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January 2012

# Overview of Swedish Criminal Procedure

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# Sweden

Christoffer Wong

## 1. General Aspects of the Procedure

### 1.1. Phases of the Criminal Procedure

The criminal process in Sweden is divided into two distinct phases: the investigative phase or preliminary investigation (*förundersökning*)<sup>1</sup> and the trial (*rättegång*), with the indictment (*åtals väckande*) serving as the dividing line between these two phases. In the literature, one also comes across the term ‘preliminary enquiry’ (*förutredning*),<sup>2</sup> which refers to the stage before the opening of a preliminary investigation. But the preliminary enquiry stage is not regulated by law and such intrusive measures as discussed in sections 2.4 and 2.52 below may, in principle, not be applied for the purpose of preliminary enquiry.

According to c 23 s 1 para 1 of the Code of Judicial Procedure (*rättegångsbalk*, RB),<sup>3</sup> a preliminary investigation shall be opened as soon as there is reason to believe that a crime susceptible to public prosecution<sup>4</sup> has been committed, either through a report or by other means. The legality principle is thus the main rule with regard to the opening of a preliminary investigation. However, the statute also provides that a preliminary investigation is not required if:

- it is evident that an investigation would be futile;
- the cost of an investigation would be disproportionate having regard to the significance of the case, and prosecution of the crime would in any case not lead to a more severe punishment than fines;
- it can be expected that the prosecution would not be brought as a result of a formal decision to drop charges (*åtalsunderlåtelse*)<sup>5</sup> or the application of rules on special leave to proceed with prosecution, provided that private or public interest is not being disregarded; or
- there is otherwise sufficient reason for prosecution of a crime that is not expected to lead to a more severe punishment than fines (or a crime committed before the court).<sup>6</sup>

<sup>1</sup> As there is no official English translation of the Swedish statutes and different authorities or commentators may use different translations, the original Swedish terms (within brackets and in italics) are given, when necessary, directly after the translated term. The translation and original term may not correspond exactly to each other in grammatical form.

<sup>2</sup> See T Bring and C Diesen, *Förundersökning*, 4th edn (Stockholm, Norstedts, 2009) 234; PO Ekelöf, H Edelstam, M Pauli, *Rättegång V*, 8th edn (Stockholm, Norstedts, 2011) 111.

<sup>3</sup> There is no separate code for criminal procedure as the Swedish Code of Judicial Procedure (*rättegångsbalk* 1942: 740) contains provisions for both civil and criminal proceedings. Reference to provisions in this Code are presented according to the format [chapter]:[section]<sup>[subsection]</sup>, eg 45:5<sup>III</sup> RB.

<sup>4</sup> This report deals only with public prosecution. Although an aggrieved party (*målsägande*) may also bring a private prosecution, the right thereto is in most cases subsidiary to the Public Prosecutor’s power to prosecute, and private prosecutions are extremely rare and normally restricted to crimes such as defamation. This report will also ignore the special cases in which prosecutions are brought by the Parliamentary Ombudsman (*justitieombudsmannen*, JO) or the Chancellor of Justice (*justitiekanslern*, JK).

<sup>5</sup> See section 3.2 below.

The preliminary investigation has two stated functions, according to 23:2 RB. In the first place, the investigation shall seek to establish the identity of the person who ‘reasonably can be suspected’ (*skäligen kan misstänkas*) of the crime and to determine whether there are sufficient reasons to prosecute that suspect. Thus, despite the fact that a preliminary investigation is opened as a result of a *crime* having been committed, the express purpose of the investigation, according to the Swedish statute, is more suspect-related than crime-related. Another stated function of the preliminary investigation is that the case shall be prepared in such a way that evidence can be presented in a concentrated manner at the main hearing. In the literature, it has been maintained that there is a third function of the preliminary investigation, not expressly stated in the statute. According to this view, the preliminary investigation provides an opportunity for the suspect to gain insight into the criminal proceeding against him/her and to ‘enrich’ the material to be considered in the investigation.<sup>7</sup> However, this should more appropriately be seen as a consequence of the structure of the preliminary investigation rather than a function.

A preliminary investigation can be terminated in a number of ways. If the investigation shows that there is sufficient evidence to prosecute, the Public Prosecutor may either go ahead with the prosecution, by issuing an indictment, or alternatively drop the charges. If, on the other hand, the evidence gathered is not sufficient for bringing a prosecution, the Public Prosecutor may either make a formal decision not to prosecute – a so-called ‘negative decision on prosecution’ (*negativt åtalsbeslut*),<sup>8</sup> or decide to ‘close the preliminary investigation’ (*att lägga ned förundersökningen*).<sup>9</sup> Neither a negative decision on prosecution nor a decision to close a preliminary investigation has the force of *res judicata*; a preliminary investigation that has once been closed can therefore be reopened, eg when new evidence emerges.<sup>10</sup>

According to 20:6 RB, the Public Prosecutor (*allmän åklagare*) shall bring prosecutions for crimes that are subject to public prosecution (cf the duty to open a preliminary investigation pursuant to 23:2 RB). It is always the Public Prosecutor – and not the police – who brings prosecutions. The legality principle is applicable, and one speaks of the Public Prosecutor’s ‘absolute duty to prosecute’ (*absolut åtalsplikt*). This means that when the conditions for prosecution are satisfied,<sup>11</sup> the prosecutor must prosecute; failure to prosecute in such cases may even amount to ‘dereliction of duties’ (*tjänstefel*), a criminal offence pursuant to c 20 s 1 CC.<sup>12</sup> However, RB also provides a number of ways in which prosecution can be avoided; these alternative ways of disposing a case are examined in section 3.2 below.

It is a feature of Swedish criminal procedure that a person is formally charged – through an indictment – at a relatively late stage of the process. As pointed out above, this takes place when the preliminary investigation is to terminate. This differs quite markedly from legal systems in which a person is charged on a lower degree of suspicion and is then detained or given bail

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<sup>6</sup> 23:1<sup>II</sup>, 23:4a and 23:22 RB. Whereas in the first three situations described above, there will be no prosecution; the last-mentioned situation refers to the case where the crime is being prosecuted directly without a preliminary investigation.

<sup>7</sup> Ekelöf, Edelstam, Pauli (n 2) 105.

<sup>8</sup> 23:20 RB.

<sup>9</sup> 23:4<sup>II</sup> RB.

<sup>10</sup> There is however no express statutory provision on the possibility of reopening of a preliminary investigation. See discussions in Bring, Diesen (n 2) 228-29.

<sup>11</sup> The statute does not indicate when the conditions for prosecutions are satisfied. In the literature, reference is usually made to the term ‘when the prosecutor on objective grounds can expect a conviction by the court’, when the question of the required strength of evidence for prosecution is discussed — see, eg Ekelöf, Edelstam, Pauli (n 2) para 37 and commentary to 45:1 RB in RB Comm.

<sup>12</sup> Penal Code (*brottsbalken*, 1962: 700), reference to provisions in this Code are presented according to the format [chapter]:[section]<sup>[subsection]</sup>, eg 9:1<sup>II</sup> CC. The canonical abbreviation for the Penal Code is ‘BrB’; the use of ‘CC’ in this report is imposed upon the author.

while the police or prosecution authorities continue with the investigation. It is therefore not at all unusual for the Swedish Public Prosecutor to issue an European arrest warrant or a request for extradition of a suspect, before making a decision to indict the person. This does not detract from the fact that the request nonetheless is made *for the purpose of prosecution*, albeit that there is no actual indictment. The distinction between the overall process of prosecution (*lagföring*) and the actual act of prosecuting a person through indictment may be a source of confusion for foreign lawyers who only have access to translated texts of the Swedish legislation.

The criminal proceeding enters the trial phase when the Public Prosecutor lodges a written indictment (*stämningsansökan*) with the court.<sup>13</sup> This act of the prosecutor is the formal act of prosecution in the narrow sense (*åtals väckande*). The court will then issue the indictment and serve it to the accused if the prosecutor's application is not dismissed.<sup>14</sup> In the majority of cases, the accused will be summoned to appear in person at a main hearing. It is at this stage of the proceeding that the accused – formerly a suspect – assumes the role of a party to the proceeding; the significance of this position will be developed in section 5 below.

To conclude this brief overview of the criminal proceeding, it may be said in summary that Sweden recognises the two distinct phases of *investigation* and *trial*. This differs from those legal systems – as is the case in a number of Member States in the EU – that adopt a tripartite distinction: investigation – prosecution – bringing to justice.<sup>15</sup> The Swedish preliminary investigation will thus cover what in such legal systems would constitute investigation and some elements of prosecution. The remaining elements of prosecution and bringing to judgment will then correspond to the Swedish trial phase of the proceeding, including the act of lodging the indictment at the court.

## 1.2. Bodies Carrying out Investigation and Prosecution, and the Status of the Suspect and the Accused

Both a police authority (*polismyndighet*) and a Public Prosecutor<sup>16</sup> have the competence to open a preliminary investigation.<sup>17</sup> However, a Public Prosecutor should take over a preliminary investigation initiated by a police authority when a person is identified who on reasonable ground<sup>18</sup>

<sup>13</sup> See 45:1<sup>1</sup> RB. In some specified cases the PP may issue the indictment directly to the accused, see 45:1<sup>11</sup> RB.

<sup>14</sup> 45:10 and 45:9 RB. The case is rarely dismissed already at this stage. However, procedural bars may become apparent after the indictment is served upon the accused, which may entail the dismissal of the case without a main hearing.

<sup>15</sup> cf the terminology in the French language (*rechercher — poursuivre — renvoyer en jugement*) and in the German language (*Untersuchung — Verfolgung — Anklageerhebung*), or under German law the *Vorverfahren* or *Ermittlungsverfahren* under the leadership of the PP, the *Zwischenverfahren* (§§ 199–211 CCP) and the *Hauptverfahren* (§§ 213–75 CCP).

<sup>16</sup> Formally it is thus the police authority as such, as opposed to a police officer, who makes the decision to open a preliminary investigation, although this function can be delegated within the authority. In the case of the prosecutor, it is the individual prosecutor who makes the decision.

<sup>17</sup> The person in charge of the preliminary investigation, whether an officer belonging to a police authority or a PP, is designated as the 'chief investigator' (*undersökningsledaren*).

<sup>18</sup> The expression 'on reasonable ground' (*skäligen misstänkt*) expresses an intermediate degree of suspicion. This can be compared with the much lower degree of 'reason to believe' [that a crime has been committed] (*anledning att anta*), which is sufficient for the opening of a preliminary investigation, see 23:1 RB. This corresponds, when the object is a person rather than a crime, to the expression [a person who] 'can be suspected' [of having committed a crime] (*den som kan misstänkas för brott*). A degree of suspicion higher than that of 'on reasonable ground' is that of 'on probable cause' (*på sannolika skäl*). This degree of suspicion is required for some intrusive measures, (eg 'remand in custody' (*häktning*) according to 24:1 RB). The expression 'sufficient reasons' (*tillräckliga skäl*) for prosecution is also used in the sense already discussed in n 11 above. Finally, 'beyond reasonable doubt' (*utom rimligt tvivel*) is the standard required for a conviction in criminal proceedings. The expressions used to indicate different degrees of

can be suspected of having committed the crime being investigated. Even in other cases the Public Prosecutor may take over a preliminary investigation if this is motivated by special reasons.<sup>19</sup> When a preliminary investigation is led by a Public Prosecutor, he or she will have at his/her disposal the resources of the police authority.<sup>20</sup> It is for the chief investigator to decide which measures to take during the investigation and when and how to conclude the investigation; the actual investigative measures such as surveillance and questioning of suspects and witnesses are normally conducted by the police. The use of some forms of investigative measures is, however, subject to the approval of the court, as will be discussed in section 2 below. Thus, the chief investigator in Sweden – who is, as mentioned above, a police officer or a Public Prosecutor – has some of the power and functions of the ‘investigating judge’<sup>21</sup> that exists in some other legal systems, albeit that the Swedish chief investigator’s power to use intrusive measures is, comparatively speaking, rather circumscribed.

The preliminary investigation follows the general features of an inquisitorial model, in that the suspect is *not* considered to be a party to the investigation.<sup>22</sup> The inquisitorial model is expressed through – inter alia – the requirement of objectivity on the part of the investigator. It is explicitly stated in the statute that the investigation should take into account not only circumstances that are disadvantageous for the suspect, but also those circumstances that speak in his/her favour.<sup>23</sup> In this sense, the suspect can be seen as an object of investigation in a process that aims at the establishment of truth. However, the suspect may also be seen as a participant in the process – without being a full ‘party’, in the adversarial sense – in that the suspect may contribute material to the preliminary investigation and he/she may also request the chief investigator to undertake certain investigative measures or to comment in general on what measures are necessary for the investigation.<sup>24</sup> The rights and privileges of the suspect are discussed in more details in section 5 below.

The prosecutor’s decision to prosecute will lead to a judicial process. The accused, quite plainly, cannot attack the prosecutor’s decision as such; once an indictment has been lodged, it is for the court to decide on all matters related to the prosecution. If, on the other hand, the prosecutor decides *not* to proceed with prosecution (either by a negative decision on prosecution, or a decision to close the preliminary investigation),<sup>25</sup> the aggrieved party may request that a superior prosecutor should review the case. This request for review is constructed as an administrative – ie not judicial – remedy, and is based on the principle that an administrative body may re-examine its own decision and a superior administrative body may review the decisions of an inferior body within the same hierarchical structure.<sup>26</sup> As Public Prosecutors are

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suspicion can thus be ranked according to the following: reason to believe reasonable ground can be suspected, probable cause, sufficient reason beyond reasonable doubt.

<sup>19</sup> 23:3<sup>I</sup> RB.

<sup>20</sup> 23:3<sup>II</sup> RB.

<sup>21</sup> The figure of the ‘investigating judge’ has not been well-received in Sweden. Even during most of the nineteenth century when the criminal process was inquisitorial, it was the judge in *the main proceeding* who was in charge of the case and who could order the prosecutor to supplement the investigation. When reform leading to the present Code of Judicial Procedure was discussed in the 1920s, the idea of introducing the investigative judge in Sweden was firmly rejected. See *Rättegång V*, p. 107 with further references given in n 2, loc cit.

<sup>22</sup> For the use of certain investigative measures for which the court’s approval is required, the suspect is, however, regarded as the counter-part of the prosecutor in the proceeding concerning the particular investigative measure.

<sup>23</sup> 23:4<sup>I</sup> RB.

<sup>24</sup> 23:18<sup>I</sup> RB.

<sup>25</sup> See section 3.2 above.

<sup>26</sup> For discussion of the review procedure, see the Prosecution Authority’s internal report, *Åklagarmyndighetens rättsliga tillsyn* (Stockholm, 1 October 2010). For a brief explanation in English of the review procedure see

independent judicial officers, a superior prosecutor will not be able to instruct the inferior prosecutor to change his/her decision. Thus, in those cases where the superior prosecutor disagrees with the decision not to prosecute, he or she will take over the case and make his/her own decision to prosecute with his/her own indictment. In this connection, it may also be noted that the prosecutor's decision not to prosecute will trigger the aggrieved party's subsidiary right to prosecute.<sup>27</sup>

Once an indictment is lodged at the court, the chief investigator is no longer the 'master' of the case. The process enters into the trial phase and the Public Prosecutor and the accused<sup>28</sup> (formerly, the suspect) are now equal parties<sup>29</sup> to the proceeding before an independent and impartial court. This marks the transition to the accusatory or adversarial model. The case will then be disposed of through a judgment or other final decisions of the court after both sides have been heard.<sup>30</sup> To characterise the change in status from suspect to accused, one may say that while the suspect enjoys all the rights, freedoms and privileges connected with anyone who is suspected of having committed a criminal offence, the accused enjoys, additionally, the fair-trial rights etc of anyone who is a party to a judicial proceeding.

In connection with the description of preliminary investigation, the principle of objectivity arises. The requirement of objectivity is perhaps natural, given the inquisitorial nature of the preliminary investigation. Questions have been raised, however, on whether the Public Prosecutor is required to remain objective even when the criminal proceeding has entered its adversarial phase. On this question it can be said that there is no explicit statutory provision for the trial phase that corresponds to 23:4 RB with respect to preliminary investigations. However, the general consensus in the literature is that the Public Prosecutor, as a public servant, is under a general obligation to be objective in the exercise of his/her functions, and this means that the Public Prosecutor shall remain objective even during the trial phase of the proceeding when he/she assumes the role of a party,<sup>31</sup> albeit that it is somewhat 'watered down' as it has also been argued.<sup>32</sup>

### 1.3. Financial Criminal Investigations

The same system of rules applies to all criminal investigations in Sweden regardless of the nature of the offence concerned. A special body, however, has been established in Sweden to coordinate the work of different authorities under a common leadership. The Swedish Economic Crime Authority (*Ekobrottsmyndigheten*)<sup>33</sup> was established to coordinate measures against economic crimes such as those committed in connection with bankruptcies, tax frauds, insider

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information at the website of the Prosecution Authority, at [www.aklagare.se/In-English/The-role-of-the-prosecutor/Decision-to-prosecute/Retrial/](http://www.aklagare.se/In-English/The-role-of-the-prosecutor/Decision-to-prosecute/Retrial/).

<sup>27</sup> 20:8<sup>1</sup> RB.

<sup>28</sup> The 'accused' (*den tilltalade*) is sometimes also called the 'defendant' (no direct Swedish equivalent, as the literal translation '*svaranden*' is used only in civil cases). These terms are used interchangeably in this report. Sometimes the term 'the defence' (*försvaret*) is used to denote the accused's side comprising the accused and his/her defence counsel.

<sup>29</sup> The aggrieved party may 'join' (*biträda*) the prosecution in the criminal proceeding (20:8<sup>1</sup> RB). Moreover, the aggrieved party's *civil claims* may be heard and decided together with the criminal proceeding (c 22 RB). These scenarios will not be discussed further.

<sup>30</sup> There exists, however, a possibility for the prosecutor to decide to drop the charges even after the indictment, but before the court gives its verdict on the case (20:7a RB).

<sup>31</sup> See Pauli (n 2) 199; Bring, Diesen (n 2) 74ff.

<sup>32</sup> L Heuman, 'Domarens och åklagarens skyldighet att vara objektiv' [2004–05] *Juridisk Tidskrift* 42–60.

<sup>33</sup> See the Government's ordinance with instructions to the Economic Crime Authority (*Förordning med instruktion för Ekobrottsmyndigheten*, 2007:972) with subsequent amendments up to ordinance 2011:661.

trading and crimes against the financial interests of the EU. This Authority has its own budget and its own Director-General; the Authority is staffed by Public Prosecutors, police officers, accountants and experts on financial matters who can contribute their knowledge in the investigation of economic crimes. The Economic Crime Authority is the Swedish contact point for OLAF (the European Anti-Fraud Office of the EU Commission). When carrying out criminal investigations, the staff members of the Economic Crime Authority exercise their power and functions as Public Prosecutors and police officers.

There are a number of other public (administrative) authorities that may initiate their own investigations into certain conduct that later becomes the subject of a criminal investigation, eg the Financial Supervisory Authority (*Finansinspektionen*), the Social Insurance Office (*Försäkringskassan*) and the Tax Authority (*Skatteverket*).<sup>34</sup> These authorities may pass on information obtained from their investigations to the Economic Crime Authority, the Police or the Prosecution Authority, but these other authorities are not part of the preliminary criminal investigation. Obviously, private entities – eg banks, currency exchange offices and insurance companies – may also report irregularities and transmit material to the police and/or prosecution authorities that may be used as evidence in a criminal investigation.

For financial crimes involving corruption, there is a National Unit against Corruption (*Riksenheten mot korruption*) within the Prosecution Authority. The Customs Office (*Tullverket*) and the Coast Guards (*Kustbevakningen*), obviously, will also assume some investigative functions as part of their normal activities.

## 1.4. Sources of Criminal Procedural Law

According to the Swedish Constitution,

Provisions concerning...relations between individuals and the public institutions which relate to the obligations of individuals, or which otherwise encroach on their personal or economic circumstances

shall be adopted by means of an act of law, ie by Parliament (8:2 RF).<sup>35</sup> In other cases, the Government may adopt provisions in the form of, for instance, an ordinance. The extent to which provisions of procedural law need to be given as an act of law depends, therefore, on whether the provisions ‘encroach on [the individual’s] personal or economic circumstances’ and not simply by virtue of their being a part of the criminal procedural law. Moreover, in accordance with 11:2 RF,

Rules concerning the judicial tasks of the courts, the main features of their organisation and legal proceedings ...are laid down in law.

This means that the procedure during the trial phase of the criminal proceeding requires a statutory base in the form of law. The main legislation in this area is RB, to which reference has already been made. As for the investigative phase, it follows from the constitutional principles that intrusive investigative measures must have a statutory base in law, while other measures may be regulated in other manners. Thus, the use of all intrusive investigative measures

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<sup>34</sup> For tax offences, there is a special law on investigation measures undertaken by the Tax Authority: Act on the assistance of the Tax Authority in criminal investigations (*lag om skatteverkets medverkan i brottsutredning* 1997:1024).

<sup>35</sup> There are actually four ‘basic laws’ (*grundlagar*) with equal constitutional rank, but for most purposes the only basic law that is relevant is the Instrument of Government (*Regeringsform* 1974: 151, RF). Reference to provisions in this Instrument of Government are according to the format [chapter]:[section]<sup>[subsection]</sup>, eg 8:2<sup>1</sup> RF. When the term ‘Constitution’ is used without qualification, it refers to the Instrument of Government. An English translation of the Constitution is available at the website of the Swedish Parliament: [www.riksdagen.se/templates/R\\_Page\\_6307.aspx](http://www.riksdagen.se/templates/R_Page_6307.aspx).

(*straffprocessuella tvångsmedel*) must be regulated by law; the main provisions concerning these measures are found in cc 24–28 RB. Furthermore, as is already apparent from the above, the main principles concerning the preliminary investigation are also given in the form of law, in this case under c 23 RB. The provisions in c 23 RB are supplemented by the ordinance on preliminary crime investigation (*förundersökningskungörelse* 1947: 948, FUK). Furthermore, the Prosecution Authority issues regulations (*föreskrifter*), advice (*allmänna råd*), guidelines (*riktlinjer*) and handbooks (*handböcker*) that normally are followed by the PPs although they do not have the force of law. These instruments deal with a wide range of subjects ranging from administrative matters, guidelines for fines to interpretation of the law.

There is only one Code of Judicial Procedure, covering both civil and criminal proceedings. Care must be taken when consulting extracts of the Code, especially in translated versions,<sup>36</sup> as some of the provisions apply to both civil and criminal proceedings while others are applicable only in one of these types of proceedings. Some provisions are also specific to the various stages of the trial (ie at the District Court, Court of Appeals or the Supreme Court).

Although amendments are regularly made to the Code of Judicial Procedure, the Code has retained its basic structure from 1942. In fact quite a few of the provisions have remained unaltered since the enactment of the code. Many of the provisions in RB only lay down general principles and their wordings are usually general enough to cover most cases, so that new situations can be dealt with through interpretation of the law. Thus one of the features of Swedish procedural law is that it often lacks precise provisions in particular areas. The *travaux préparatoires* to RB and subsequent amendments,<sup>37</sup> case law<sup>38</sup> and judicial literature<sup>39</sup> are accepted as supplementary sources of law. However, given the ‘antiquity’ of the original *travaux préparatoires* to RB, they are usually unhelpful for finding solutions to modern problems. However, statements made in connection with later amendments to RB can be used to illuminate the legislative intention, especially when the express purpose of new legislation is to depart from the fundamental principles of procedural law.<sup>40</sup>

Since 1995, the ECHR has been a part of Swedish law and is directly applicable as such.<sup>41</sup> The case law of the ECtHR is regularly referred to in Swedish judgments;

<sup>36</sup> In 1998 the Ministry of Justice published an English translation of the Code of Judicial Procedure in the publication Ds 1998:65 *The Swedish Code of Judicial Procedure*. Ds 1998:65 is available at [www.sweden.gov.se/sb/d/3926/a/27778](http://www.sweden.gov.se/sb/d/3926/a/27778). This translation has not been updated.

<sup>37</sup> The main source in the *travaux préparatoires* is the government bill put before the Parliament. However, all other publicly available statements made during the entire legislative process are also considered part of the *travaux préparatoires*.

<sup>38</sup> There is no official doctrine of precedents in Swedish law, but the judgments of the Supreme Court are in practice followed. See, however, the discussion below on ECHR. Note, for the purpose of the field being studied, there is little case law since many of the decisions made during the investigative stage are made by the chief investigator and are not appealable to the courts, eg whether someone ‘may be suspected’ of having committed a crime.

<sup>39</sup> For questions of criminal procedure, the law on the extent to which an indictment may be amended or the boundary of *res judicata*, for instance, has been very influenced by academic writings. The series of books under the title *Rättegång*, originally written by Per Olof Ekelöf, is an authoritative textbook used in the universities and referred to by the courts. P Fitger, *Rättegångsbalken* (Commentary on the Code of Judicial Procedure, online version available at the paid database <http://zeteo.nj.se>, latest update per 1 February 2011) is a much-used reference work used by practitioners. Also widely used are, on the preliminary investigation, T Bring and C Diesen, *Förundersökning*, 4<sup>th</sup> edn (Stockholm, Norstedts, 2009); and on intrusive investigative measures, P Lindberg, *Straffprocessuella tvångsmedel – när och hur får de användas?*, 2<sup>nd</sup> edn (Stockholm, Thomson Reuters, 2009).

<sup>40</sup> See, for instance, the changes made through the parliamentary bills proposition 2004/05:131 *En modernare rättegång reformering av processen i allmän domstol* and proposition 2007/08:139 *En modernare rättegång några ytterligare frågor*, both on a major reform of the system of courts of general jurisdiction.

<sup>41</sup> Sweden adheres to the so-called dualistic model of international law, which means that the courts in Sweden cannot directly apply international conventions as such. However, the Parliament has passed a special Act on the



understandably, this is the case more for the Supreme Court than for courts at lower levels. ECtHR case law provides the courts in Sweden with a rich source for their interpretation of Swedish statutes, when they are general in character and it is uncertain whether a certain rule is applicable in a certain situation. Furthermore, although the ECHR is directly applicable only as law, ie not as a constitutional law, the Convention is considered in practice to have a higher rank than ordinary law, so that other laws should be interpreted in conformity with the ECHR, and where there is a direct conflict between a Swedish provision and the ECHR, the ECHR prevails. Thus, the Supreme Court will go against its own previous decisions or decide a case *contra legem* if Swedish law is found to be in breach of ECHR. In a case that has attracted much debate<sup>42</sup> the Supreme Court deferred to the ECHR to such an extent that the Supreme Court's judgment was based on its speculation as to how the ECtHR *might* decide a similar case in the future, ie not based on existing ECtHR case law. However, in a later case,<sup>43</sup> the Supreme Court has been more restrictive and maintained that it could only disapply a Swedish law if it is clear that the Swedish law breaches the ECHR.

Another source of law is the law of the EU, including the case law of the ECJ. In this respect, the Swedish position does not differ from that of any other Member States in that all courts must give effect to EU law through various means, including the use of EU law-conforming interpretation and the setting aside of domestic legislation. Swedish courts have been reluctant to request preliminary rulings from the ECJ when a question of EU arises, but such requests are now being made more frequently.<sup>44</sup>

## 2. Investigation Measures

### 2.1. First Measures in a Preliminary Investigation

As mentioned in section 1 above, a preliminary investigation shall be opened as soon as there is reason to believe that a crime has been committed. The opening of the preliminary investigation is made by a formal decision of the chief investigator. It is considered that – for reasons of legal certainty – the authorities must avoid any doubt as to whether an investigation has commenced as many provisions of RB are applicable only when there is an ongoing preliminary investigation.<sup>45</sup> During the preliminary investigation, any person may be questioned, if it is

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European Convention (*lag om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna*, 1994:1219), which states, simply, that the ECHR has the force of law in Sweden. This means that the whole of the ECHR and its protocols can be applied as a direct source of law by the courts and other public authorities.

<sup>42</sup> See the judgment of the Supreme Court in NJA 2005, s 805. NJA: *Nytt Juridiskt Arkiv*, this is the annual law report of cases from the Supreme Court of Sweden. Cases are identified by the year and the first page of the case in the annual report.

<sup>43</sup> NJA 2010, s 168. A number of cases from the district courts and court of appeal have refused to follow the precedent of the Supreme Court in NJA 2010 s 168 and disappplied the Swedish law that these courts considered to be in breach of the ECHR. In Sweden, the lower courts are in theory not bound by the decisions of the higher courts but in practice the decisions of the Supreme Court are almost always followed.

<sup>44</sup> See the chapter on courts of general jurisdiction in X Groussot, C Wong, A Inghammar, A Bruzelius, 'Empowering national courts of general jurisdictions', *Empowering National Courts in EU Law* (Stockholm, SIEPS, 2009:3).

<sup>45</sup> See FUK §1a ; Bring, Diesen (n 2) 220.

considered that he or she may provide relevant any information that is relevant to the investigation.<sup>46</sup>

According to 23:8<sup>I</sup> RB, a police officer may require that a person present at the crime scene<sup>47</sup> should attend a questioning session, to be held immediately at the police station (*medföljande till förhör*). This is applicable to any person and is based on the principle that each and every one has a duty to assist in the investigation of crimes; at this stage it is not necessary to classify a person either as a suspect, a witness or any other person who may provide information concerning the crime scene. That person may be escorted to the police station if he or she refuses voluntarily to follow the police officer and does not give a reason for refusal. Due to the special importance and the urgent need of hearing persons with a particularly close contact to the crime scene as soon as possible, the police officer is given the power (23:8<sup>III</sup> RB) to conduct questioning pursuant to this provision even before a formal decision is made to open a preliminary investigation. In normal cases, the person questioned is under no obligation to remain for questioning for more than six hours – this is the rule for questioning in general and will be discussed further under section 2.2 below.

## 2.2. 2. Questioning of Persons in General

In cases other than those dealt with under section 2.1 above, a person may be summoned for questioning. The questioning normally takes place at the police station but may also be conducted by other means, eg via telephone. A summons to questioning may be combined with the stipulation that an administrative fine (*vite*) be imposed if the summoned person fails to appear.<sup>48</sup>

A person summoned for question who fails to appear at the hearing may be picked up by the police and escorted to the hearing, if the questioning is to take place within 100 km of that person's residence or the place where he/she received the summons. If the crime being investigated is punishable by a prison sentence *and* there is a well-grounded risk that the person would not heed the summons or that he or she would frustrate the investigation (by destroying evidence or otherwise), that person may be escorted to the hearing even without previously having been summoned for questioning. Furthermore, the restriction of 100 km will not apply if it is of 'manifest importance' (*synnerlig vikt*) to the investigation that the questioning should take place. Although the above is applicable to any person being questioned in the course of a preliminary investigation, the statute requires that a witness or other persons questioned without being a suspect should be escorted by the police for question only if this is of 'particular importance' (*särskild vikt*).<sup>49</sup>

A person summoned for questioning is under no obligation to remain at the police station for more than six hours. He or she may leave the police station immediately and may not be summoned again for questioning before 12 hours have expired, unless there are 'manifest reasons' (*synnerliga skäl*) for doing so. If the person being questioned is under 15 years of age, he or she is under no obligation to remain for more than three hours; however, if it is of 'special

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<sup>46</sup> 23:6 RB.

<sup>47</sup> This provision is applicable to the 'immediate' crime scene regardless of the type of offence being investigated. Its application is extended through 23:8<sup>II</sup> RB to 'an area connected to a place where a crime has recently been committed', or an attempt, provided that the crime is punishable by a minimum sentence of four years' imprisonment.

<sup>48</sup> See 23:6a RB. Further provisions on the actual imposition of the administrative and appeals against this are found in 23:6a and 23:6b RB.

<sup>49</sup> The legal base of the scheme procedure described here is found in 23:7 RB. For clarification, it may be added that the Swedish expression *synnerlig vikt* means a greater importance than *särskild vikt*. However, in the present context the difference between 'manifest importance' and 'particular importance' is not great.

importance' for the investigation, he or she may be required to remain, additionally, for three hours.<sup>50</sup> The statute provides that when the person being questioned is below 15 years of age, his or her custodian should be present unless this would jeopardise the investigation.<sup>51</sup> In other cases, it is for the chief investigator to decide who may be present during the questioning, having regard to the purposes of the investigation. The statute requires that, as far as possible, a reliable witness should be present during the questioning.<sup>52</sup> According to FUK § 7, this person should, in the first place, be a 'citizen witness' (*medborgarvittne*);<sup>53</sup> however, in practice a citizen witness is often not available. A qualified legal counsel for the person questioned has the right to be present during the questioning if this does not jeopardize the investigation.<sup>54</sup> The chief investigator may decide that the content of the questioning may not be divulged by the person heard or others present at the hearing.<sup>55</sup> The conditions described here are applicable to all persons being questioned,<sup>56</sup> but there are exceptions to these general rules when the person being questioned is someone who can be suspected of having committed a crime.

For persons who 'can be suspected' of having committed a crime,<sup>57</sup> there is a far-reaching duty to remain for questioning. In this context, the degree of suspicion does not need to be so high that the person be designated as a suspect.<sup>58</sup> A person who can be suspected of having committed a crime is under an obligation to remain available for questioning for a further six-hour period, after the initial six-hour period has expired, provided that this is of manifest importance for the investigation.<sup>59</sup> Thus, after a maximum of 12 hours, a person suspected at this level is free to leave the police station, and may not be required to be present for questioning again until a 12-hour period has expired. If the chief investigator wishes to hold the person after this period of time, he or she must use some of the intrusive investigative measures to be discussed below, for which a higher degree of suspicion is required.

### 2.3. Formal Designation as a Suspect

Given the central importance of the status of a person being charged with a criminal offence against the background of Article 6(3) ECHR, the Swedish statutory provision concerning the designation of a person as a suspect is, to say the least, cursory, and it may be questioned whether the Swedish law satisfies the requirement of the ECHR, in particular Article 6(3)(a) on the right to be informed, promptly and in detail, of the nature and cause of the accusation against him. According to 23:18<sup>I</sup> RB, the suspect shall, when he or she is questioned, be notified of the suspicion against him or her when the preliminary investigation has proceeded so far that the

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<sup>50</sup> 23:9<sup>II</sup> RB.

<sup>51</sup> 23:10<sup>VI</sup> RB. Note also that special provisions in a separate statute, the Young Offences Act (*lag med särskilda bestämmelser om unga lagöverträdare*, 1964: 167), are often applicable to persons under 15, 18 and 21 years of age. Special treatments of these young offenders are not discussed in the present report.

<sup>52</sup> 23:10<sup>II</sup> RB.

<sup>53</sup> 'Citizens witnesses' are citizens nominated by the municipalities to follow the work of the police in the police district in accordance with the Act on citizen witnesses (*lag om medborgarvittnen* 1981: 324). There are other provisions in FUK § 7 not detailed here, eg the preference for a female witness when a woman is being questioned.

<sup>54</sup> 23:10<sup>III</sup> RB.

<sup>55</sup> 23:10<sup>VII</sup> RB.

<sup>56</sup> See generally 23:9-10 RB.

<sup>57</sup> On the degree of suspicion see n 18 above.

<sup>58</sup> Formal designation as a suspect will be discussed in section 2.3 below.

<sup>59</sup> 23:9<sup>I</sup> RB.

suspect has been identified as a person who on reasonable ground<sup>60</sup> is suspected of having committed an offence. On a literal application of the statute, the requirement to notify the suspicion is applicable whenever, but also only, when the suspect is being questioned. Thus, if in the course of questioning someone previously not suspected of a crime, the investigator arrives at the conclusion that the person being interviewed can on reasonable ground be suspected of the crime being investigated, notice of suspicion must be given. Usually this means that the questioning must stop if the suspect has the right to a defence counsel and a counsel is not present.<sup>61</sup> On the other hand, the limitation of the notification requirement to situations when the suspect is being questioned means that the prosecutor may, theoretically, avoid notifying a person of suspicion against him/her on reasonable ground by not questioning that person, and it has been known that a chief investigator would delay the notification until the preliminary investigation is near its completion. This *modus operandi* has been criticised as being inappropriate and in breach of Article 6(3)(a) ECHR as the suspect would – in such cases – not be informed, promptly, of the charges against him/her.<sup>62</sup>

As mentioned above, the obligation to give notice arises when the degree of suspicion reaches the level of ‘on reasonable ground’. It has been discussed whether ECHR requires that the notification be given at an earlier stage than provided for in Swedish law. This question hinges on the interpretation of what constitutes being ‘charged with a criminal offence’ according to Article 6(3) ECHR. Clearly, being ‘charged with a criminal offence’ cannot mean the act of prosecution according to Swedish domestic law. The concept has an autonomous meaning, and the Swedish Supreme Court has had an opportunity to examine at which stage of the criminal proceeding in Sweden, a person would be considered as being ‘charged’ according to the autonomous meaning of the ECHR. There is no doubt that – at the latest – a person will be considered ‘charged’ when he or she is suspected of crime on reasonable grounds. The question is whether a person may be considered as being ‘charged’ at an earlier stage. In a case concerning the appointment of a public defence counsel, the Supreme Court stated in general that a person should be treated as ‘charged with a criminal offence’ when ‘the authorities have taken some measure with the consequence that a person’s situation is substantially affected by the fact that there is a criminal suspicion against him’.<sup>63</sup> In this particular case, the fact that a person X has been summoned to the police station for questioning as a result of a complaint that X has committed the crime of assault is not considered to be sufficient to qualify the summons to question to be treated as a criminal ‘charge’. In this case, the allegation is clear – viz assault. But the complaint alone does not give reasonable ground that person X has committed the crime, nor

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<sup>60</sup> See n 18 on the different degrees of suspicion. Note in particular that suspicion ‘on reasonable ground’ is a higher degree of suspicion than ‘can be suspected’ of having committed a crime, the latter of which would be sufficient for questioning the person for an additional six hours, after an initial period of six hours.

<sup>61</sup> 21:3, 21:3a and 23:10<sup>IV</sup> RB.

<sup>62</sup> See Ekelöf, Edelstam, Pauli (n 2) 134-35. Against this criticism, it can be argued that the general purpose of Art 6 ECHR is to ensure a fair trial and the promptness requirement will be satisfied so long as the notification is given so that the accused, if it turns out that he or she ultimately be prosecuted, has sufficient time to prepare for his/her defence. However, the practice of not immediately giving notification of suspicion may still be criticised for breach of the freedom from self-incrimination often associated with the rights under Art 6(1) ECHR. As a person is not aware of the fact that he or she is being considered or treated as a suspect, he or she may ‘voluntarily’ come forth with evidence which would be improper for the prosecution to demand. Viewed in this perspective, there may be some justification, after all, for 23:18<sup>I</sup> RB as the risk of self-incrimination is most acute in situations where a suspect is being questioned, and 23:18<sup>I</sup> RB requires that the person, when questioned, must be put on alert that he or she is under suspicion. In this way, 23:18<sup>I</sup> RB can be understood as a safeguard against the problem of self-incrimination rather than being an expression of the right to information on the criminal charge.

<sup>63</sup> NJA 2001, s 344. The wording of the Supreme Court’s statement is very close to that of similar statements of the ECtHR, cf for instance ‘measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect’, *Corigliano v Italy* App no 8304/78 (ECtHR, 10 December 1982) para 34.

is the measure of summoning a person for questioning a measure that could substantially affect a person's position. This precedent establishes that a person is not treated as a suspect – which is to say, being 'charged with a criminal offence' in the context of ECHR – merely because he or she can be suspected of a crime; the crucial point lies instead at the level of suspicion 'on reasonable ground'.<sup>64</sup>

In this context it should also be mentioned that there is a criminal suspect register (*misstankeregister*) kept by the National Police Board (*Rikspolisstyrelsen*). This register contains records of, inter alia, persons over 15 years of age who on reasonable ground are suspected of having committed a crime falling under the Penal Code or a crime under other statutes provided that crime is punishable by a more severe sanction than fines.<sup>65</sup>

## 2.4. General Comments on Intrusive Investigative Measures

As explained in section 1.4 above, the use of all intrusive measures must be regulated in law, more precisely by Act of Parliament. The intrusion must be justified by a legitimate purpose in a democratic society – the investigation of crimes is undoubtedly such a legitimate purpose. The most important forms of 'intrusive investigative measures' (*straffprocessuellt tvångsmedel*) are regulated within the Code of Procedure RB, while some special forms of intrusive measures are regulated in separate statutes.<sup>66</sup> It is important to point out that such measures are investigative measures, in that they are applied for the purpose of conducting a criminal investigation – which by definition is an investigation of a crime already committed. Thus, another statutory base is needed for intrusive measures justified on other grounds, including the prevention of crime, even though there is no or little difference in the actual effect experienced by the individual concerned (eg deprivation of liberty). A prerequisite for the application of an intrusive investigative measure is that a 'preliminary criminal investigation' (*förundersökning*) has been opened (see section 1.4 above).<sup>67</sup> Some of these measures will remain applicable also during the trial and even after the trial pending judgment, or after a conviction pending enforcement of the sentence.

Within RB, the detailed rules on the different types of intrusive investigative measures are found in cc 24–28. These provisions will be described briefly below together with the provisions in some special statutes. As it is impossible, given the space limitation, to go through the details concerning each measure, some general principles governing the use of intrusive investigative measures are presented. They are such principles that would apply to all measures, unless there are specific rules providing otherwise; for instance, it is obvious that the principle of notification cannot apply to clandestine measures. A group of intrusive investigative measures which are specifically directed against personal liberty (*personella tvångsmedel*) such as detention and remand in custody and another group of measures directly against 'real' objects (*reella tvångsmedel*) such as house search and seizure, but some measures can concern both categories, eg body

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<sup>64</sup> On this point, the authors of *Rättegång V* are in agreement; see Ekelöf, Edelstam, Pauli (n 2) 136.

<sup>65</sup> See Criminal Suspects (Register) Act (*lag om misstankeregister*, 1998: 621).

<sup>66</sup> Some examples of statutes besides RB with special provisions on intrusive investigative measures are: Act on clandestine audio-monitoring in a closed space (*lag om hemlig rumsavlyssning*, 2007: 978), Act on measures to prevent particularly serious crimes (*lag om åtgärder för att förhindra vissa särskilt allvarliga brott*, 2007: 979), Act on measures in investigations concerning certain crimes endangering society (*lag om åtgärder för att utreda vissa samhällsfarliga brott*, 2008: 854) and special criminal statutes such as the Smuggling Act (*smugglinglagen*, 2000: 1225).

<sup>67</sup> A decision to apply an intrusive investigative measure can be made simultaneously with the opening of a preliminary investigation. See Lindberg (n 39) 6–11 on the requirement of preliminary investigation and some exceptions to this requirement. As mentioned in section 2.1 above, a person may be required to attend a questioning session at the police station even before the opening of a preliminary investigation. This is possible only if there is an express statutory basis; and this basis is found in 23:8<sup>III</sup> RB.

search (which both intrudes into a person's physical integrity and treats the human body as an object of examination). In Swedish law, there are no general rules on how the authority may obtain and use information in a criminal investigation;<sup>68</sup> so, it will be difficult to answer questions on specific measures of investigative methods such as data-mining, on-line search and use of experts etc. Many investigative measures that may be regulated specifically in other legal systems may exist also in the Swedish system, but not as a separate form of investigative measure but rather a permitted way of executing those intrusive investigative measures already found in Swedish statutes.

The constitutional norm requiring that provisions on the use of intrusive investigative measures must have a statutory basis in the form of law is a manifestation of the principle of legality. Moreover, the fact that it is a public authority which carries out the investigation entails that the appropriate standard for exercise of public power must be followed. This means, *inter alia*, that the question of competence must be addressed, which in some cases may mean, paradoxically, that a public official will lack competence to do something that a member of the general public will be free to do.

Two other – overlapping – fundamental principles govern the use of intrusive investigative measures, viz the principle of necessity (*behovsprincipen*) and the principle of proportionality (*proportionalitetsprincipen*). As recapitulated by Lindberg, according to the 'principle of necessity', intrusive measures should only be used if there is an evident need to apply that measure and the purpose of the measure cannot be fulfilled by any less intrusive means. This entails that a particular intrusive measure must cease to apply as soon as the purpose for employing that measure is achieved, or when the measure is no longer necessary for other reasons. The authority should consider whether a less intrusive measure can be used as well as the option of not using any intrusive measure at all. The use of measures, which exclusively or mainly are undertaken simply to lessen the authority's obligation to perform its duties, is considered thus to be a breach of the principle of necessity.<sup>69</sup> Much of the idea of proportionality is already contained in the necessity consideration as it is hardly likely that a measure would be proportional if it is not necessary in the sense described above. The abstract balancing of interests is in the most part already given through the conditions stipulated in law for the different types of intrusive measures. Using Lindberg's characterisation, again, the 'principle of proportionality' means that the official who decides to apply a certain intrusive measure must determine in each individual case whether the nature and duration of the measure stands in reasonable proportion to the desired result. In determining what is proportional, account must be taken, *inter alia*, of the seriousness of the crime, the degree of suspicion against the suspect, the intrusion that the measure entails (especially on persons other than the suspect) and the duration of the measure. The intrusive measure can only be employed if the reasons for using that particular measure outweigh the intrusion and/or harm that the measure entails.<sup>70</sup> Moreover, as the use of intrusive measures is an exercise of public power, the general principle of objectivity in public function must be observed; the principle of consideration is applicable in the sense that no one should unnecessarily be exposed to suspicion of crime or should suffer any undue inconvenience.<sup>71</sup>

Some confusion has arisen – especially when terminologies are translated from Swedish into another language – due to a failure to observe the distinction between a decision to apply an intrusive measure and the enforcement of that decision. For instance, while it is the court which makes the decision to remand someone in custody, it is a police officer who will execute that decision, eg by arresting the person remanded in custody *in absentia*. In this example, the

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<sup>68</sup> See, eg, Lindberg (n 39) 427.

<sup>69</sup> See *ibid* 24 with further references to the *travaux préparatoires* and pronouncement of the Parliamentary Ombudsman (JO).

<sup>70</sup> Lindberg (n 39) 26.

<sup>71</sup> *ibid* 31-32.

enforcement of a decision on one intrusive measure (here ‘remand in custody’) would necessitate the use of another intrusive measure (here ‘arrest’). In some cases, the decision and the execution of that decision is constituted by one and the same act, eg arresting someone. It should also be noted that while a decision may be quashed or appealed against, the enforcement of a decision is often a ‘real act’ that cannot be undone. There are also measures that have such a short duration that it is not meaningful to make appeal against such measures possible. Appeal against decisions on intrusive investigative measures in RB is permitted only when there is express provision thereon.<sup>72</sup>

In section 2.3 above, it was mentioned that the chief investigator may, pursuant to 23:18<sup>1</sup> RB, theoretically – and sometimes also in practice – delay notifying a person of suspicion against him/her, simply by not questioning that person. However, as the use of intrusive investigative measures would require a certain degree of suspicion, the suspect would be alerted of the suspicion against him/her, indirectly, through the application of an intrusive investigative measure. The right to be informed of the ground for the intrusive measure is related to the right to liberty and security guaranteed under Article 5 ECHR, in particular, Article 5(2) concerning the right to information. Thus, in a large number of cases – albeit not all cases – a failure to give notice of suspicion on reasonable ground is compensated by the requirement to give notice when an intrusive measure is applied. To summarise, the right to information as a consequence of a restriction to the right to liberty and security interacts with the fair-trial right (in the present author’s view, especially the freedom from self-incrimination), so that the individual’s overall integrity is maintained.<sup>73</sup>

## 2.5. *Investigative Measures Involving Restriction on the Liberty of the Suspect*

### 2.5.1. Remand in Custody (*Häktning*)

The Swedish provisions on the conditions for deprivation of liberty of a person have a rather peculiar construction in that the prerequisites for the different measures are not defined individually for each measure. Instead, the conditions for the most intrusive measure – ‘remand in custody’ – are used as the paradigm case in a cascade system, ie the conditions for applying the other measures are defined by reference to ‘remand in custody’. The next most intrusive measure – ‘detention’ – is then seen as a provisional measure for ‘remand in custody’, ie a person may be detained with a view to his/her being remanded in custody. Then there are provisional measures for ‘detention’, and so on. This cascade system also functions as a scale for the consideration of necessity and proportionality in the sense that one shall examine whether a less intrusive measure within this system is more appropriate.

There are four types of situation, each having a specific set of conditions leading to remand in custody: (i) standard offences, (ii) serious offences, (iii) unknown identity and non-residents, and (iv) manifest reasons.

#### (i) Standard Offences (24:1<sup>1</sup> RB)

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<sup>72</sup> *ibid* 102.

<sup>73</sup> Another dimension of the distinction between ‘Art 5-type rights’ and ‘Art 6-type rights’ is that the latter type of rights pertain to the person who is him or herself under criminal investigation; whereas in case of intrusive measures, also third parties may suffer harm or inconvenience as a result of someone else’s (suspected) crime. This mean, *inter alia*, that there are often express provisions concerning notification when the intrusive measure in question concerns also a third party. For measures that directly affect the suspect only, express provisions on notification are often absent as they are unnecessary in virtue of the measures being immediately experienced by the suspect.

Three parameters determine the conditions for the application of remand in custody for standard offences, viz the nature of the crime, the degree of suspicion and the risk that custody addresses. The alleged offence must be one that is punishable by imprisonment for one year or more, the degree of suspicion must have reached the level of ‘on probable cause’ (*på sannolika skäl*)<sup>74</sup> and, taking all circumstances into consideration, any of the following risks exists: that the suspect may flee from justice, that the suspect may tamper with evidence or otherwise frustrate the criminal investigation and that the suspect may relapse into criminal activities. It is the court<sup>75</sup> which, upon application by the chief investigator (prosecutor), decides whether the person should be remanded in custody after weighing all the factors for and against this measure. The person may not be remanded in custody if the expected sanction is likely to be limited to fines.<sup>76</sup> There are statutory provisions that stipulate that remand in custody in certain cases can only be ordered if it is obvious that satisfactory supervision of the suspect cannot be arranged in another way.<sup>77</sup> The court must – according to the statute – specify the crime of which the person is suspected and state the reasons for remanding the suspect in custody; however, in routine cases the reason given is restricted to the specification of on which risk it is that the decision is based.

#### (ii) Serious Offences (24:1<sup>II</sup> RB)

The same conditions as for (i) must be satisfied. However, if the offence is punishable by not less than two years’ imprisonment, then there is a presumption for remand in custody. Such a suspect shall then be remanded in custody unless it is obvious that there is no reason for doing so – typically, this will be a consequence of none of the risks being likely to realise.

#### (iii) Unknown Identity and Non-residents (24:2 RB)

A person who on probable cause is suspected of having committed a crime may be remanded in custody if he or she refuses to provide his/her name and address or if the details provided are likely to be false. This means that the requirement of an offence punishable by imprisonment for one year or more is dropped; but there must still be a risk, which in this situation, would be the risk of fleeing from justice. The court must, as in (i) above, perform a necessity and proportionality analysis. The same applies to a person not domiciled in Sweden and there is a risk that he or she may flee from justice.

#### (iv) Manifest Reasons (24:3 RB)

The main rule in this case is that if it is possible to remand a person in custody in accordance with (i) or (iii) above but for the fact that the degree of suspect does not reach that of ‘on probable cause’, then it is under 24:3 still possible to remand the suspect in custody if he or she is suspected of the crime ‘on reasonable ground’ and there are manifest reasons for detaining the person in custody for the purpose of the criminal investigation. This measure is known as ‘remand in custody for investigation’ (*utredningshäktning*).

When the court decides that a person shall be remanded in custody, it shall also set out a date by which an indictment must be lodged. This time limit may be extended. If the suspect is not indicted within two weeks, the court shall conduct a hearing on the question of custody at least every two weeks, at which it shall see to it that the investigation is being carried out

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<sup>74</sup> See n 18 on the different degrees of suspicion.

<sup>75</sup> 24:5 RB. This can be seen as an expression of the principle of proportionality: for such an intrusive measure it is for the court and not the prosecutor to decide on the measure.

<sup>76</sup> 24:1<sup>IV</sup> RB. Note that it is the actual expected sanction in the particular case that is in question, not the general range of applicable sanction for the offence.

<sup>77</sup> 23:4 RB concerning, inter alia, persons of old age, suffering from illness and women who have recently given birth.



expeditiously. A new hearing may be held between longer intervals if it is obvious that a hearing will be meaningless under the circumstances.<sup>78</sup> The conditions at a remand centre are regulated by a special statute.<sup>79</sup> The court may also, upon application by the Public Prosecutor, order special restrictions while the suspect is remanded in custody.<sup>80</sup> It can be seen as an expression of the principle of necessity that a decision to remand someone in custody must be rescinded by the court as soon as the reasons for custody are no longer present; if this occurs before the suspect is indicted, the prosecutor may also make such a decision to rescind the custody order.<sup>81</sup> A decision of the district court to remand someone in custody can be appealed to the court of appeal, and the latter court's decision appealed to the Supreme Court.<sup>82</sup> However, as the district court must as the main rule review the decision on remand in custody at least every two weeks, appeals to the superior courts are of interest only in cases where the suspect has been remanded in custody for some time.

### 2.5.2. Detention (*Anhållande*)

Detention is the next step down from remand in custody on the cascade of intrusive investigative measures. Pursuant to 24:6 RB, a person may be 'detained' (*anhållen*) pending the court's examination of the question of remand in custody, if there are reasons to apply this latter measure. It is a Public Prosecutor who has the competence to make such a decision.<sup>83</sup> This is the function of detention as a provisional measure. Detention is transitory in nature, as there is a strict time limit for lodging an application for remand in custody. This application must be made without delay and at the latest at 12 noon of the third day after the decision to detain the person; if the detention order was issued against a suspect at large, the period for lodging an application for remand in custody runs – instead – from the day when the order is executed (ie when the suspect is arrested).<sup>84</sup> The court must without delay hold a hearing on the question of remand in custody and at the latest no more than four days after the suspect is arrested or the detention order executed.<sup>85</sup>

Besides being a provisional measure pending remand in custody, detention may also be used as an independent investigative measure. When suspicion has not reached the level of 'on probable cause', detention cannot be used as a provisional measure for remand in custody, as there will not be reason to remand the person in custody for lack of sufficient strength of suspicion. 24:6<sup>II</sup> RB provides, therefore, the possibility to detain someone 'on reasonable ground', if there are manifest reasons for detaining that person for the purpose of the criminal investigation. Even in this case, the time limit for lodging an application for remand in custody must be observed.

### 2.5.3. Arrest (*Gripande*)

There are three forms of arrest. 23:7 RB describes the form which is a provisional measure pending a decision to detain someone. The statute provides thus, that a police officer may in urgent cases – even without a detention order – arrest a person, provided that there are reasons

<sup>78</sup> For details and some special cases, see 24:18 and 24:19 RB.

<sup>79</sup> Remand Centre Act (*håketeslag*, 2010:611).

<sup>80</sup> 24:5a RB. Such restrictions pertain mostly to communication with the outside world.

<sup>81</sup> 24:20 RB.

<sup>82</sup> 49:5<sup>I</sup> point 6 RB and 54:4 RB.

<sup>83</sup> 24:6<sup>III</sup> RB.

<sup>84</sup> 24:11–12 RB. The detained person is free to go if an application for remand in custody is not made then.

<sup>85</sup> 24:13 RB.

for detaining that person. Arrest can also be an enforcement measure for a detention order or order for remand in custody that has been issued against someone at large.

The third form of arrest is that of the ‘citizen’s arrest’ (*envarsgrípande*). According to 24:7<sup>II</sup> RB, not only officials, but anyone at all, may arrest a person caught *in flagrante* for a crime punishable by imprisonment, or a criminal suspect wanted by the police.

The Public Prosecutor shall be informed after the arrest and decide whether the arrested person shall be detained.

#### 2.5.4. Travel Restriction (*Reseförbud*) and Reporting Order (*Anmälningsskyldighet*)

‘Travel restriction’ and ‘reporting order’ can be used either as an independent intrusive investigative measure, or as a substitute in lieu of a more intrusive measure. According to 25:1 RB, if is ‘on reasonable ground’ a person suspected of a crime punishable by imprisonment, and – having regard to the nature of the crime, circumstances related to the suspect or other circumstances – there is a risk that the suspect may flee from justice, but there is otherwise no sufficient reason to detain that suspect or to remand him or her in custody, then he or she may be subjected to travel restriction or a reporting order, if this is sufficient against the risk of absconding. ‘Travel restriction’ is a prohibition against leaving a certain area without permission; and a ‘reporting order’ is an order to report to a specified police authority at specified times. The requirement that the crime is punishable by imprisonment is lifted if there is a risk that the suspect may flee from justice by leaving the country. If there are per se reasons for detention or remand in custody of a suspect, but travel restriction or reporting order will constitute adequate safeguard, such measure may be taken. Decisions on travel restriction and reporting order can be made both by a Public Prosecutor and by the court.

### 2.6. Other Intrusive Investigative Measures

#### 2.6.1. Sequestration of Assets

According to 26:1 RB the court may order the sequestration (*kvarstad*) of so much of a suspect’s assets as would cover his or her liability to pay to the appropriate recipient/beneficiary fines, the value of confiscated property, corporate fines, damages in tort and other compensations etc as a result of a criminal conviction. This measure is applicable with respect to a person who on reasonable ground is suspected of having committed a crime, provided that it is reasonable to assume that there is a risk of the suspect seeking – through concealment of his or her assets or otherwise – to avoid fulfilment of his or her liability.

This measure is quite different from the other intrusive investigative measures, in that its purpose is purely pecuniary in character. It is a security measure that seeks to ensure that the suspect is upon conviction able to meet his or her debt to the state or individuals entitled to compensation; it does not affect specific items of property. This measure cannot be used to obtain evidence.

#### 2.6.2. Seizure of Objects

One of the most frequently used intrusive investigative measures is the seizure of objects (*beslag*). As outlined in 27:1 RB, there are four situations in which seizure can be used as an intrusive measure, of which only one has an explicitly investigative purpose. These situation are (i) when the seized object is of value to the criminal investigation, especially when it is likely that the object will be used as evidence at trial, (ii) when it is a matter of restitution of the property to its rightful owner, (iii) for the purpose of securing a physical object that can be confiscated upon

conviction, and (iv) to secure objects that may be of use in an investigation into the confiscation of proceedings of crimes.

The subject of a seizure order is a 'physical item' or 'object' (*föremål*), which will be the term used here. Thus it is not possible to seize a debt, a balance in a bank account or immaterial property in general. Pursuant to 27:1<sup>11</sup> RB, however, written documents in their physical form are included under the concept of 'object'; the information per se contained in the documents, on the other hand, cannot be the subject of seizure. (More will be said below on the treatment of written documents.) Obviously, there cannot be any requirement that the seized object should belong to, or be in the possession of, the suspect, as stolen goods constitute a large part of all objects being seized. In general, seizure can be executed in relation to anyone in possession of the item, which means that this measure may often affect 'third parties' (in the present context meaning persons other than the suspect and the aggrieved person). There is, however, a requirement that the object be accessible.<sup>86</sup> This means that a seizure order would not automatically also give the right to carry out searches in order to obtain the object; for this, other forms of intrusive measures are needed, eg a search warrant. Seizure is, however, also possible with regard to an object found in the course of executing another intrusive measure.<sup>87</sup>

A prerequisite for a seizure order is that there is reasonable ground to believe<sup>88</sup> that the seized object can be linked to one of the four situations justifying seizure as described above. Unlike the case with many other intrusive measures that require an underlying offence of a certain severity (eg one that is punishable by imprisonment), there is, for seizure, no such general requirement.

A seizure order is issued by the court upon application of the chief investigator or prosecutor. After the prosecutor has lodged an indictment, the aggrieved party may also apply for a seizure order and the court may also take up the matter *proprio motu*.<sup>89</sup> It is not necessary here to discuss the details concerning hearings concerning seizure orders; it suffices to note that the court is obliged continuously to review its decision on seizure and to quash the order and to return the seized items as soon as the seizure is no longer motivated.

As mentioned above, written documents can be the subject of a seizure order. The term 'written document', however, covers a larger area than is suggested by its literal meaning. 'Written documents' include, in this context, also media such as CD or DVD discs, and many other forms of computer accessories – a mobile telephone which contains SMS messages within it<sup>90</sup> may therefore be seized, and the rules on written documents will then apply with respect to the SMS messages. In general, digital material is treated as written document if it can be rendered into a readable form.<sup>91</sup>

However, the above rules on seizure of written documents are subject to the express exception that documents may not be seized if there is reason to believe that they could contain privileged information such as confidential communications between a defence counsel and his or her client. The same applies with regard to communication between a suspect and his relatives or other closely related persons, unless the criminal investigation concerns an offence punishable

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<sup>86</sup> 27:5<sup>1</sup> RB, which is applicable also in relation to a prosecutor and police officer. 'Accessible' may be compared to the requirement of being 'in plain sight' in some legal systems.

<sup>87</sup> cf 27:4 RB.

<sup>88</sup> For seizure, then, the prerequisite is not related to the degree of suspicion with respect to a suspect. The requirement is, rather, that there should be a link between the seized object and the goal of the seizure.

<sup>89</sup> 23:5 RB.

<sup>90</sup> From a proportionality point of view, it can be discussed whether the whole telephone can be seized or just the SIM-card or the memory card, if the messages are stored in the cards.

<sup>91</sup> See NJA 1998, s 829; Lindberg (n 39) 390-91.

by a minimum of two years' imprisonment.<sup>92</sup> Furthermore, there are restrictions as to who is authorised to examine the content of written documents that can be seized. For instance, postal and telegraphic communications, business accounts, other private documents that have been seized may only be examined by the chief investigator or prosecutor; and letters and other sealed documents can only be opened by the chief investigator, a prosecutor or the court.<sup>93</sup>

In other cases, the authorities may to a fairly large extent make use of all content that is 'accessible' from the seized objects even though, as mentioned above, information per se cannot be the subject of a seizure order.<sup>94</sup> There are no general rules governing how information is obtained and used during a criminal investigation, nor are there general rules that give guidance on whether the authority may photograph, copy or employ other technical means in order to get at or retain the information found in a seized object.<sup>95</sup> It is a common practice that documents are photocopied, information from digital media is copied or stored and an exact mirror of a computer's hard-disc may also be made if needed. One odd consequence of this is that while the original object seized must be returned if the seizure order is quashed, the copies etc do not constitute seized property, and the authorities are not obliged to return or destroy them. There is no clear rule on the treatment of copies of seized objects; although several proposals have been made, these have not led to legislation.<sup>96</sup>

### 2.6.3. Interception of Objects (Including Letters)

Upon application by the chief investigator or prosecutor, the court may issue an order that a letter, parcel or consignment that arrives at a delivery service (eg the post office or private expeditors) shall be intercepted and held there, pending a decision on the seizure of that item. A prerequisite for the interception order is that the item to be intercepted must be capable of being subject to a seizure order.<sup>97</sup> Thus the provision on interception can only be applied to 'objects' in the sense applicable for seizures. The interception order is issued for a specified period and is valid for a maximum of one month from the day that the order is served upon the delivery service. The order shall contain the instruction that the delivery service must not inform the sender, recipient or any other person of the interception order without the permission of the chief investigator or a prosecutor.<sup>98</sup> When the item has arrived and is held at the delivery service, the service must immediately notify the person who requested the order, who must then make a decision on seizure without delay.<sup>99</sup>

### 2.6.4. Access to Relevant Premises ('Crime Scene')

Pursuant to 27:15 RB, a room or a building may be closed, and access to a certain area may be prohibited in order to facilitate the investigation of crime. There is no requirement that the crime under investigation has a certain degree of severity. The restriction may cover premises other than the 'crime scene', so long as the measure facilitates the investigation. Orders may also be made pursuant to this provision to forbid the removal or transfer of physical objects and similar

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<sup>92</sup> See 27:2 RB for more on the categories of persons affected and further conditions on the applicability of the exception.

<sup>93</sup> 27:12 RB.

<sup>94</sup> See NJA 1998, s 829 (cited in n 91 above) concerning data stored in a computer which are not sorted and not readily accessible in a readable form.

<sup>95</sup> See Lindberg (n 39) 427.

<sup>96</sup> *ibid* 432.

<sup>97</sup> 27:9<sup>I</sup> RB.

<sup>98</sup> 27:9<sup>II</sup> RB.

<sup>99</sup> 27:9<sup>III</sup> RB.

acts. Any person who is competent to issue or execute a seizure order (see section 2.6.2 above) is also competent to issue or execute an order to restrict access. The usual principles of necessity and proportionality apply when deciding whether to issue a restriction at all and the extent and duration of the restriction.

#### 2.6.5. Searches

Searches can be divided into three different categories: ‘house search’ (*husrannsakan*), ‘frisk search’ (*kroppsvisitation*) and ‘body search’ (*kroppsbesiktning*).

The rules governing house searches are rather complicated as they differ according to where the search is to take place, for what reasons the search will be undertaken, and whether it is a person or an object that is the subject of the search. It should also be noted that a house search has the function of merely finding a person or an object, so there is often a need to combine a house search with further measures such as seizure, if the authority intends to take into custody or otherwise process the result of the search.

In general, a search of a house belonging to a suspect can be ordered if there is reason to believe that a crime has been committed that is punishable by imprisonment. The search is to take place in the suspect’s house, rooms or closed storage spaces and must pertain to one of the following purposes: (i) to search for objects that can be subject to seizure, or (ii) to ascertain circumstances that may have a significance for the criminal investigation or an investigation on the confiscation of proceeds of crime.<sup>100</sup> If the search is to take place at locations belonging to someone other than the suspect, one of the following additional conditions must be satisfied: (iii) the crime was committed at that location, (iv) the suspect was apprehended there, or (v) there is otherwise particularly strong reasons to believe that the search will lead to objects that can be subject to seizure or be of use for the purposes described in (ii) above.<sup>101</sup>

If the purpose of the search is to find a person who shall be arrested, detained, remanded in custody, escorted to questioning or appearance at a court, or to be taken to a undergo a body search or body cavity search, then a house search can be executed at that person’s home, or, at someone else’s home if there is particularly strong reason to believe that he or she can be found there.<sup>102</sup> In order to find a suspect who shall be arrested, detained or remanded in custody for a crime – or attempt thereto – punishable by at least four years of imprisonment, searches may also be carried out in means of transportation in a certain place, if there are special reasons to believe the person will pass through that place.<sup>103</sup> There are also some provisions that need not be described here permitting house searches in public places and at locations used by criminal groups and on searches for the purpose of serving certain legal documents.<sup>104</sup>

Decisions on house searches are made by the chief investigator, a prosecutor or the court.<sup>105</sup> In case of urgency, a police officer may also carry a house search without prior instruction from the chief investigator, a prosecutor or the court.<sup>106</sup>

In Swedish law, a ‘frisk search’ is defined as an examination of the clothes and other items that a person is wearing, as well as bags, packages and other objects that the person is

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<sup>100</sup> 28:1<sup>I</sup> RB.

<sup>101</sup> 28:1<sup>II</sup> RB.

<sup>102</sup> 28:2 RB.

<sup>103</sup> 28:2a RB. (This provision was added after the murder of former prime minister Olof Palme.) The expression ‘means of transportation in a certain place’ is capable of being interpreted extensively, eg road blocks on motorways, sealing off large part of the underground system or airport, and control of luggage space of passing motor vehicles. See Lindberg (n 39) 596-97.

<sup>104</sup> 28:3 and 23:4 RB.

<sup>105</sup> 28:4 RB.

<sup>106</sup> 28:5 RB.

carrying. A basic prerequisite for this measure is a reasonable belief that a crime punishable by imprisonment has been committed.<sup>107</sup> Moreover, if the search is performed on someone who on reasonable ground is suspected of the crime, the purpose of the search must be to find an object that can be seized, or to ascertain other circumstances that can be of value for the criminal investigation or an investigation on confiscation of proceeds of crime.<sup>108</sup> Searches can also be performed on someone who is not suspected on reasonable ground of committing the crime, but in that case, there must exist a particularly strong reason to assume that the search would reveal items that can be seized or otherwise is valuable for the purpose of ascertaining other circumstances that can be of significance to the criminal investigation or an investigation with a view to confiscation of proceeds of crime.<sup>109</sup>

A 'body search' is much more intrusive than a frisk search and is defined as an examination of a human body's surface and cavities as well as the taking of samples from the body and examination of such samples.<sup>110</sup> This measure can only be undertaken on a person, who on reasonable ground is suspected of a crime punishable by imprisonment.<sup>111</sup>

## 2.6.6. Freezing

Sweden has implemented Council framework decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence through the Act on recognition and enforcement of freezing orders within the EU (*lag om erkännande och verkställighet inom Europeiska unionen av frysningsbeslut*, 2005: 500) and an accompanying government ordinance (2005: 501). However, this Act only lays down additional rules on sequestration and seizure orders with respect to other Member States of the EU; the domestic provisions on sequestration (section 2.6.1 above) and seizure (section 2.6.2 above) are still valid with regard to the actual application of these measures.

## 2.6.7. Production Orders

The obligation to exhibit/disclose documents (*editionsplikt*) in a legal proceeding is regulated in C 38 RB, and the provisions there are formally applicable in both civil and criminal proceedings. However, in criminal proceedings, the right not to be subject to self-incrimination means that a suspect or an accused may never be obliged to produce any documents at all. It is theoretically possible to order a third party to disclose documents pertaining to the criminal investigation. However, as search and seizure are two much more powerful measures available in the course of a preliminary criminal investigation, production orders are not very practical in criminal proceedings.<sup>112</sup>

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<sup>107</sup> It may seem, at first sight, that this rather common measure should require a crime punishable by imprisonment. However, it may be noted that many minor offences can lead, *in abstracto*, to imprisonment, so that frisk searches are possible for such offences, eg searches for stolen items in 'petty theft' (*snatteri*, 8:2 CC) even if the value of the goods is less than 1000 SEK (ca 110 EUR), or searches for spray cans for 'criminal damage' (*skadegörelse*, 12:1 CC) through painting graffiti.

<sup>108</sup> 28:11<sup>I</sup> RB.

<sup>109</sup> 28:11<sup>II</sup> RB.

<sup>110</sup> The taking of saliva falls under the notion of 'taking samples from the body' and is regulated in 28:12a and 28:12b RB. The taking of photographs and fingerprints is regulated in 28:14 RB.

<sup>111</sup> 28:12 RB. For exceptions with respect to saliva samples, see 28:12a and 28:12b RB.

<sup>112</sup> See Ekelöf, Edeltam, Pauli (n 2) 260.

### 2.6.8. Clandestine Surveillance

RB contains provisions on three types of clandestine surveillance: clandestine monitoring of telephone conversation or ‘wiretapping’<sup>113</sup> (*hemlig teleavlyssning*),<sup>114</sup> clandestine monitoring and control of telephone communication (*hemlig teleövervakning*), and clandestine video surveillance (*hemlig kameraövervakning*).

Clandestine monitoring of telephone conversations means that calls that are being or have been connected to or from a certain telephone number, a code or another destination (known collectively as ‘tele-address’) are listened to or recorded clandestinely in order to obtain the content of the conversation. Both incoming and outgoing calls are subject to this measure.<sup>115</sup> Clandestine monitoring and control of telephone communication means that information on calls that are being or have been connected to and from a certain tele-address are collected without the knowledge of the callers as well as the manipulation of traffic so that calls to or from a certain telephone number etc are prevented from being connected to the number.<sup>116</sup> For both measures, a prerequisite is that someone is suspected on reasonable ground of having committed a crime, and that the measure carries pressing weight for the investigation. Strictly speaking, the monitoring does not need to be restricted to conversations in which the suspect participates; it suffices that the conversation to a certain tele-address is particularly valuable to the investigation. These measures are, moreover, not restricted to a tele-address belonging to the suspect (eg the suspect’s own telephone), but are applicable to any tele-address, including (but not only) any tele-address that the suspect may call to and from. However, the statute stipulates further conditions so that there must be some close connections between the suspect and the tele-address being monitored.<sup>117</sup> Naturally, the fundamental principles of necessity and proportionality are applicable. The subject of both forms of monitoring is a tele-address, not a particular person.

Besides the above general prerequisites there are *de minimis* rules as to the severity of the offence being investigated. Clandestine monitoring and control of telephone traffic is applicable only to offences punishable by imprisonment of at least six months, certain specified crimes as well as – where criminalised – attempt, preparation or conspiracy to commit such crimes.<sup>118</sup> For the more intrusive measure of clandestine monitoring of telephone conversations, the threshold is set to offences punishable (*in abstracto*) by imprisonment of two years and – where criminalised – attempt, preparation and conspiracy to commit such crimes, or other crimes for which the sentence *in concreto* is expected to exceed two years’ imprisonment.<sup>119</sup>

The third measure regulated in C 27 RB is clandestine video surveillance. This means that a remotely controlled TV-camera, other optic-electronic instrument or other comparable equipment are used visually to monitor a person in the course of a preliminary investigation. This means that only visual images are permitted; for audio monitoring the provisions according

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<sup>113</sup> Of course, the measure is equally applicable to mobile telephone conversation.

<sup>114</sup> Note that this is concerned with monitoring of telephone conversation, to be distinguished from monitoring using concealed devices pursuant to the Act on clandestine audio-monitoring in a closed space (*lag om hemlig rumsavlyssning*, 2007: 978) mentioned in n 66 above, which is applicable to specified locations and not telephone conversations.

<sup>115</sup> 27:18<sup>1</sup> RB.

<sup>116</sup> 27:19<sup>1</sup> RB.

<sup>117</sup> See 27:20<sup>1</sup> RB for the further conditions as well as general prerequisites for the application of both measures discussed here.

<sup>118</sup> 27:19<sup>II</sup> RB. The specified crimes according to this provision are ‘unlawful access to computer system’ (*dataintrång*, 4:9c CC), ‘child pornography crime’ that is not considered to be ‘petty’ (*barnpornografibrott*, 16:10a CC), ‘smuggling of narcotics’ (*narkotikasmuggling*, s 6 para 1 of Smuggling Act, *lag om straff för smuggling*, 2000:1225).

<sup>119</sup> 27:18 RB.

to a special statute<sup>120</sup> are applicable. In principle, video surveillance can only be used to monitor a place where a certain person is present who is suspected on reasonable ground of a crime punishable *in abstracto* by a minimum of two years' imprisonment and – where criminalised – attempt, preparation and conspiracy to commit such crimes, as well as crimes that are likely *in concreto* to lead to at least two years' imprisonment.<sup>121</sup> However, in some cases, there may not be a specific person who is under suspicion on reasonable grounds, yet it is of particular importance to establish the identity of suspects and therefore to use video surveillance. There is thus an exception to the main principle above. According to 27:20c RB, even if no one is suspected of the crime on reasonable ground, video surveillance may nonetheless be carried out over the crime scene and its surroundings. The subject of video surveillance is in all cases a certain specified location and not a person.

Common to all forms of clandestine measures regulated under c 27 RB is that the order must be made by a court upon application of the chief investigator or a prosecutor. The principles of necessity and proportionality must be adhered to strictly, which means, *inter alia*, that the measure must be discontinued as soon as it is no longer justified.

Due to the clandestine nature of these measures, their subject cannot, naturally, be informed of them while they are being monitored. To safeguard the interests of individuals at a court hearing concerning clandestine measures, there are 'public representatives' (*offentliga ombud*), who are persons qualified to act as defence counsels or former tenured judges and appointed by the government for three years at a time. The public representatives have the right to obtain information on the case, to express their point of view and to appeal against the court's decision.<sup>122</sup>

After the event, the persons affected have a right to be informed of the clandestine measures. The person who is – or has been – suspected of the crime shall be informed of the measure(s) that he or she has been subject to. For the monitoring of a tele-address not belonging to the suspect, the owner of the tele-address shall also be informed. If video surveillance has been executed in a private location not belonging to the suspect, the owner of that location must also be informed. This information must be given to those concerned as soon as this will not jeopardise the investigation, but at the latest one month after the termination of the clandestine measures.

#### 2.6.9. Infiltration

There are no express statutory rules in Sweden on 'infiltration' and this measure is often discussed in the larger context of provocation. When determining whether a measure is acceptable, the case law of the ECtHR plays therefore an important role.

In Swedish academic writings and case law, a distinction between provocation of evidence and provocation of crime is recognised.<sup>123</sup> It is generally accepted that subterfuge may be employed so as to obtain evidence of a crime already committed, but it is not permissible to induce someone to committing a crime that he or she would not otherwise have committed. The Prosecution Authority has published its own interpretation of the law on provocative

<sup>120</sup> Act on clandestine audio-monitoring in a closed space (*lag om hemlig rumsavlyssning*, 2007: 978), which is a 'provisional' statute in the sense that its validity is restricted in time and the Parliament must periodically pass a new statute to extend the validity of the Act. The present Act is valid until 31 December 2012 by virtue of a statute (2010:406) passed by Parliament in 2010. This measure is applicable only to offences punishable *in abstracto* by imprisonment of at least four years or other crimes that *in concreto* are expected to result in a sentence of imprisonment for at least four years upon conviction.

<sup>121</sup> 27:20a and 27:20b<sup>II</sup> RB.

<sup>122</sup> 27:26–27 RB.

<sup>123</sup> See, eg, P Asp, *Straffansvar vid brottsprovokation* (Stockholm, Norstedts, 2001).



measures,<sup>124</sup> which serves as guidance for prosecutors contemplating such measures. In principle, a provocative measure may only be taken after a decision by a Public Prosecutor. With regard to infiltration, it is suggested that private individuals may be used as infiltrators only under exceptional circumstances. There are special provisions regarding foreign undercover officials who perform their duties in Sweden with a protected identity.<sup>125</sup>

There remains the problem of how evidence obtained through an improper measure should be treated. This issue will be discussed in section 4 below.

#### 2.6.10. Controlled Deliveries

There are no express rules in Swedish law on controlled deliveries that take place exclusively on Swedish territories. The point of departure is that the police have a general duty to prevent crime and to react when a crime is committed.<sup>126</sup> In principle, then, a police officer can never decide not to take appropriate measures as a reaction to crime for reasons of expediency of investigation. However, an appropriate response may consist in the reporting of the crime – or suspicion of a crime – to a superior police officer or a prosecutor. The general duty to react cannot possibly be interpreted as a duty immediately to take action as soon as there is reason to believe that a crime has been, is being or will be committed.<sup>127</sup> In practice, the decision that the police should not interfere with a suspected transport is made by a Public Prosecutor.

With regard to controlled deliveries with an international dimension, special provisions are found in the Act on certain forms of international cooperation in criminal investigations.<sup>128</sup> This statute has been enacted to fulfil Sweden's obligation under, inter alia, the Council framework decision 2002/465/JHA of 13 June 2002 on joint investigation teams and the convention of 29 May 2000 between the Member States of the EU on mutual legal assistance in criminal matters. An application from a foreign authority for controlled delivery in Sweden is handled by a Public Prosecutor, while a request from Sweden for controlled delivery abroad is made by a Public Prosecutor, or by the police, the customs authority or the coast guards, if permission is given by the prosecutor.

### 3. Prosecution Measures

#### 3.1. Opening of Investigation and Prosecution

The various stages of the criminal proceeding have already been described in section 1.1 above. It suffices here to recapitulate that the prosecution is formally brought by the act of the Public Prosecutor lodging an indictment at the court.<sup>129</sup> As described in section 1.2 above, it is always the Public Prosecutor who makes the decision on prosecution, while both the police authority and a Public Prosecutor have the power to open a preliminary criminal investigation.

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<sup>124</sup> *Provokativa åtgärder*, RättsPM 2007:4 (updated March 2008).

<sup>125</sup> ss 15–17, Act on certain forms of international cooperation in criminal investigations (*lag om vissa former av internationellt samarbete i brottsutredningar*, 2003:1174).

<sup>126</sup> Police Act, s 2 (*polislag*, 1984:387). See Act on general principles governing police measures, s 8.

<sup>127</sup> See the commentary to s 8 of the Police Act in N-O Berggren, J Munck, *Polislagen: En kommentar*, available at <http://zeteo.nj.se>.

<sup>128</sup> *Lag om vissa former av internationellt samarbete i brottsutredningar*, 2003: 1174.

<sup>129</sup> 45:1<sup>1</sup> RB.

### 3.2. Unilateral Disposal of the Case

Where there is sufficient ground for prosecution, the Public Prosecutor is in principle obliged – in accordance with the principle of legality – to prosecute. On the other hand, if, at the end of a preliminary investigation, there is insufficient evidence for prosecution, the prosecutor must decide either to make a ‘negative decision on prosecution’ (*negativt åtalsbeslut*) or to ‘close the preliminary investigation’ (*att lägga ned förundersökningen*, also known as *förundersökningsbegränsning*). It is difficult to draw the line between these two types of decision. According to 23:4<sup>11</sup> RB, a preliminary investigation shall be closed if there is ‘no longer any reason for pursuing the investigation’, and 23:4a RB provides furthermore that the preliminary investigation may be closed if continued investigation of the case would require such costs that it would be disproportionate having regard to a number of factors specified in the statute, or, if the case may be disposed of in some other way. Thus, given this structure of the legislation, a ‘decision to close the preliminary investigation’ shall be made if the decision can be justified by 23:4<sup>11</sup> or 23:4a RB. In other cases, the prosecutor shall make a ‘negative decision on prosecution’.

Given that the prosecutor has sufficient evidence to prosecute, the case may be disposed of by a ‘decision to drop charges’ (*åtalsunderlåtelse*). If a person may be prosecuted for a number of crimes, the prosecutor may decide to drop some of the charges, while proceeding to prosecute on the other charges. As opposed to a ‘negative decision on prosecution’ where there is insufficient evidence to bring prosecution, a ‘decision to drop charges’ presupposes that the prosecutor could, instead, have chosen to prosecute,<sup>130</sup> which means that it would be a serious mistake if a prosecutor were to decide to drop the charges, rather than issuing a ‘negative decision on prosecution’, when there is not enough evidence for prosecution. The conditions for dropping charges are given in 20:7 RB. A basic requirement is that a decision to drop charges must not mean that either a public or private interest will be disregarded. Furthermore, one of the conditions enumerated in 20:7 RB must normally be fulfilled: (i) it can be expected that the crime would not lead to a more serious sanction than fines (*böter*); (ii) if it can be expected that the crime would lead to a suspended sentence (*villkorlig dom*), there are special reasons for dropping the charges; (iii) if the suspect has committed other crimes, there is no need to prosecute the crimes for which the charges are to be dropped, since the inclusion of these charges would not affect the total sanction given that the suspect is prosecuted for the other crimes;<sup>131</sup> and (iv) if it is expected that the person will receive psychiatric care, or care according to the Act on support and service to persons with disability.<sup>132</sup> In exceptional cases, charges may be dropped even if none of the conditions in (i) to (iv) above is satisfied; 20:7<sup>11</sup> RB provides that charges may nonetheless be dropped if, due to special reasons, it is clear that a penal sanction is not necessary to deter the suspect from further crimes and there are no other reasons to bring prosecution when all circumstances are taken into account.

The decision to drop charges instead of prosecution is a favourable decision and it is not possible to appeal against such a decision. However, as a basic condition for dropping the charges is that no public or private interest is being disregarded, the suspect’s interest should also be taken into account, so that a decision to drop charges will not be made against the wishes of the suspect. In this connection, it should be noted that a decision to drop charges will be entered

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<sup>130</sup> Although the rules on dropping of charges do not presuppose a confession or consent of the suspect, in practice, a confession is considered *prima facie* to be such strong evidence that it would justify the prosecutor’s expectation of a conviction if the case were to proceed to trial.

<sup>131</sup> Under Swedish law regarding sentencing, a common sanction is given for all crimes for which an accused is convicted. In calculating the common sanction, the effect of addition charges will level off after a certain point, so that further convictions will not affect the total sanction imposed.

<sup>132</sup> *Lag om stöd och service till vissa funktionshindrade*, 1993: 387.

into the person's criminal record;<sup>133</sup> there are therefore good reasons why a suspect might challenge a decision to drop charges.

An aggrieved party may also object to the charges being dropped. Although the prosecutor must take into account private interests, including the interests of the aggrieved party, a decision to drop charges may still be made despite the objection of the aggrieved party. In this case, the aggrieved will have a subsidiary right to bring a private prosecution, which can be seen as a remedy against the prosecutor's decision to drop charges.<sup>134</sup>

### 3.3. *Multilateral Disposal of the Case*

Whereas the decision to drop charges discussed in section 3.2 above is – at least formally – a unilateral decision of the Public Prosecutor, some alternative means of disposing a case are subject to the consent of the suspect. In accordance with provisions in C 48 RB, a case may be disposed of through a 'penal order' (*strafföreläggande*) issued by a Public Prosecutor, or through a 'summary fine order' (*föreläggande av ordningsbot*) issued by a police officer. In both cases, the order can be seen as a proposal from the side of the authorities, which the suspect may accept or reject.<sup>135</sup> If the suspect accepts the proposal, no prosecution will be made and the order will have the same status as the judgment in a criminal proceeding which has acquired finality.<sup>136</sup> Both a penal order and a summary fine will become part of the criminal records of the person subject to the order.<sup>137</sup> If the orders are not accepted by the suspect, the criminal process will proceed in the normal way and the crimes will be prosecuted if conditions for this are fulfilled.

A *penal order* may be issued by a Public Prosecutor for offences punishable by fines. The penal order will specify the amount of the fine and the crime for which the fine has been imposed. A penal order may also impose a suspended sentence (*villkorlig dom*), or a suspended sentence in conjunction with a fine, if it is clear that the court will impose such a sanction upon conviction. An acceptance of the penal order means that the suspect admits to having perpetrated the crime and accepts the penalty imposed; a penal order is also deemed to be accepted – where only money payment is imposed – if the suspect has paid the fine in full within the time limit specified in the penal order.<sup>138</sup>

A *summary fine order* may be issued by a police officer for an offence punishable by a fixed fine, ie for minor criminal offences that in many other legal systems would be treated as administrative breaches (eg traffic offence, littering and public nuisance). Such orders are usually issued and accepted on the spot, but the suspect is also given the possibility to consider his or her position and to accept or reject the order at a later date. In some circumstances the summary fine order is issued by a Public Prosecutor, or an officer within the customs authority or the coast guard.<sup>139</sup>

Other than the above-mentioned orders, Swedish law does not recognise other forms of multilateral disposals. Admittedly, there exists the practice of mediation under the auspices of state or municipal authorities;<sup>140</sup> mediations take place entirely outside of the criminal process.

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<sup>133</sup> s 3, no 4 of the Criminal Register Act (*lag om belastningsregister*, 1998: 620).

<sup>134</sup> 20:8 RB. See also commentary to this section in Fitger (n 39). The subsidiary right to bring private prosecution is also applicable when the prosecutor makes a 'negative decision on prosecution'.

<sup>135</sup> There is, however, no possibility to modify or negotiate the terms of the order.

<sup>136</sup> 48:3<sup>II</sup> RB.

<sup>137</sup> See n 133.

<sup>138</sup> Provisions on penal orders are found in 48:1–3 and 48:4–12a RB.

<sup>139</sup> Provisions on penal orders are found in 48:1–3 and 48:13–20 RB.

<sup>140</sup> See the Act on mediation on the ground of crime (*lag om medling med anledning av brott*, 2002: 445).

From time to time it has been discussed whether the prosecutor and the suspect may come to some form of agreement to reduce the material to be dealt with at a trial, especially in complicated cases involving economic and organised crimes. This discussion has not led to any legislation, and the general reaction to a ‘negotiated’ justice – such as plea bargaining – has been negative.<sup>141</sup>

### 3.4. *Committal to Trial*

As explained in section 1.1

1. Phases of the criminal procedure above, the crucial point where the criminal proceeding changes its character is when the prosecutor lodges an indictment with the court. From this point onwards, it is no longer the prosecutor/chief investigator but the court who is in charge of the proceeding, and the prosecutor and the accused are equal parties at this stage. There is no additional proceeding after the indictment — eg a committal hearing — in which the accused is committed to trial. As already pointed in section 1.1), formal prosecution is brought at a relatively late stage of the proceeding; this is because most of the preparation for trial is supposed to have been carried out already during the preliminary investigation, so that most of the work that remains to be done after the indictment has an administrative character like setting a date and arranging for the appearance of witnesses. The court will in most cases simply issue the indictment and summon the accused to a main hearing. The accused does not need to submit replies to the charges and in many simple cases will not need to contact the court before the main hearing. However, preparatory meetings with the parties will be held in complicated cases, or where this will facilitate the main hearing.

## 4. Evidence

The fundamental principle governing the law of evidence is free admission and free evaluation of evidence.<sup>142</sup> By free admission it is meant that there is no general restriction on what is admissible as evidence, which means that in theory even illegally obtained evidence may be admitted in court. By free evaluation it is meant that it is for the judge to determine what value should be given to each piece of evidence; there are no rules that designate a certain value to a particular type of evidence. Thus, a confession will be given the evidential value that it ought to have after an investigation of all the circumstances, and not be regarded as conclusive evidence that someone has committed a crime. These principles are expressed in the statutes – under 35:1<sup>1</sup> RB – in the following terms:

The court shall, after a conscientious examination of everything that has been adduced as evidence, decide what has been proved in the case.

The notion of ‘conscientious examination’ is the same as that of ‘*conviction intime*’ in most civil law systems. Having stated these general principles, it must be said that there are some special rules concerning the presentation of different types of evidence; most of the special rules can be explained by reference to the general principles governing Swedish procedural law (such as the principles of orality and immediacy) or to rights guaranteed by the ECHR.

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<sup>141</sup> See, for instance, the anthology published by the Prosecution Authority, *Effektivare hantering av stora och komplicerade brottmål en idéskrift* (December 2006) and the report of the commission on limitation of preliminary criminal investigation SOU 2010:43 *Förundersökningsbegränsning*.

<sup>142</sup> For a general presentation of the law of evidence see Ekelöf, Edlestam, Pauli (n 2) para 23; introductory remarks to chapter 35 RB in Fitger (n 39).

An example of such special rules is provided by the provisions on written evidence. The principle of orality entails that evidence should be taken up orally at the main hearing; this is done through questioning of the accused, the aggrieved persons and witnesses, and through oral pleading by the prosecution and the defence at the end of the main hearing. This means that there is in practice a prohibition on the recitation or reading of a prepared speech/statement or other written document, as such reading will defeat the purpose of having an oral session.<sup>143</sup> The principle of immediacy entails inter alia that the court – at least in questions of fact – can only base its finding on the evidence presented at the main hearing. Written records of interviews undertaken during the preliminary investigation are thus excluded from the evidence. If a party wishes to rely on such evidence, then the person who made the statement must be questioned again at the main hearing. This is a situation in which the principle of free admission of evidence is being overridden by the principle of immediacy and the principle of orality as the latter principles are considered to provide the best available evidence for the judges' free evaluation. Written evidence is, however, not excluded altogether. 35:14 RB provides that records, for instance, of an interview during a preliminary investigation may be used as evidence at the main hearing in certain cases, eg if the person cannot be heard at the main hearing. Moreover, the requirement of orality may arguably be fulfilled by orally making a reference to a written document. There is in fact an express provision in 46:6<sup>IV</sup> RB that permits references to written documents during a main hearing, provided that the court considers it appropriate. This practice has been criticised on the grounds that it may mean that it would be more difficult for the judges to form an overall picture of all the evidence.<sup>144</sup> The practice may also be criticised on the basis that references to written material to which only the parties and the court have access frustrates the principle of public trial, the point of a public trial being to allow the public present at the hearing to assess for themselves on what evidence the judges' conclusions are based.

It may be noted in this connection that the terminology in Swedish law may cause some confusion. When the term 'written evidence' (*skriftligt bevis*) is used, one refers to the content of a written document, and not the document itself.<sup>145</sup> Thus, a photograph cannot be written evidence in this sense, since it normally does not have a written content – unless, of course, it is a photograph of a written document. Neither would a written document be written evidence if the document is used, for instance, to establish whether a signature on it is genuine or not, or whether a fingerprint can be traced; the use of the written document for such purposes is governed by rules on 'inspection' (*syn*) in C 39 RB – in much the same way as relating to the inspection of objects like knives or weapons – and not the rules on written evidence in C 38 RB.

It is said above that, theoretically, even illegally obtained evidence can be put forward at trial, as a consequence of the principle of free admission of evidence, and there is no rule in the Swedish statutes that explicitly prohibits such evidence. In many cases, there is no practical problem, as the probative value of illegally obtained evidence is in many cases, objectively speaking, so low (eg information obtained following misleading questions by the police) that its admission would not have any effect on the case. However, there are certainly cases where the probative value of the evidence is very high (eg a video of a crime being committed, recorded in the course of an unauthorised clandestine surveillance) if one focuses solely on the evidence's objective probative value. In such cases, the court cannot ignore the fact that very good evidence of the crime in fact exists. At the same time, the use of such evidence may constitute a clear violation of the accused's rights under the ECHR. The courts have over the years adopted different methods to deal with the effect of illegally obtained evidence, and the Supreme Court

<sup>143</sup> See 46:5 RB and Ekelöf, Edelstam, Pauli (n 2) 14.

<sup>144</sup> Ekelöf, Edelstam, Pauli (n 2) 15.

<sup>145</sup> See Ekelöf, Edelstam, Pauli (n 2) 256.

has given a ruling that represents the current status of Swedish law on this subject.<sup>146</sup> The Court considered different methods to remedy the situation and ruled out, inter alia, the option of excluding the illegally obtained evidence, as it would be difficult to foresee what consequences this might have against a system based on the fundamental principle of free admission of evidence. In the end, the Supreme Court arrived at the position that the violation of a fundamental right guaranteed by the ECHR requires – despite the fact that there is no direct support for this solution in the statute – that the accused be acquitted of the charges, since a ‘substantive condition for punishment’ (*materiell straffbarhetsbetingelse*)<sup>147</sup> is lacking in such cases. There is no reason why this principle should not be applied also to evidence obtained illegally in another Member State of the EU; the basic principles of free admission and free evaluation of evidence entail that evidence obtained in another Member State shall not be treated differently from evidence obtained in Sweden.

## 5. The Rights of the Suspect/Defendant during Investigation and Prosecution

### 5.1. *Presumption of Innocence*

There is no express rule in RB – or elsewhere – that stipulates the presumption of innocence of a suspect. In Swedish legal doctrine, the principle has often been approached from another angle, namely the prosecutor’s burden of proof. This burden of proof – together with the requirement of proof beyond reasonable doubt – is understood to have an effect equivalent to the presumption of innocence.<sup>148</sup> As the ECHR is a part of Swedish law, Article 6(2) of the Convention:

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law

is fully applicable in the Swedish courts. Although both the Swedish doctrine on the prosecutor’s burden of proof and the condition of being charged with a criminal offence under the ECHR presupposes that a charge has been brought, the presumption of innocence must a fortiori apply to stages of the criminal proceeding before the bringing of charges.

A corollary of presumption of innocence is that both an accused who has been acquitted after trial and a former suspect against whom a criminal investigation has been discontinued for lack of evidence are treated as innocent. In both cases, as has been pointed out in the literature, the termination of the procedure must be taken conclusively and unambiguously to mean that the accused or former suspect is not guilty, and that any harm or detriment associated with the

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<sup>146</sup> NJA 2007 s 124. This case concerns the theft of paintings by Renoir and Rembrandt from the National Museum in Stockholm and the legal question at issue pertains to provocation of crime by the police, and is therefore based on the right to a fair trial according to Art 6 ECHR. However, the principle established by the Supreme Court can be applied to other situations involving illegally obtained evidence, if it can be argued that a violation of other Convention rights, too, eg the right to privacy according to Art 8 would ‘irremediably undermine the fairness of the trial’. On the expression ‘irremediably ...’ see eg *Vanyan v Russia* App no 53203/99 (ECtHR 15 December 2005) para 49.

<sup>147</sup> The Supreme Court has, thus, avoided a ruling that would base the acquittal on grounds of justification or excuse. By resorting to the use of the concept of ‘substantive condition for punishment’, the Supreme Court acknowledged in fact that the person could have committed a crime even though it would be unjust for the state to exercise its penal power in the particular case.

<sup>148</sup> P O Ekelöf, H Edlestam, L Heuman, *Rättegång IV*, 7th edn (Stockholm, Norstedts, 2009) 150.

accusation or suspicion should as far as possible be eliminated.<sup>149</sup> It is therefore considered inappropriate that a court – for example as obiter dicta in a judgment finding the accused not guilty of homicide – should make any statement with the suggestion that the accused may have been guilty of another crime.<sup>150</sup> However, the presumption of innocence does not mean that a finding of ‘not guilty’ or ‘insufficient evidence to commence or continue a criminal investigation’ would preclude a future finding of guilt. As mentioned in section 1 above, a preliminary investigation that has been closed can be reopened when this is called for, usually as a result of the emergence of new evidence.

## 5.2. *The Right of the Defence to Undertake Investigative Measures/Acts in their own Right and the Right to Request Special Acts of Investigation*

It follows from the general principles of law that the defence may on its own initiative undertake investigative measures in the course of a preliminary investigation;<sup>151</sup> in this respect the position of the defence is no different from that of any private individual. This also means that the defence will have no special competence to undertake measures that cannot be carried out by a private individual. However, when a person is suspected on reasonable ground to have committed a crime, he or she will have the right to access information on the preliminary investigation and to state the investigative measures that the defence considers appropriate.<sup>152</sup> The suspect, or his or her defence counsel, may request that questioning or other measures be conducted; such request shall be granted if they may be of significance for the investigation. If such a request is denied, the chief investigator is obliged to give reasons for his or her decision.<sup>153</sup> If the chief investigator has completed the investigation without granting the defence’s request for further measures, the defence may report this to the court, which has the authority to question the suspect or other persons, as well as to carry out other measures.<sup>154</sup> Besides the fact that the cost of the measure will be borne by the public authority, an obvious advantage to let the chief prosecutor carry out the measure is that intrusive investigative measures may then be used that are otherwise not available to the defence as a private individual. As the chief investigator is required to be objective (see section 1.2 above), he or she is likely to grant any reasonable request. It should also be borne in mind that it is in the interest of both the prosecutor and the defence to have the best available material before them, before a decision on prosecution is made.

<sup>149</sup> See P O Träskman, ‘Presumptionen om den för brott misstänktes oskyldighet’, *Festskrift till Lars Welamson* (Stockholm, Norstedts, 1987) 469-86; K Nowak, *Oskyldighetspresumptionen* (Stockholm, Norstedts 2003) 425.

<sup>150</sup> See Nowak (n 149) 433ff. A further twist in this case was that the accused could not appeal against the obiter dicta, these being merely part of the reasoning with no operative force as verdict and could therefore not prove in a court of law that they were (also) innocent of the other crime. For further information on this case see *Rättsfall från hovrätterna* (RH) 1988: 136 (law reports from the Swedish of appeals; cases identified by year and number in the annual volume) and decisions on the inadmissibility of cases *H v Sweden* App no 15260/89 and *A v Sweden* App no 15513/89 (ECtHR of 29 June 1992).

<sup>151</sup> Reference may also be made to 21:7 RB, which has been taken to imply a duty of a defence counsel to act independently of his or her client; thus a defence counsel does not need to ask the permission of the chief investigator before making contacts with possible witnesses. See Ekelöf, Edeltam, Pauli (n 2) 137.

<sup>152</sup> In practice, the defence normally only requires such supplementary investigative measures after the chief investigator has given a notification that the preliminary investigation is about to be closed (*slutdelgivning*). However, there is in principle no reason why the defence should not suggest that the chief investigator should take an appropriate measure at an earlier stage.

<sup>153</sup> 23:18<sup>I</sup> and 23:18<sup>II</sup> RB.

<sup>154</sup> 23:19 RB but also to some extent 21:8 RB.

### 5.3. *The Right to Legal Assistance*

Regardless of the severity of the case, a suspect always has the right to be assisted by a defence counsel (*försvarare*) of his own choosing.<sup>155</sup> This right should be distinguished from the right to a 'public defence counsel' (*offentlig försvarare*), who is paid out of public funds. In the first place, a public defence counsel is appointed at the request of the suspect when certain conditions are fulfilled.<sup>156</sup> If the suspect is deprived of liberty by being detained or remanded in custody, the condition for appointment of a public defence counsel is met. If the suspect is neither arrested nor remanded in custody, a public defence counsel is appointed at the suspect's request if he or she is suspected of a crime punishable by at least six months' imprisonment. Furthermore, regardless of the severity of the crime and regardless of whether the suspect has requested a public defence counsel, one will be appointed *ex officio* (i) if the suspect is in need of a defence counsel in view of the investigation, (ii) if it is uncertain what sanctions will be imposed and there is reason to believe that a conviction will result in more than fines or suspended sentence or a combination of both, and (iii) if there are otherwise special reasons having regard to the circumstances of the suspect or of the case. Furthermore, there is a reminder in 23:5 RB that the chief investigator should make a report to the court when there is a need for a public defence counsel to be appointed. A defence counsel has the right to be present at interviews held in the course of the preliminary investigation (though in some cases only if this will not jeopardise the investigation)<sup>157</sup> and the public defence counsel always has the right to meet with his client in private, if the latter is arrested or remanded in custody.<sup>158</sup>

### 5.4. *The Right to have another Person Informed about one's Arrest*

According to 23:21a RB, if a person has been deprived of liberty inter alia through detention or remand in custody, a relative or another closely related person of the suspect shall be informed as soon as this can be done without jeopardising the investigation. However, such information should not be given against the will of the person held, unless there are particularly good reasons for doing so, eg when the person is a minor or if the person has been reported missing.<sup>159</sup> In this connection, it may be added that since the question of remand in custody is one for the court to decide, the identity of the person in an application for remand in custody will be information in the public domain. Prior to the lodging of the application for remand in custody, the chief investigator may invoke the secrecy rules governing a preliminary investigation for a refusal to divulge the identity of the suspects being investigated.<sup>160</sup>

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<sup>155</sup> 21:3 RB.

<sup>156</sup> 21:3a RB.

<sup>157</sup> 23:10 RB.

<sup>158</sup> 21:9 RB; the rights of a defence counsel who is not a public defence counsel appointed by the court are more limited in this regard.

<sup>159</sup> See Lindberg (n 39) 256. There are also obligations to inform other person in specific cases, such as information to the Immigration Authority (*Migrationsverket*) when a foreigner is remanded in custody (see Lindberg (n 39) 306) as well as obligations to inform certain states arising from bilateral treaties.

<sup>160</sup> The rules are constructed in such a way that the prosecutor has the power to classify the information, but is not under a legal duty not to divulge the information. However, out of consideration of the suspect's integrity, his or her identity is usually kept secret. It is an entirely different matter how the media choose to publish/broadcast the information if they get hold of this in an improper way (eg through 'leaks').



### 5.5. *The Right to be Informed of the Charges*

The right to be informed of the charges has already been discussed in section 2.3 above; as mentioned there, this right arises when a person is suspected on reasonable grounds of the commission of a crime.

### 5.6. *Access to the File during a Criminal Proceeding*

The question of access to the file during a criminal proceeding is a rather complicated one, since there are many rules that overlap each other. To begin with, there are constitutional rules on public access to official documents laid down in the Freedom of the Press Act.<sup>161</sup> As some of the documents used in a preliminary investigation are official documents, there is a basic right of public access to such documents, regardless of whether one is a suspect or otherwise involved with the case. There are, however, also rules that restrict access to public documents. The second tier of rules comes from the Act on openness and official secrets.<sup>162</sup> This Act regulates when information held by public authorities can be divulged, and when access to such information is restricted. This Act is also applicable to any person and in all situations, but there are specific provisions within that Act that deal with restrictions under a criminal investigation. The Act also makes a distinction between information on oneself and information on others, which obviously has significance when a suspect is interested in what charges are being made against him or her. The provisions of the Act on openness and official secrets are, unfortunately, not entirely coordinated with the rules from the Freedom of the Press Act, as the former statute concerns information while the latter deals with documents; it is thus possible that one may have access to an official document, but information contained in the document is classified. The third tier of rules are those found in RB and other special statutes that deal directly with the right to information and access to the files during a preliminary investigation and during the trial phase. These rules can also be divided into those that apply to everyone (including the media) and those that apply only to the parties to the proceedings. Given this complex structure it will be impossible to provide a meaningful account of the system in a short space. Moreover, a recent law commission<sup>163</sup> has proposed law reform, inter alia, in the area of the suspect's access to investigative material and in an earlier law commission<sup>164</sup> the access by third parties has been examined. As new, clearer, legislation may come into being, the following presents only some basic features of access to the case file according to the rules in RB.

To begin with, the important provision in 23:18<sup>1</sup> RB, already mentioned several times, gives the suspect and his or her defence counsel the right continuously to be informed of the material that has been gathered during the course of the preliminary investigation, as long as this can be done without jeopardising the investigation. However, when the chief investigator has given notification to the suspect that the preliminary investigation is about to be closed (*slutdelgivning*), the defence will have access to all the information gathered during the preliminary investigation, as access to such information at this stage cannot be said to jeopardise the investigation. The material on which the decision on whether to bring a prosecution in the case in question is based will be found in a 'case file' (*förundersökningsprotokoll*). Perhaps more importantly, the chief investigator is under an obligation to reveal also material that is not considered to be relevant to the decision on prosecution; this kind of material is known as 'incidental material' (*sidomaterial*, also known as *slasken*). It has been stressed in the literature that the possibility for the defence to access incidental material is particularly valuable, as it is

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<sup>161</sup> Tryckfrihetsförordning, 1949: 105.

<sup>162</sup> Offentlighets- och sekretesslag, 2009: 400.

<sup>163</sup> SOU 2010:14 *Partsinsyn enligt rättegångsbalken*.

<sup>164</sup> SOU 2009:72 *Insyn och integritet i brottsbekämpningen några frågor*.

often in this material that the defence may discover evidence that the prosecution has overlooked.<sup>165</sup> The obligation to account for incidental material also gives the defence the opportunity to see whether the principle of objectivity has been observed during the course of the preliminary investigation. It may be added that the material in the preliminary investigation may contain classified information (eg personal details of a witness). Such classified information must be included in the case file, if the information is relevant for the decision on prosecution, which means that the defence will have access to such information (although access by the general public may be restricted). The rule on unconditional access is, however, not applicable to incidental material; thus, classified information may be kept from the defence if it is not relevant for the decision on prosecution and therefore is included only as incidental material.<sup>166</sup>

When the suspect is indicted, the defence will – in addition to the right of access – also have the right to have a copy of the case file.<sup>167</sup> There is no right to obtain copies of the material if prosecution is not brought, nor is there a right to obtain copies of incidental material.

When the case file is handed over to the court, the material contained in the file become official documents and are in principle accessible to the public. However, information in these documents may be classified (especially in sensitive cases, like sexual offences cases, and cases involving young persons). Naturally, this restriction on access is only applicable to the general public; the defence will of course have access to information on the case.

### 5.7. *The Right to Assistance for the Suspect During the Pre-Trial Procedure (Translator, Defence Lawyer)*

The right to a defence counsel (discussed in section 5.3 above) applies throughout the criminal proceeding from the moment that there is suspicion on reasonable ground until the case has been finally disposed of. The accused – by virtue of being a party to the criminal proceeding – has the right to an interpreter at a court hearing.<sup>168</sup> This right, however, is applicable only at the trial phase, as the relevant statutory provision is found in the part of RB that deals with the courts in general. There is no explicit right to an interpreter during the preliminary investigation, but it is generally accepted that this right also exists when someone is heard during the preliminary investigation; otherwise there is not much point in questioning the person.<sup>169</sup> In any case, where there is no explicit rule on a question of defence rights, the ECHR can be used as a basis for legal practice.

### 5.8. *The Right to Silence During the Pre-Trial Procedure*

According to 35:4 RB, the court may draw the conclusion as it sees fit from the fact that a party fails at the trial to fulfil an obligation incumbent upon him/her, eg by refusing to answer questions posed. This provision is formally applicable to parties in both civil and criminal proceedings. The silence of the accused *may* thus be interpreted as evidence against him/her within the general framework of free admission and free evaluation of evidence. Although criticisms have been raised, claiming that the permissive rule in 35:4 RB would be contradictory to the right to remain silence, the general view is that the right to silence is not being infringed by the free evaluation of evidence when the rule is applied against the general background of

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<sup>165</sup> See Ekelöf, Edelstam, Pauli (n 2) 143 and further references therein.

<sup>166</sup> *ibid* 144.

<sup>167</sup> 23:21<sup>IV</sup> RB [1].

<sup>168</sup> 5:6 RB.

<sup>169</sup> See Bring, Diesen (n 2) 131-32.

ECtHR case law,<sup>170</sup> ie when the inference is not used as the only or main evidence against the accused.

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<sup>170</sup> See Nowak (n 149) 413-18; Commentaries to 35:4 RB in Fitger (n 39).