

THE EUROPEAN ARREST ORDER AGAINST JULIAN ASSANGE

There are many peculiar elements involved in the Swedish authorities' dealing with the case of Julian Assange being suspected of rape. Undoubtedly feminist politics are involved, possibly foreign policy as well.

Background

On August 20th 2010, a Friday afternoon, Maria Häljebo Kjellstrand, at the time prosecutor on duty in Stockholm, decided to arrest Julian Assange in absentia on grounds of suspected rape. This decision was made upon a telephone report by a police officer. It was taken before the police interviews of the two women concerned were finished. Somebody leaked the decision to the Swedish tabloid Expressen, and it was made public all over the world. However, the decision was overruled within 24 hours by chief prosecutor Eva Finné. She stated that Assange was no longer suspected of rape.

Claes Borgström, a lawyer known for feminist activism, lodged an appeal on behalf of the two women. The appeal was examined by Marianne Ny, chief of a prosecution "development center" specialized in, among other things, sexual offences. She decided to overrule Finné's decision and reopen the case of suspected rape. Like Borgström Ny is a feminist. She is known to have said that when a woman alleges she has been a victim of assault by a man, it is a good idea to have the man detained, because it is not until he is arrested that the woman has time to think of her life in peace and realize how she has been treated. According to Ny the detention has a good effect as protection for the woman "even in cases where the perpetrator is prosecuted but not found guilty". However, during the weeks Assange was still in Sweden Ny did not arrest him, nor did she interview him about the allegations under investigation.

When Assange had left Sweden (his application for a residence permit was rejected) Ny decided to arrest him in absentia and applied to the Stockholm District Court to confirm her decision. The District Court granted her application and, after appeal, its decision was confirmed by the Svea Court of Appeal. However, even before the Court of Appeal had had time to examine the appeal, Ny issued a European Arrest Warrant against Assange. The Court of Appeal was chaired by its President, who was until recently National Prosecutor General.

It is not clear why Ny missed the opportunity to interview Assange whilst he was still in Sweden, nor why she did not accept Assange's proposal to be interrogated in England according to rules valid in both Sweden and Britain on Mutual Legal Assistance. There are different means available to that effect, mentioned in the Handbook on International Legal Assistance, published by the Swedish National Prosecutor General. Ny first said that it would not be compatible with Swedish law to interrogate Assange in England, which obviously is not true. In later interviews Ny answered that in the case of where it turned out after an interrogation of Assange that he should be immediately arrested, that

would not be possible unless he was in Sweden. Possibly we see here a reflection of her view that it is a good thing to have a "perpetrator" (!) locked up even in cases where he is subsequently acquitted in a court of law.

Assange's fear of being extradited from Sweden to US

Assange has opposed being surrendered to Sweden. He says he fears that Sweden would in its turn extradite him to US, where he would be likely to be put away in jail or even murdered as a result of the anger Wikileaks has caused in US. The question of Assange having by Wikileaks's activities violated US law on espionage is presently being investigated in US, and there are prominent persons who have expressed the view that he should be treated as a terrorist and sentenced to death.

It has been held against this argument that it would be legally easier for US to have him extradited from UK than from Sweden. However, this argument overlooks psychology. Assange has much more popular support in UK than in Sweden. It is therefore not unlikely that extraditing him from UK to US would seem politically impossible, whereas having him extradited from Sweden would probably not cause much protest amongst Swedes. All the mass media in Sweden have a rather biased view on the case to the detriment of Assange, and they express great confidence in Sweden's judiciary in the present case.

There are two facts that in my view justify Assange's fear of being extradited from Sweden to US. Firstly, there are extremely strong interests in US who want him delivered because of Wikileaks. Secondly, reports from the US embassy in Stockholm published by Wikileaks have revealed that the Swedish Government has gone out of its way to be helpful to US in various controversial matters. So why would the US not make use of its influence to put pressure on Sweden in order to have Assange extradited to the US?

Political considerations under Swedish law

Now, would it be illegal under Swedish law if political considerations have influenced the treatment of Assange by Swedish authorities as to the suspected sexual offences?

Maybe Marianne Ny should not be blamed for wanting to press the definition of rape in cases of consensual sex. After all, she is heading a "development center" specialized in sexual offences.

To be sure, there can be no doubt that she has acted contrary to European law as established by the Court of Justice of the European Union. The issuing of a European Arrest Warrant against Assange runs counter to the European principle of proportionality: in interfering with a person's freedom a State authority must limit itself to what is necessary in order to achieve its objective. In the present case Ny has clearly stated that her objective by issuing the European Arrest Warrant is to question Assange, because only after having heard his statements will she be able to decide whether or not to prosecute him. Obviously Ny could have had Assange interrogated in England.

However, the Swedish version of the principle of proportionality is more blurred than that developed by the Court of Justice of the European Union. Thus, the Swedish statutory instrument regulating the issuance of European Arrest Warrants provides (under the headline "Proportionalitet") that a warrant may be issued only in cases where, considering the harm inflicted upon the person concerned, the delay and the costs that may be expected, an Arrest Warrant should be justified with respect to the nature and gravity of the offence "and other circumstances". These last quoted words seem to put no limit to what considerations are legal under the Swedish principle of proportionality enshrined in the statutory instrument.

So would it be legal under Swedish law to let considerations of foreign relations policy influence a prosecutor's decision whether or not to issue a European Arrest Warrant? I think yes, perfectly legal. In point of fact the Swedish fundamental law, the Instrument of Government, provides that where an issue of importance for Sweden's relation to another State appears in a public authority, the authority has to inform the Minister of Foreign Affairs (Chapter 10 § 8). The official comment to this provision states that the Minister must have an opportunity to explain to the authority what aspects of foreign policy may be involved. As a corollary of this provision the Handbook on European Arrest Warrant published by the National Prosecutor General provides that in case of doubt the National Prosecutor General's office is to be consulted.

Under these provisions Ny must have consulted the National Prosecutor General before issuing the European Arrest Warrant against Assange, and the National Prosecutor General must have presented the matter before the Minister of Foreign Affairs. Therefore it seems odd that Anders Perklev, National Prosecutor General, in an interview in Expressen gives the impression that Marianne Ny has been acting totally independently in the Assange case: "Every prosecutor dealing with the case makes an independent evaluation. It is not the Prosecution Authority as such that makes a decision, it is the individual prosecutor who decides in his or her own name."

Another rather peculiar thing is a communication made by Ny when the Westminster City Magistrates' Court in London released Assange on condition of bail and rather severe restrictions. Sweden was given two hours' time to decide whether or not to appeal. When the two hours were almost gone it was reported on the radio that Sweden had not appealed. But then, in the very last moment, it was dramatically noted that Sweden had indeed decided to appeal. The following day Ny communicated on the Prosecutors' home page that it was "the British prosecutor" who had made the decision to appeal. Likewise, a representative of the National Prosecutor General, Nils Rekke, confirmed on TV that the appeal was a "purely internal British" decision. Later on, however, Ny stated that she was "content" with the decision – one may guess that the British Prosecutor had protested against being indirectly accused of high-handedness.

Why these halftruths allocating all responsibility to Ny for the procedure in Sweden and to the British for Sweden 's appeal in Britain? Well, I don't know the answer to that, but it does appear as if something is being hidden under the carpet.