Italy). In other words, we compare Scandinavian states with countries with similar economic development and determine to what extent there are differences in detention conditions.

The international human rights organs provide a useful alternative lens on the question of Scandinavian penal exceptionalism. They represent an epistemic community that is qualitatively

distinct from that of comparative criminology and public policy in two salient, albeit contradictory, ways. Firstly, the logic of human rights orients practitioners towards implementation of universal minimum standards rather than a comparative search (whether explicit or implicit) for best practices or some other criterion of justice or fairness. The second is that human rights monitoring is often geared towards the exposure of violations – focusing on the more problematic aspects of state practice. Thus, the narrative of detention conditions in international human rights discourse may diverge significantly from that acquired through a comparative snapshot. On one hand, a human rights review may be more positive towards states in areas that criminologists would suggest need greater improvement. On the other hand, it may be more critical in areas that are shrouded by the comparativist search for progressive detention models (see e.g. Pratt, 2008; for a critique, see Scharff Smith, 2011). In any case, our chapter seeks to provide a 'view from elsewhere', possibly that of an 'impartial spectator' immune from the impulse of parochialism (cf. Sen, 2009). Indeed, international human rights treaty bodies are designed to play precisely this role (Buchanan, 2008).

This international material may also permit us to investigate the causes of any Scandinavian exceptionalism(s). The editors challenged us to explore the hypothesis that any differences, whether positive or negative, in detention conditions in the Scandinavian region may be explained by a strong social welfare state. In our view, this supposition is both important and problematic. Our departure point in studying Scandinavian exceptionalism is that the field must move beyond the cultural essentialism that pervades much of the scholarship (Langford and Schaffer, 2014; cf. Scharff Smith, 2011, p. 42). Vast swathes of public policy with all their variations cannot be explained simply by "distinctive domestic social values, including that of solidarity" (cf. Bergman, 2007; Lawler, 1997). Thus, we agree that a focus on the Scandinavian social welfare model and its underlying ideology is crucial. The reciprocal nature of the Scandinavian social contract may exclude and marginalize certain groups, particularly those groups perceived as unable to make a contribution (Langford and Schaffer, 2014). Travellers and Roma, Sami, person with disabilities, certain juveniles have been historically met with repressive or assimilatory measures (e.g. Minde, 2003; Sköld, 2013). Moreover, we agree with the editors that the coercive power and the ambition of the welfare states may have unintended consequences in the field of punishment: 'the fact that Scandinavian welfare states are large,

powerful and arguably often trusted by the public, can lead both towards humane policies on the one hand and effective social control on the other hand' (Scharff Smith, 2011).

However, a singular focus on the welfare state and its ideologies risks falling into a new form of essentialist exceptionalism and conflating analytically distinct factors. Values, ideas, culture or mentalities do not automatically translate into actions, decisions and policy – it requires the active work of purposive agents, who hold certain beliefs and act on them, as also argued by ideational scholars in comparative politics and international relations (Beland, 2005; Berman, 2001). In order to assert the centrality of national values for policy, existing essentialist accounts of exceptionalism tend to focus on hegemonic discourses and dominant norms in Scandinavian societies (Brysk, 2009, p. 60f), despite the fact that such discourses are usually produced through processes of political contestation (Schmidt, 2008). We therefore worry that agents and contestation can be too easily lost in orienting the explanatory focus strongly towards the form of the state and its ideologies, in this case social welfarism. Comparative analysis of Scandinavian exceptionalism needs also to compare the politics, structures and incentives that guide and shape detention policy.

In this chapter, we attempt to provide a greater handle on this explanatory question by examining two dimensions of our primary material. First, we examine whether the Scandinavian states in their argumentation to these UN committees use a discourse and justificatory rhetoric that reflects a social welfare model or ideology, which we have supplemented through a brief analysis of the more detailed response to the European CPT. Second, we analyze variation between Scandinavian states. If the Scandinavian model or ideology is a paramount explanation, we should expect similar approaches to detention conditions across time and space. If not, it would suggest that domestic politics and structures may be more salient.

A broad picture: The UN Treaty Bodies

The core international human rights conventions are monitored by their own independent expert committees. For example, the Human Rights Committee (HRC) is responsible for the International Covenant on Civil and Political Rights (ICCPR); and the CAT monitors the Convention against Torture. The principal function of these committees is to periodically review the performance of states (they also issue general interpretive statements and most of them

adjudicate in a quasi-judicial fashion individual complaints). They do so through a dialogue with states (roughly every five years), based on a report issued by a state, which is increasingly supplemented by information submitted by non-governmental organizations or acquired from intergovernmental organizations. At the conclusion of the review, concluding observations (COs) are issued by the committee. Some describe this as the most important activity of human rights treaty bodies; it "provides an opportunity for the delivery of an authoritative overview of the state of human rights in a country and… advice which can stimulate systematic improvements" (O'Flaherty, 2006, p. 35).

The regular and independent nature of these COs offers a useful insight into evaluating Scandinavian penal practices. However, there are several methodological conundrums to be addressed. Treaty body periodic review developed recently, with different committees developing different practices. For example, CAT's practice can be divided into eras. Until the early 1990s, the emphasis was on 'constructive dialogue' (Kälin, 2012, p. 35), including a few general observations that did not distinguish between commendations and concern. COs in their monitoring-orientated form only emerged in the mid-to-late 1990s (Kälin, 2012, p. 36), distinguishing between 'positive aspects' and 'subjects of concern'; nevertheless, COs remained short, lacking detail. In the early 2000s, the committee introduced an informal distinction between very positive commendations and more general ones noted 'with satisfaction', and established a clearer link between concerns and specific recommendations. These trends continued into the most recent reporting era, coinciding with the 'Harmonised Guidelines' for treaty bodies issued in 2006 (Kälin, 2012, pp. 21–23). 'Principal subjects of concern and recommendation' now link concerns and recommendations directly, ensuring at least one recommendation per concern, and are listed thematically. The List of Issues to be addressed by states during their reports adds a further source for gauging committee views. In some instances, one-year follow-up requests are attached to pressing recommendations, suggesting CAT's priorities.

A related challenge is varying coordination between reports. Commenting on the Human Rights Committee (HRC), Kälin notes that 'while the majority of concerns addressed in the most recent Concluding Observations remain the same as those raised during the previous examination, there are always several points that are no longer mentioned' (Kälin, 2012, p. 67f). This may reflect

that the state has implemented a recommendation, but could equally reflect 'an oversight' or that other concerns have emerged (Kälin, 2012, p. 66f). Likewise, repetition may imply the state is conducting reforms to which the committee wishes to contribute. Nonetheless, O'Flaherty found CAT to be among those 'least inclined to even loosely refer to previous concluding observations' (O'Flaherty, 2006, p. 27).

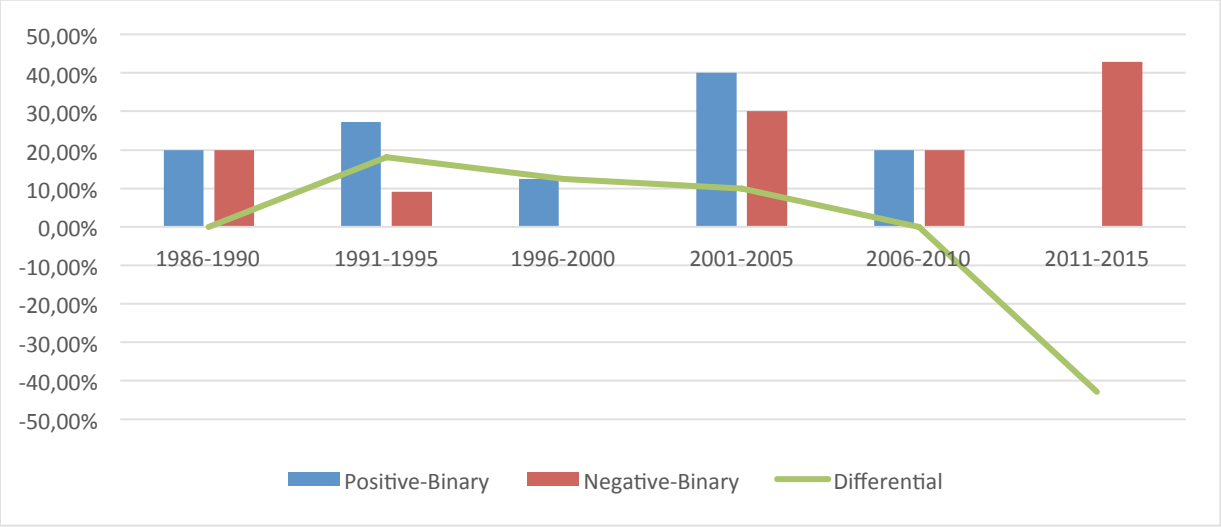
With these points in mind, we firstly take a look at how five human rights treaty bodies have reviewed the Scandinavian states over time in relation to detention practices. These bodies are the HRC; CAT; Committee on the Elimination of Racial Discrimination (CERD); Committee o the Rights of the Child (CRC); and Committee on Economic, Social and Cultural Rights (CESCR).

We have reviewed all 53 concluding observations between 1986 and 2015 from these bodies. Detention sites were defined to include police stations and prisons. Likewise, we include a broad spectrum of practices: solitary confinement, placement of juveniles with adults, visitor rights, etc. Across these concluding observations, we have specifically coded whether the committees refer positively and negatively to detention practices.[1] While the language is occasionally ambiguous, it is usually clear when a committee is affirmatory or critical. Note that positive and negative comments sometimes occur in a single observation while some committees almost never addressed detention conditions (CESCR).

In Figure 1, we divide the concluding observations into six periods of five-year blocks. There were seven to eleven observations in each period with the exception of 1986-1990, which had only five. Strikingly, in the first three periods, negative evaluations by UN committees is relatively rare and the differential is generally in favour of positive comments (i.e, the gap between the percentage of positive and negative comments). However, in the latter three periods, there is a rise in the presence of negative reviews. Moreover, by 2015 the differential is inverse.

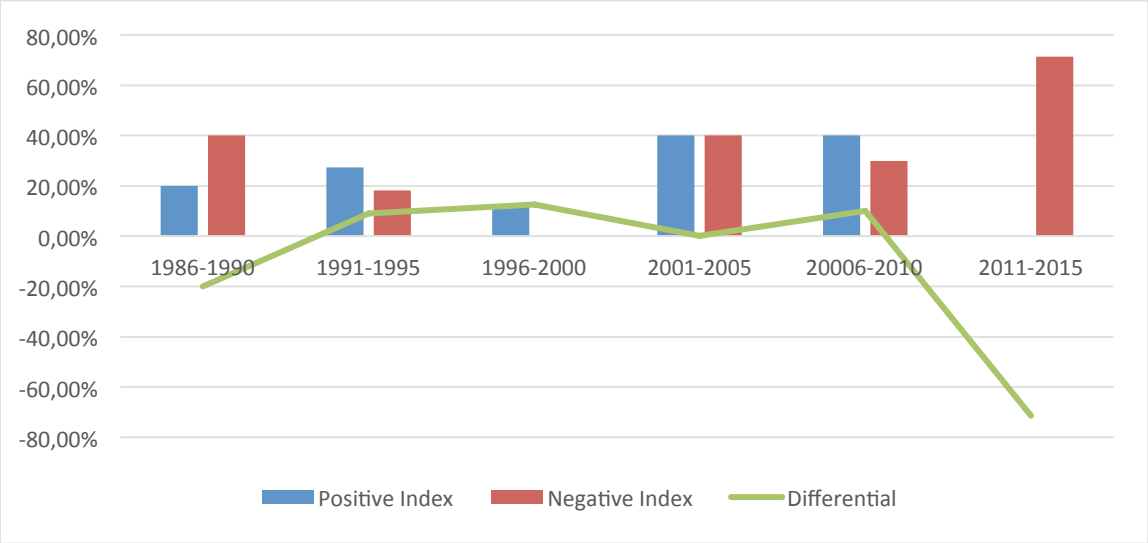
[1] The coding manual is available on request from the authors.

Figure: 1. UN Concluding Observations: Detention in Scandinavian States, 1986-2015



We also coded whether the observation was general in nature or referred to a specific practice concerning detention. An index was created whereby a specific observation was weighted twice that of a general observation. As Figure 2 shows, negative observations were on average more specific and decidedly more negative in the most recent period.

Figure 2. UN Concluding Observations Specificity of Observations on Scandinavian States, 1986-2015



This longitudinal perspective across different committees therefore provides us with a different lens on the Scandinavian states. The trend suggests that Scandinavian states are not simply (or no longer) viewed as positive models for others to emulate. Rather, the focus is on eliminating certain problematic practices. An illustrative example comes from the CRC in relation to Sweden. The early reviews raise concerns but suggest a high level of trust between the State and committee. In 1993, the Committee raised direct concerns about detention:

> The Committee is concerned that the Government does not ensure that children in detention are separated from adults. The Committee is also concerned by the practice of taking foreign children into custody under the Aliens Act and notes that this practice is discriminatory in so far as Swedish children generally cannot be placed in custody until after the age of 18. (Committee on the Rights of the Child, 1993, para. 9)

In 1999, there is a positive comment made in relation to the concern expressed in 1993, under the heading "*Followup measures undertaken and progress achieved by the State party"*:

> The Committee appreciates the efforts of the State party to implement the recommendations of the Committee … and welcomes progress achieved in reviewing legislation and taking appropriate measures to improve the compatibility of the juvenile justice system with the Convention, especially articles 37, 39 and 40, as well as other relevant international standards in this area, such as the Beijing Rules, the Riyadh Guidelines and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. (Committee on the Rights of the Child, 1999, para. 4)

It is then another decade until Sweden faces negative evaluation from this Committee on penal practices. However, the concern is more specific, is directed at the use solitary confinement and makes reference to independently acquired information:

> The Committee welcomes various achievements made by the State party in the area of juvenile justice. However, the Committee expresses its concern that under current rules … it is possible to isolate children in youth detention centres if they display violent behaviour or are affected by drugs to the extent that they jeopardize the general order. In addition, the Committee expresses its concern at reports that this treatment is also used as punishment. The Committee is of the view that solitary confinement should not be used unless it is judged to be absolutely necessary and the period of isolation may not exceed 24 hours. (Committee on the Rights of the Child, 2009, para. 70, recommendation at 71)

A similar trend can also be seen in the HRC's evaluation of Norway. In 1989, the Committee (1989, para. 68–69) expressed a wish to receive more information on, inter alia, time-limits governing resort by prison authorities to solitary confinement or the use of security cells; clarification as regards to detention in mental health institutions; time-limits for preventative detention, and the placing under special observation. However, in 2006, the Committee gives much more detailed accounts of their concerns in direct relation to Norway's penal practices, expressing 'concern':

> [A]bout provisions of solitary confinement and the possibility of unlimited prolongation of such pre-trial confinement, which might be combined with far-reaching restrictions on the possibility to receive visits and other contact with the outside world… [and] the continued use of pre -trial detention for excessive periods of time. (Human Rights Committee, 2006, para. 13–14, see also 16)

and in 2011:

> [A]t reports of excessive use of coercive force on psychiatric patients and the poor mechanisms of the Control Commissions for monitoring mental health-care institutions… the increased use of pretrial detention and solitary pretrial detention, as well as post-conviction incommunicado detention, in the State party… the excessive length and conditions of pretrial detention of juveniles … [and] that the State party maintains a reservation to article 10, paragraphs 2 (b) and 3, of the Covenant and that juveniles are not segregated from adult prisoners. (Human Rights Committee, 2011, para. 10, 12, 13)

A Comparative Method

However, the above picture of increasing critique of Scandinavian states risks conflating the rise in critique of Scandinavian practices with a more critical approach by the committees to all states. Any change may be simply accounted by shifts in committee practice. Indeed, as the level of detail (Kälin, 2012, p. 63) and diversity of issues covered have generally increased, a mere longitudinal perspective is insufficient. In order to address whether the Scandinavians present exceptionalism, we therefore compare over time the Scandinavian states to four European states: Belgium, Germany, Italy, and United Kingdom, representing the other two categories of welfare state regimes in Esping-Andersen's (1990) typology: corporatist and liberal. We have also decided to use data from the CAT periodic review process. It is a convention devoted to one right

(protection from cruel, degrading and inhuman treatment), thus making comparison between states easier, and it is oriented towards domestic detention conditions.[2] Moreover, recent research suggests there has been a gradual improvement in state reporting to CAT (Creamer and Simmons, 2015).

Still, there are limitations to using COs for this purpose. The first is prioritization. It can be difficult to interpret the seriousness CAT attaches to recommendations as there is no formal practice in differentiating between particular positives and negatives. The second is accuracy. Some argue that committees do not operate impartially; that they are becoming more critical generally, or particularly towards supposed better performers, including Scandinavian states. Recent work finds no correlation between good performance on torture indexes and state responsiveness in reporting; indeed, there is a weak correlation in the other direction, although this disappears when controlling for recent democratization (Creamer and Simmons, 2015). Despite these limitations, COs provide a basis for comparative qualitative analysis. Certain themes repeatedly return in COs and, in later reporting eras, the committee specifically categorizes concerns and recommendations. These categories can be projected backwards, and the nature of concerns raised under each theme can be discussed based on: frequency of repetition; tone, length and detail; whether previous recommendations are followed-up; whether they are outcome or process-orientated; whether they relate to positive or negative obligations; which articles of the treaty they relate to; and whether they relate to minimum or developmental standards. Moreover, for Scandinavian and comparator states, there has been largely consistent reporting from the early 1990s, which provides a more secure basis for comparison. In addition, we have checked the more skeletal CAT reports against the more fulsome reports of the European Committee for the Prevention of Torture (CPT). Using these qualitative indicators, we can analyze Scandinavian states to determine if COs reflect superior human rights practice.

[2] Although it is not always clear which article(s) CAT grounds such discussions in, Article 11 stands out: "Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture."

Scandinavian States

(i) Denmark

While the Committee raises various detention-related issues in Denmark, it regularly addresses solitary confinement (recently given a separate section in COs), a concern in some Scandinavian states addressed by other UN and European bodies (Barker, 2012; Smith, 2007). This concern is first raised in 1989 (Committee against Torture, 1989, para. 103). The state representative responded that access to media, exercise and 'contact with prison staff… distinct from police officials' meant 'such confinement could not be considered… true solitary confinement,' adding that stricter rules were introduced to ensure it was proportional to sentences and did not exceed eight weeks (Committee against Torture, 1989, para. 116).

This did not prevent the Committee returning to the issue in 1996, although it is grouped with other miscellaneous concerns, without a corresponding recommendation. However, a year later, the Committee (1997a, para. 181, 186) highlights 'the institution of solitary confinement, particularly as a preventive measure during pre-trial detention, but also as a disciplinary measure,' including a recommendation that 'except in exceptional circumstances… solitary confinement [should] be abolished, particularly during pre-trial detention, or at least that it should be strictly and specifically regulated by law… and that judicial supervision should be introduced' (Committee against Torture, 1997a, para. 11). Other detention-related concerns and recommendations are made regarding police treatment of detainees and demonstrators, including use of dogs for crowd control, and 'the real degree of independence' of detainee complaint mechanisms.

In 2002, CAT (2002a, para. 5(a), (b), 6(b), 7(c)–(d)) implies progress, noting 'with satisfaction' new controls regarding solitary confinement, 'decreasing its use' and 'providing for judicial control,' in addition to progress on earlier family access, mandatory medical examinations, and access to lawyers and interpreters'. However, concerns linger about 'lack of effective recourse procedures against decisions imposing solitary confinement.' This leads to recommendations to 'continue to monitor the effects of solitary confinement… and… of the new bill,' and to 'establish adequate review mechanisms relating to… [its] determination and duration.'

In 2007, solitary confinement still has its own section, but the tone is tempered by the report's first Positive Aspect welcoming 'ongoing efforts to improve conditions in prisons,' and 'in particular… efforts to introduce alternative measures to custodial ones' (Committee against Torture, 2007a, para. 4). The Committee also starts its specific concern on solitary confinement by appreciating the reduction of the upper limit for under-eighteens to four weeks and concludes by observing the judicial review mechanism to review continued confinement (citing Article 11). However, CAT (2007a, para. 11) 'remains concerned' about 'prolonged' confinement, 'with particular concern' that suspects, including under-18s, 'may be held indefinitely in solitary confinement during… pre-trial detention.'

The Committee recommends Denmark continue to monitor the effects of solitary confinement, and amendments restricting its grounds and duration; Denmark is urged to make confinement 'a measure of last resort, for as short a time as possible under strict supervision… with a possibility of judicial review,' including restricting it to 'very exceptional cases' for under-18s, and to 'aim at its eventual abolition,' with a direct reference to the same points in Denmark's 2005 CRC report. Regarding indefinite pre-trial detention, Denmark is urged to 'respect… the principle of proportionality and establish strict limits,' and 'increase the level of psychologically meaningful social contact' (Committee against Torture, 2007a, p. 14).

These recommendations are not considered pressing enough for one-year follow-up. Still, committee members, while encouraging progressive restriction, are not satisfied that solitary confinement continues, and develop increasingly detailed and clear COs.

(ii) Sweden

Turning to Sweden, the Committee (1989, para. 48, 66) requests information on time-limits for 'incommunicado detention' already in the state's 1989 report. Yet, the Committee does not follow up the clarification in the same report or in 1993. The 1993 COs instead reflect a glowing report, concluding that Sweden's 'legal and administrative regimes… were *models* to which most other countries should aspire' (Committee against Torture, 1993a, para. 374, 386).

However, in 1997, '"restrictions", some leading to solitary confinement for a prolonged period… in pre-trial detention', emerge as the second subject of concern, alongside worries about police methods for detainees and demonstrators (Committee against Torture, 1997b, para. 220, 222).

While the Committee welcomed that these 'restrictions' were 'under review,' it recommended 'that the institution of solitary confinement be abolished, particularly during… pre-trial detention, other than in exceptional cases… and the measure is applied, in accordance with the law and under judicial control' (Committee against Torture, 1997b, para. 225). The next COs list among issues that 'also' concern the Committee 'several cases of the excessive use of force by police personnel and prison guards'; however, solitary confinement is not mentioned (Committee against Torture, 2002b, para. 5(c), 7(f)).

By 2008, detention issues return. One issue is 'fundamental safeguards', where the Committee (2008a, para. 11) notes 'with appreciation' new legislation… on access to a lawyer and notification of custody; nonetheless, CAT is concerned about how fundamental safeguards are administered, and recommends 'effective measures' to ensure they are secured 'in practice'. There is also a concern regarding 'imposition of restrictions on remand prisoners' affecting 40 to 50 per cent of remand prisoners, while remand prisoners are unable 'to effectively challenge and appeal decisions.' The Committee (2008a, para. 16) 'also regrets the lack of official statistics on… such restrictions,' but positively notes proposed 'regulatory changes aimed at securing a uniform and legally secure use of restrictions.' All detention-related paragraphs are subject to one-year follow-up (Committee against Torture, 2008a, para. 30). Thus, like Denmark, CAT gives Sweden's detention issues, particularly isolation, considerable attention, with gradual reforms unable to allay concerns.

(iii) Norway

In Norway's 1993 report, CAT (1993b, para. 73) 'congratulates' the country regarding its 'rules and practices' for detention and treatment of prisoners. Solitary confinement is first raised in 1998, particularly its 'preventive' use during pre-trial detention, and includes a recommendation almost identical to the corresponding recommendation in Denmark's 1997 report (Committee against Torture, 1998, para. 154, 156).

In 2002, the Committee (2002c, para. 84–86) 'continues to be concerned' about pre-trial solitary confinement – the sole concern listed – recommending 'information on steps taken to respond to the Committee's ongoing concern… be included in the… next periodic report.' However, it notes developments 'with satisfaction' regarding 'proposals… for an amendment to the Criminal

Procedure Act to reduce… overall use of solitary confinement and to strengthen… judicial supervision,' and guidelines on family notification, lawyers and healthcare access.

In 2008, the Committee (2008b, para. 3(b)) notes with satisfaction that the amendment has been adopted, alongside 'abolition of solitary confinement as a sanction,' although this appears in a somewhat parenthetical 'as well as' clause. Worries persist about 'lack of adequate statistics validating the effectiveness of these measures.' The Committee (2008b, para. 8, 18) tells Norway to 'compile detailed statistics' on these measures, and 'application of recent amendments to the Immigration Act concerning… detention of foreign nationals,' with this requiring one-year follow-up.

This turn to immigration is reflected in the rest of the detention section, where CAT (2008b, para. 18, 9), 'while welcoming the recent… legislative act to regulate the rights of persons staying at the Trandum Alien Holding Centre, notes that the supervisory board… has yet to be established', with a corresponding recommendation (requiring one-year follow-up). Furthermore, the Committee (2008b, para. 10) 'remains concerned about reports on the use of unnecessary force… and… discriminatory treatment based on ethnicity', and requests the government 'ensure that all appropriate measures are taken', although this recommendation does not require one-year follow-up. Thus, when the CAT perceives that progress is made on solitary confinement and other detention-related issues, its focus turns to implementation and a disaggregated, discrimination-based approach.

Comparator States

(i) Belgium

How does the CAT's reporting of Scandinavian states compere with other European states? We first examine Belgium. In Belgium's first report in 2003, the Positive Aspects the Committee (2003, para. 4(e), 5(h–l), 6 (g–l)) mentions include the repeal of a law allowing minors to be placed in detention centres for up to 15 days and efforts to solve problems of overcrowding in juvenile detention, but the Committee raises concerns regarding lacking legislation on rights of persons under arrest, prison violence, inadequate information about access to medical care in prisons, and the possibility of isolation of juvenile delinquents over 12 years for up to 17 days, with detailed corresponding recommendations. The report concludes with a uniquely pointed

prioritization, requesting the next report 'contain detailed information on the practical implementation of the Convention and all of the points raised in the present conclusions.'

In 2009, the Committee (2009, para. 4(a), 5(a), 16, 17) notes steps forward 'on principles governing… prison establishments and the legal status of detainees' and 'minimum standards for places of detention.' However, there is a long list of detention-related concerns, dominating the latter COs. The Committee begins these with children. It is 'deeply concerned' that the requirements that legal counsel or trusted adults be present during interrogation of minors 'is rarely respected,' and 'remains concerned' under-18s can be tried as adults – a concern expressed with reference to CRC's 2002 COs.

Additionally, the Committee (Committee against Torture, 2009, para. 16–19) is concerned about prison overcrowding, conditions and violence. It recommends establishing a national organ for 'conducting regular visits' to detention facilities, and to consider alternatives to detention. The Committee also raises concerns about the 'special individual security regime.' Despite noting with satisfaction certain improvements, the Committee is concerned about the lack of a right to appeal, and 'allegations that the mandated procedure is not followed, that detainees are not able to challenge the appropriateness of such measures and that hearings are conducted without an interpreter or lawyer.' Yet further detention-related worries are expressed about the 'register of detainees;' again, the positives regarding legislative changes are tempered by CAT's focus on implementation.

Moreover, the Committee (Committee against Torture, 2009, para. 20–23, 31) 'regrets' lack of recognition of detainees' rights to legal assistance and that 'the draft Code of Criminal Procedure mandates access to legal assistance only eight hours after detention,' explicitly referring to 'previous recommendations.' The final concerns regard conditional release and committal of mentally ill offenders. Of these detention-related concerns, only two – on protection of minors and the detainee register – require one-year follow-up. However, the volume and variety of concerns, with the increasingly detailed and disaggregated focus that does not take legislation at face value, suggest CAT is significantly worried about Belgian detention.

(ii) Italy

In 1992, Italian representatives stressed isolation was allowed only 'for health reasons and normally involved exclusion from communal activities for… up to two weeks,' and that incommunicado detention was limited to 24 hours. Committee members expressed concern that Italy had no system for compensating victims of ill-treatment in detention, mentioning specific cases (Committee against Torture, 1992, para. 332, 337, 338).

By 1995, detention becomes the subject of two of the three concerns (Committee against Torture, 1995, para. 154–156, 157(c)). These detention-related concerns were 'serious acts of torture, and in some cases deaths' documented by NGOs, with penalties imposed on state officials 'not commensurate with the seriousness of these acts;' and a broader 'matter of some concern' regarding 'the number of unconvicted prisoners… overcrowding in prisons and the suspension, even temporary, of humanitarian rules' on prisoners' treatment. While recommendations do not reflect the same weighting towards custody-related issues, one recommendation 'suggests' Italy 'should… monitor effective compliance with safeguards during preliminary custody,' particularly legal and medical access.

The Committee (1999a, para. 165(b), 167) finds progress in its 1999 report, praising modification of 'precautionary measures to protect arrested persons and detainees from ill-treatment or torture,' including audio-visual documentation of questioning outside court. Nevertheless, one of just two concerns is prison overcrowding and 'facilities which [make] the overall conditions of detention not conducive to the efforts of preventing inhuman or degrading treatment or punishment,' with lingering 'cases of ill-treatment… many of them involv[ing] foreigners.'

Again, recommendations return to other issues, but both the 1995 and 1999 reports list, among 'Factors and difficulties impeding the application of the provisions of the Convention,' attitudes towards foreigners (Committee against Torture, 1995, para. 153). The relative dominance of detention-related issues continues in 2007, where, after the principal concern regarding domestic incorporation of a definition of torture, preventative detention and 'fundamental safeguards' take centre stage (Committee against Torture, 2007b, para. 6, 7). The Committee is also 'concerned at allegations that fundamental legal safeguards for persons detained by the police… are not being

observed in all situations,' and is further concerned over how 'an accused person may be held in detention for five days... before being allowed to contact an attorney'.

These concerns are subject to one-year follow-up. Later concerns also address detention of asylum seekers and non-citizens. One final concern, which is also subject to one-year follow-up, relates to 'continuing overcrowding and understaffing in prisons,' noting improved penitentiary health care, but expressing concern about reported ill-treatment, 'unsuitable infrastructures and unhygienic living conditions, in CPTAs and identification centres,' and the lack of an 'independent organization' to 'systematically monitor' these centres (Committee against Torture, 2007b, para. 29, 9, 16). CAT makes two recommendations regarding these issues. Detention-related issues in Italy are closely linked to broader concerns about non-citizens and immigrants, once more reflecting an increasingly disaggregated assessment.

(iii) Germany

Solitary confinement is not a major detention-related issue for Germany. The first mention comes in 1990, where the Committee (1990, para. 185, 193) requests specific information, eliciting a response that 'confinement was a disciplinary measure… could not exceed 21 days, before which a medical check was undertaken; if illness occurred during confinement it had to be discontinued; visits were not prohibited.'

Committee members (1990, para. 166, 183, 191, 193, 195) also ask about 'incommunicado detention', including seeking 'clarification on the concept of "remand custody"' and police use of force. The government representative emphasized 'that, although there was no incommunicado detention… detainees could be held in separate quarters for health or personal reasons or, in cases of violence or attempted escape, could be isolated for not more than 15 days, when an attorney had to be informed,' while stressing that 'treatment in such circumstances was the same as for other prisoners'. The Committee praised Germany for 'abolition of incommunicado detention.'

In 1993, Committee members (1993c, pp. 166, 189) ask again about incommunicado detention but the state representative does not respond. Related concerns are raised in 1998 regarding 'open-ended legal provisions permitting, under certain circumstances, the discretionary but

significant reduction of the legal guarantees of those detained,' although there are no related recommendations.

Preventative detention is raised in 2011. The Committee (2011, para. 5(b), 16, 17) praises Germany for limiting preventive detention, yet notes 'with regret… that more than 500 persons remain in preventive detention, some of them having been in preventive detention for more than twenty years.' Beyond this, the Committee's concerns regard specific ill-treatment, especially related to delayed investigation, raised in 2004 (Committee against Torture, 2004a, para. 4(a)), foreigners and use of physical restraints at state level. Thus, while there is less of a clear pattern to detention-related concerns for Germany, there is also a trend towards more disaggregated analysis.

(iv) United Kingdom

Detention-related concerns regarding the UK focus in earlier reports on Northern Ireland, with detailed questions and answers regarding terror detainees (Committee against Torture, 1992, para. 99, 111, 105, 119). In (somewhat unusually for early CAT reports) specific queries regarding other detention issues, Committee members wondered what standards were applied to detainees, whether the Government was concerned about the reported 100 per cent increase from 1980 to 1990 in detainee suicides, and whether using strip cells to house suicidal prisoners was appropriate. In response, state representatives informed the Committee that prison rules reflected the United Nations Standard Minimum Rules for the Treatment of Prisoners, where 'exceptions related to budgetary or technical problems.' The representative also 'gave statistics' and explained 'proposals to reform the prison system.'

The committee (1992, para. 125) concludes that 'except for the situation existing in Northern Ireland… the United Kingdom met in virtually every respect the obligations… in the Convention.' The committee (1996, p. 60(b–c, d, g, k)) continues this focus in 1996, where Positive Aspects include improved interrogation practices and improved conditions in Northern Irish detention centres. However, under Factors and Difficulties Impeding the Application of the Convention, CAT (1996, para. 61, 64(a, c), 65(a, e)) notes that 'maintenance of the emergency legislation and of separate detention or holding centres will inevitably continue to create conditions leading to breach of the Convention' in Northern Ireland, and that 'this is particularly so because… permitting legal counsel to consult with their clients at their interrogations is not

yet permitted.' This is further reflected in concerns about 'vigorous interrogation of detainees… which may sometimes breach the Convention,' with a recommendation regarding 'abolishing detention centres in Northern Ireland… repealing… emergency legislation,' taping interrogations and permitting access to lawyers. Again, the general concern relates to suicide and detention facilities.

In 1999, again, Northern Ireland is the only listed impediment to the Convention. However, many issues raised previously do not feature, with concerns related to 'deaths in police custody and the apparent failure… to provide an effective investigative mechanism;' and 'the retention of detention centres in Northern Ireland' (Committee against Torture, 1999b, para. 75, 76(a, c)) .

The 2004 report also provides little continuity between reports, with a long, new concern detailing 'reports of unsatisfactory conditions in… detention facilities,' including deaths in custody, violence overcrowding, 'slopping out' and 'unacceptable conditions for female detainees' in one prison. However, terrorism-related themes continue to dominate – both regarding Northern Ireland and new anti-terror legislation, including operations under the 'war of terror' (Committee against Torture, 2004b, para. 4(g, c)).

Summary

Does the above review of COs reveal penal exceptionalism? Partly yes, partly no. Table 2 summarises changes over time in the COs. Overall, the Committee finds *fewer issues* of concern in the Scandinavians than in some comparator states, particularly Belgium, Italy and the UK. However, Germany's COs suggest that there are no qualitatively substantive differences even if the topics are different.

Table 2: Detention conditions

State	Early COs	Late COs
Denmark	Solitary confinement – "institution"	Nods to progress but increasingly detailed
Sweden	Solitary confinement not major issue	Becomes central ("institution"), disappears, then returns
Norway	Similar to Denmark	Progress, attention turns to foreign nationals
Belgium	Uniquely long, detailed concerns, including isolation	Even more detailed, disaggregated concerns
Italy	Police discrimination and treatment in custody	Preventative detention and basic safeguards, focus on foreign nationals
Germany	Few concerns beyond exceptions to legal safeguards	Preventative detention, increasingly disaggregated focus
UK	Terrorism (Northern Ireland)	Terrorism (Northern Ireland, anti-terror legislation)

However, as well as experiencing a similar trend in the committee's more disaggregated, detailed analysis, Scandinavian reporting is, to varying degrees, somewhat dominated by *solitary confinement*. Nevertheless, solitary confinement is a difficult issue to weigh. It might be thought to be a singular issue particular to the long history of this practice in Scandinavian countries. Conversely, there is significant evidence that prolonged solitary confinement has deeply harmful psychological and physical effects (Smith, 2006). In our material, almost all Scandinavian states are persistently unresponsive to calls from the Committee to address the problem, even when one-year follow-up is established. At most, we can identify a certain positive exceptionalism (Scandinavians outperform most comparator states on detention conditions generally) and negative exceptionalism (regarding solitary confinement). However, the picture becomes slightly more complicated once we disaggregate and examine particular countries and practices.

In order to check the reliability of CAT reports we have compared their conclusions with those of the European CPT using Sweden and Germany as a small sample. First, we compared reports on Sweden and found that the emphasis at different points in time is not overly dissimilar. The

CPT (1992, para. 63–69) raises the issue of solitary confinement in the 1990s (although four years earlier) and becomes more critical over time. Interestingly, the COs from CAT (2008a) detail concern about a wide range of restrictions (including solitary confinement) on remand prisoners that largely resembles the later CPT (2009) report in both language and substance. Obviously, the voluminous CPT reports examine a wider range of issues.[3] Some issues are more serious than other. One notable omission from the CAT COs is police misconduct and the adequacy of follow-up investigation of individual police and systemic problems. The CPT (2009, para. 10–17) places particular emphasis on this issue, which is arguably relevant in all Nordic states (see e.g. Nasjonal institusjon for menneskerettigheter, 2015). However, this omission does little to weaken the reliability of the CAT's reports. Instead, it might strengthen skepticism over Scandinavian exceptionalism.

For comparison, we have chosen to look at Germany given that it was the most similar to the Nordic states in terms of the tenor of the CAT review. We hypothesized that CAT may have been too gentle with Germany and that the CPT might have displayed a more critical stance. Interestingly, this was not borne out by the CPT report and any differences between Sweden and Germany seem to narrow considerably when the two reports are placed side-by-side. Of particular interest, is that the 1993 CPT report strongly criticizes Germany for the extensive use of solitary confinement in:

> the situation of prisoners placed in solitary confinement or under a segregation regime in the establishments visited (in particular Straubing and Tegel Prisons) is of concern to the CPT. Its delegation found that the regime applied to prisoners undergoing prolonged periods of non-voluntary isolation did not provide the stimulation required to avert damaging changes in their social and mental faculties. In this respect, the CPT has recommended immediate changes to the solitary confinement arrangements in order to provide the prisoners concerned with purposeful activity and guarantee them appropriate human contact… (European Committee for the Prevention of Torture, 1993, para. 216)

[3] The CPT report in 1993 voiced concern over the following issues: Too small cubicles (Six cubicles measuring each 1.65 m x 0.88 m (1.45 square metres) found in the Central Police Station in Stockholm) (§18); Lack of arrangements for providing food to persons in custody (§19); Notification of custody (§22-24); Access to a lawyer (§25); Information as to rights: medical care; conduct of interrogation; custody records (§29-37); Cellular accommodation (§42-48); Food for inmates (§49); Outdoor exercise (§50-53); Regime activities (§54-62); Induction unit (§82-83); Reinforced security measures (§88); Watchdog procedures (§135-137); Closed psychiatric wards (§144-147); Closed unit, refugee centre (§148-150).

Yet, in its more recent reports, the CPT (2014) directs less criticism against Germany and it appears the state has taken steps to address solitary confinement. Instead, the most critical remarks concern the over-use of preventive detention and certain security measures.[4] It is thus notable that Germany seems more responsive to concerns on solitary confinement than Sweden, although read together the reports do not provide evidence for any assertion that detention practices are more humane in in Germany than Sweden. Rather, this comparison suggests that strong Scandinavian exceptionalism, as it pertains to humane treatment, is difficult to substantiate.

Conclusion: Strong state social welfarism as explanation?

This article has set out the view from elsewhere on Scandinavian penal exceptionalism. The comparative analysis of four European states with three Scandinavian states suggests that the general idea that Scandinavians are relatively strong positive performers on detention conditions finds some support. However, the analysis across all committees also reveals a negative exceptionalism on some issues (such as solitary confinement) but also that the degree of positive exceptionalism depends on the choice of comparator state (e.g. Germany vs Italy). Notably, a state like Germany seems more receptive to critique on the practice of solitary confinement when compared to Sweden.

To the extent that there is exceptionalism, how does strong state social welfarism feature in the material we have amassed? In a very preliminary fashion, we have sought to address the challenge, but the answers point in three different directions. First, we have reviewed the responses by Scandinavian states to criticisms from CAT and have found no use of an explicitly social welfare discourse. The responses are characterised by a strong orientation to factual descriptions and an acceptance of the discursive playing field created by the conventions. Thus, social welfarism is not so pervasive an ideology that Scandinavian states find it difficult to employ other forms of discourse. There seems to be at least a recognition that it is not a discourse that can be easily mobilized by these states to justify poor performance or negative exceptionalism.

[4] For example, (§40); use of broad metal handcuffs and legs being immobilized with leather belt (§43); "specially secured rooms" (§45) and; the use of surgical castration in the context of treatment of sexual offenders (§49).

Second, in order to corroborate these findings, the analytical framework we have developed in this chapter could usefully be applied to provide more detailed, qualitative analysis of other treaty bodies dealing with human rights in the penal area. Among these, the European Committee for the Prevention of Torture (CPT) would again be a natural candidate. An initial review of German and Swedish government responses to reports between 1993 and 2014 suggest some subtle differences even though the Swedish responses do not invoke social welfarism as a justification: First, in the German response there is a slightly more frequent and engaged invocation of *principles* (e.g. rule of law, human rights, proportionality) and the noting of more rights-inflected policies like *monitoring and accountability* (Government of Germany, 2012, 2014). In the Swedish responses, principles are sometimes mentioned but practices are more likely to be defended reports are more likely to defend its response by reference to its 'systems' for addressing certain problems (Government of Sweden, 2010, 2004). Second, Swedish responses are significantly more terse than their German counterparts and engage less with the Committee's concerns.

Can these differences be ascribed to a social welfarist ideology? Possibly. However, further research would obviously be necessary across a wider group of states to test whether these differences are constant and significant. Moreover, even if it was, it is not axiomatically clear whether this discursive variation reveals a social welfarist *ideology* or an exceptionalist *mythology*. Thus, the Swedish reports could be read as containing an attitude that the CPT has little right to criticize Sweden since it is exceptional and a world leader in detention conditions. In other words, it is not that the Swedish state is completely infused by social welfarist frame but rather the government is convinced of the fact that its social welfare state has been exceptionally successful and that foreign critics have little to contribute to its improvement. This may also explain why Sweden has been more resistant to criticism on solitary confinement but a state like Germany has been more reflexive.

Third, while there are many similarities between the Scandinavian states, they respond somewhat differently to the committees. We see this partly with the issue of detention conditions and even more so with other issues in CAT such as defining torture in domestic law (Fisher et al., 2015). Norway has exhibited more responsiveness than Sweden and Denmark. This suggests that domestic politics and configurations of actors and interests also need to be taken into

consideration. In order to test the social welfarist hypothesis properly, we need to analyze how and why the Scandinavian states differ from one another. It is likely that domestic configurations of actors and discourses and background structures and incentives are of particular importance in shaping the trajectories of the practice of detention in strong social welfare states.

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