



The public prosecutor, its role, duties and powers in the pre-trial stage of the criminal justice process – a comparative study of the french and the swedish legal systems –

Akila Taleb, Thomas Ahlstrand

IN **REVUE INTERNATIONALE DE DROIT PÉNAL** 2011/3 Vol. 82 , PAGES 523 TO 540

PUBLISHER **ÉRÈS**

ISSN 0223-5404

ISBN 9782749215563

DOI 10.3917/e.ridp.823.0523

Uploaded: 04/30/2012

Article available online at

<https://droit.cairn.info/journal-revue-internationale-de-droit-penal-2011-3-page-523?lang=en>



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**THE PUBLIC PROSECUTOR,
ITS ROLE, DUTIES AND POWERS IN THE PRE-TRIAL STAGE
OF THE CRIMINAL JUSTICE PROCESS
– A COMPARATIVE STUDY OF THE FRENCH AND
THE SWEDISH LEGAL SYSTEMS –**

Akila TALEB* / Thomas AHLSTRAND**

It would be very hard to imagine the criminal process in an ordered state governed by law without any official fulfilling the functions of what is generally called the “prosecutor”. Throughout Europe –and the world, bearing in mind that most, or all, functioning criminal process systems in the world have European root– the official may be given different names –prosecutor, “*procureur*”, “*staatsanwalt*”, “*officer van justitie*” etc– his or her organizational home might vary – an independent organization, a branch of the police authorities, a department of the judiciary – and the breadth of the duties and the powers invested can differ; in some countries, as in England, part of the duties may even be entrusted to private practitioners on a case-to-case basis. The international community has acknowledged the importance of the function of the official prosecutor in, for example, the 1990 *UN Guidelines on the role of prosecutors*¹ and in the 2000 Council of Europe *Recommendation on the role of public prosecution in the criminal justice system*². All international criminal courts from the Nuremberg trials onwards have had prosecutors assigned as independent civil servants.

Ideally, the criminal process system is often seen as a choice between two possible systems, the inquisitorial, with a role for an active judge and the accusatorial, based on the idea of the parts in process as two dueling combatants, equal in arms, before an impartial judge; the former having its modern roots in the judicial reforms following the French revolution, the latter in

* PhD researcher, Lecturer and member of the Criminal Law Centre at the University Jean Moulin Lyon 3 (France).

** Deputy Chief Public Prosecutor, International Public Prosecution Office, Gothenburg (Sweden).

¹ Adopted in Havana August 27 – September 7, 1990, U.N. Doc. A/CONF.144/28/Rev.1 - 189, 1990.

² Rec. 19 adopted October 6, 2000.

the English common law system. In reality, of course, there is no such thing as a completely inquisitorial or a completely accusatorial system. As the role and function of the prosecutor gives him or her, so to speak, the key to the criminal process, we have deemed it fruitful to study and to compare the roles and functions of prosecutors in two procedural systems each on the rather extreme end of the inquisitorial/accusatorial spectrum, i.e., the French, as inquisitorial, and the Swedish, as accusatorial. France and Sweden, like a vast majority of States within the European legal system, over the years, have developed a strong and powerful prosecution system. In Sweden the prosecution service is a homegrown product. In its modern version it was first introduced in 1948 after a long and thorough preparation as part of a main change of the procedural laws in general courts, where the most important issue, apart from a general modernization, was the switch from the inquisitorial to the accusatorial system³. In France traces of prosecution date back the medieval world namely the 12th century and clearly announced a switch from the accusatorial to the inquisitorial procedure.

Consequently, our aim is to describe, highlight and critically discuss some differences and similarities between the two systems. While they have evolved in opposite directions, both the French and Swedish legal systems are now likely to promote the accusatorial rather than the inquisitorial criminal justice system. Thus, although specificities can be noted, we are bound to admit the existence of a general tendency growing fast in Europe as far as criminal justice systems are concerned. Here lies a more global issue in the current development of law in modern societies and both France and Sweden are part and parcel of this global legal change. In that perspective we have to wonder if it can logically and reasonably be foreseen that law, through its transformations, is being gradually unified. Here again the role and status of Public prosecution will provide us with a good example of what has been achieved in terms of European judicial cooperation.

Yet we need to moderate our enthusiasm on globalisation and unification of law. Therefore, after a brief description of the recent changes in the France, we will finally discuss not only some advantages but also some drawbacks and dangers within both systems. We will also put forward a few discussion points with regard to the current ideas concerning the introduction of a European Prosecutor.

1. The public prosecution: education, career and organization

Today there are about 850 prosecutors in Sweden as compared to 2000 or more judges, whereas there are about 8200 magistrates in France, including

³ Swedish Law on procedure 1948, chapter 7 on prosecutors.

prosecutors and judges.⁴ Even though their qualifications are, to a certain extent, different, prosecutors in France and in Sweden are professionals⁵ and their positions within the criminal justice system do not differ that much from each other.

Firstly, Swedish law students who wish to enter the prosecution service have to be, as a prerequisite condition, fully trained lawyers and all prosecutors have, as have all judges and most lawyers in private practice, compulsory experience from a two-year posting as minor judge/secretary at a district court⁶. On the contrary, French law students are not required to be well experienced practitioners since they will first have to pass an annual competitive national examination to enter the National School for the Judiciary located in Bordeaux. Nevertheless training undertaken at this school lasts not less than 31 months and provides the future prosecutors and/or judges with some undeniable experience. Besides, the National School for the Judiciary has developed other access routes to the magistracy, some of them being more similar to the Scandinavian prosecution system of Sweden⁷. Professional experience has indeed become a key asset in entering the profession, particularly after the "Outreau" Case in 2004 in which the magistracy was severely criticized for its lack of experience⁸.

Secondly, although the career as a prosecutor is a special career in both countries, the evolution process inside and outside of the judicial profession, is not rigid. Sometimes Swedish prosecutors become chiefs of police or judges, sometimes judges become prosecutors, and as judges and prosecutors share the same formal background in legal training, both categories are eligible for most positions within the respective careers. Other prosecutors go into private practice as attorneys. But the vast majority of prosecutors remain in the profession. As for

⁴ Survey, Ministry of Justice, 2009: Actually this disparity can be explained by the huge gap between the two countries with regards to the number of inhabitants being far less important in Sweden than in France.

⁵ Both In France and in Sweden, education requires at least 4 years of legal studies at a law faculty.

⁶ Swedish Ordinance on prosecutors 2004:1265, §17.

⁷ Any person who justifies their relevant professional experience regarding the legal profession can submit an application to enter the school.

⁸ In this case, a couple falsely accused people of being involved in sexual abuse on the couple's four children. Thirteen of those people were acquitted after spending years behind bars awaiting trial. This case, known as one of the biggest miscarriages of justice in France, put French Justice into question, with the focus being on the role played by the investigating judge/"juge d'instruction" who had given too much credit to the children's testimonies that turned out to be inconsistent. As a result, a committee was tasked to formulate recommendations to improve French judicial investigation, in order to provide investigating magistrates with stronger safeguards and experience in the course of their daily activities.

French prosecutors and judges, “any magistrate, in the course of his or her career, intends to be nominated to “standing” and “sitting” magistracy functions”⁹. Consequently, public prosecutors can become judges and conversely these magistrates can subsequently hold a position as a public prosecutor.

Thirdly, the organisation and structure of the public prosecution service differ from one country to another. As a preliminary remark, it is important to point out that Swedish prosecutors, being part of an independent institution, work in a building separated from the courts. As such they barely see and meet judges unless they are expected to do so in the course of their judicial activities¹⁰. To the contrary, French prosecutors have their office either inside the courts of original and appellate jurisdictions or inside the Supreme Court. Consequently due to this geographical proximity between French prosecutors and judges, although they have different tasks (prosecuting and judging), the risk of collusion is said to be higher in the French legal system.

While the French ‘Ministère public’ is divided into three levels matching the seats of the courts, the Swedish Prosecution Authority is based on a two-level structured system, a central management level and a local, operational level. In France, at the top of the hierarchy lies the general prosecutor’s office¹¹, which is within the jurisdiction of the Supreme Court, followed by 37 appellate prosecutors’ offices¹², each of which includes a general prosecutor and several deputies¹³. Then stand 158 district offices¹⁴, each of them including the chief district prosecutor and deputies having authority over prosecutors carrying out their functions before all courts of original jurisdiction below a district court¹⁵.

The Swedish public prosecution service includes the Prosecution Authority and the Economic Crimes Bureau, a special prosecution agency whose aim is to fight economic crime.

The central level of the Swedish Prosecution Authority is responsible for the management, planning and coordination of activities as well as for strategy and policy matters including functions like supervision, legal control and reviews, and

⁹ Article 1, Ord. n°58-1270 December 22, 1958. Standing magistrate means prosecutor, sitting magistrates refer to an investigating magistrate, a liberty and custody judge or a trial judge.

¹⁰ e.g.: adversarial meeting for a pre-trial detention hearing.

¹¹ Parquet général près la Cour de cassation.

¹² Among which two are referred to, not as a court of appeal but as superior appeal tribunals (in Saint Pierre et Miquelon’s archipelago and Mayotte island).

¹³ Avocats généraux and substituts généraux.

¹⁴ Before 2008 there were 181 district offices. See the reform of the “judicial map” (the location and jurisdiction of French courts) by which two decrees (February 15, 2008) removed 23 district courts.

¹⁵ The police court, neighborhood judges and the juveniles’ Courts.

the processing of cases concerning misuse of office and complaints against prosecutors. The central management structure also includes four national development centres in Stockholm, Gothenburg, Malmö and Umeå. As for the organization and hierarchy, the Swedish Prosecution Service is headed by the Prosecutor-General, who is a judicial officer under the government¹⁶. There are about forty local branches, called chambers, headed by Chief Prosecutors each comprising about ten to sixty-odd prosecutors. The Prosecutor-General is the highest-ranked prosecutor in the country for prosecutors attached to both the Prosecution authority and the National Economic Crimes Bureau. He is also the only public prosecutor in the Supreme Court. The Swedish judicial system includes a wider range of authorities than the French one since it includes not only the Swedish Prosecution Authority, but also, for instance, the Swedish Police Service. France, on the other hand, the police institution is not part and parcel of the judicial system even though police officers can have tasks within, or linked to, the judicial system.

Yet, despite these specificities, similarities between the two systems can be underlined. First, both French and Swedish prosecutors are part of the judicial system and all prosecutors, in their daily activities, duties and obligations, have a national competence¹⁷. Another similarity lies in the fact that both systems are well organised, specialised, and based on a strong hierarchy. Furthermore, the geographical distribution of Swedish local prosecution offices may correspond to the French regional jurisdiction of appellate prosecution offices. As for the latter, appellate offices match the French regions and, concerning the former, of the 38 Swedish prosecution offices that conduct operative work on local areas, 32 are indeed local offices operating in geographical areas that roughly correspond to a county¹⁸. Finally, both in France and in Sweden, the work at a local public prosecution office is conducted in close co-operation with police officers, who perform the operative investigations.

2. Instigation of investigation: sharing of competences between the police and the prosecution service

In determining whether or not a case meets the requirements in order to enter the criminal justice system and if, consequently an investigation should take place, the French and the Swedish legal systems demonstrate some specificities that turn out to be similarities.

¹⁶ Swedish Code of judicial procedure, 1948, On prosecutors, chapter 7 § 1-2

¹⁷ Prosecutors work within the jurisdiction of the court they belong, yet for example when issuing orders or warrants, these documents can be implemented and be effective on a national level (e.g. national warrant of arrest)

¹⁸ In the largest cities there are several local public prosecution offices.

Under French provisions, although the police hold discretionary powers including powers of coercion, they must always refer to the prosecutor who is the only authority that can decide whether or not a case should enter the criminal justice process. Hence, considering French criminal inquiries, the prosecutor has all the powers that a police officer of a specific rank in the hierarchy can have¹⁹ and can thus hold all the police powers, as far as their investigative mission is concerned²⁰. In other words, the French judicial police officer has some powers and a liberty of action provided he reports everything to the district prosecutor who remains the one who holds the power of the effective management of the inquiry and, as mentioned above, legal provisions do so state²¹.

On the other hand, under the Swedish law, the power to initiate and lead a preliminary investigation is shared between the police and the prosecution service. In case of minor offences the police will be competent to conduct the preliminary investigation from beginning to end whereas in case of more serious offences, the prosecution service and if, at this stage, a suspect has been identified, will take over the preliminary investigation work²². Even though the Swedish police are entitled with powers to lead investigations, the prosecutor is, in any circumstance, responsible for ensuring that the crime is investigated in the best way possible. As a consequence, Swedish police officers always conduct preliminary investigations on and under the instruction of the prosecution authority just like in France.

In both legal systems, there is indeed a constant coordination and cooperation between the police and the prosecution authority, which leads undoubtedly to a sharing of competences during the instigation of investigation. The role and powers of each authority will be determined by two criteria: the level of complexity and seriousness of the case.

3. Powers and scope of coercion during investigations

As a starting point, it is relevant to clarify the term “suspect” since the rules of coercion in both criminal justice systems imply that a person is suspected of an

¹⁹ Namely the judicial police officer (*‘officier de police judiciaire’*), article 41 of the Code of Criminal Procedure (CCP)

²⁰ Articles 14 to 17 of the CCP; Nevertheless there is no such powers for documents issued by the investigating magistrate to the judicial police officers through a specific document named the “rogatory” letter. This exception stems from the principle of the separation between the prosecutorial and the investigative Authorities.

²¹ Article 19 of the CCP: “judicial police officers are required to notify the district prosecutor forthwith of the felonies, misdemeanours and petty offences of which they have knowledge

²² Under special circumstances, regardless of the complexity and the seriousness of the offence, the prosecutor will have to lead the preliminary investigation: when the suspect has been arrested and will consequently be detained, when the suspect or the victim is under-aged or, in case of domestic violence.

offence. Under the French criminal law, a suspect is defined as “any person against whom there exist one or more plausible reasons that he or she has committed or attempted to commit an offence²³”. Under the Swedish law, a suspect is a person against whom there exists a “reasonable suspicion” that he or she has committed or attempted to commit an offence.

These definitions cover, under the two legal systems, the first degree of suspicion. A second and more serious degree does exist in both systems and is applicable only to suspects involved in a judicial examination and against whom there is “probable cause” under the Swedish law²⁴ or “strong and concordant evidence” under French law, that they may have participated, as perpetrator or accomplice, in the commission of the offences²⁵. Coercion is allowed and may be resorted to upon merely meeting the requirements of the first degree of suspicion, although these two situations carry different tools and degrees of coercion. But, either way, whether there is a ‘plausible reason’ or a ‘reasonable suspicion’, such terminology does not allow us to define in specific terms the notion of suspect and leaves the police a wide range of discretionary powers according to the circumstances of the case. Yet when a decision to detain someone is made, the prosecutor has to ensure that there are sufficient reasons to believe that the person held in the police station is, in one way or another, involved in the criminal offence. Consequently, in both legal systems, the terms “plausible reason” and “reasonable suspicion” need to meet the requirements of fairness and due process of law and have, as such, to be interpreted in an objective way, thus avoiding any subjective suspicion.

Despite a few specificities, the powers of coercion held by the French and the Swedish prosecution authorities, in the course of a criminal investigation, are quite similar. Police custody and pre-trial detention powers will be considered here below to underline the similarities between the two systems.

Both French and Swedish prosecutors have the power to hold a suspect in custody. While the police have the power to stop, search and arrest someone who is suspected to have committed a criminal offence, they need to report any police detention to the prosecution service. In France, any judicial police officer is entitled to hold a suspect in custody for up to 24 hours. When necessary an extension may be allowed for a second period of 24 hours if the request is sent and agreed to by the district prosecutor prior to the first 24 hours deadline²⁶.

²³ Article 55-1 of the CCP.

²⁴ It is a matter for the judges and prosecutors to distinguish between these two categories as the text in the statutes has no definition; e.g. Swedish code of judicial procedure chapter 23 §1 and chapter 24 §1.

²⁵ Article 80-1 of the CCP.

²⁶ Articles 63 and 77 of the CCP.

Regardless of the length of custody, the district prosecutor is under a more general duty to supervise police custody measures by visiting the places where suspects are held²⁷. In Sweden, if the power to arrest someone of whom there is a reasonable suspicion is given to police officers, the suspect can be held at the police station for a period which will not exceed six hours. For any extension the police are under the obligation to report to the prosecutor who is the only one competent to extend the length of custody up to three and a half days. Hence while detention decided by a judicial police officer may last for a longer period in France²⁸, the maximum legal length of custody, including any extension, is usually more important in Sweden²⁹.

Yet in both systems, the prosecution authorities' powers are limited, since the fundamental rights and liberties of the accused are guaranteed by the necessary involvement of a judge. The opportunities for both a judge and/or a "magistrate du siège" to be part of the two criminal justice systems are multiple. It is possible to give an example of the judge's involvement during the pre-trial process by introducing the rules related to the extension of police custody or pre-trial detention.

Under French provisions, any decision to extend the length of custody beyond 48 hours will belong to the liberty and custody judge, on the initiative of the district prosecutor. Under exceptional circumstances and when the offence falls within the scope of those mentioned in article 706-73 of the Code of criminal procedure, "two supplementary extensions each of twenty-four hours can be authorised, by a written and reasoned decision, on the request of the district prosecutor and by either the liberty and custody judge, or the investigating judge"³⁰. Thus if the prosecution holds the power to control any custody, this power is limited and shared with a judge, if and when the length of custody exceeds 48 hours³¹. Since 2006³², in case of a serious potential terrorist attack or when international

²⁷ Article 41 §2 of the CCP.

²⁸ See above 24h in France v. 6h in Sweden. The power given to French judicial officers to hold a suspect in custody for up to 24 hours has been, over the last few months, severely criticized and is, thus, currently being discussed by public authorities (e.g. the government). In order to reduce the excessive number of custodies, the minister of justice has made it clear that police detention should be justified by "the real necessity of the inquiry". The Léger committee in its reports has recommended the implementation of a "judicial retention" prior to any custody, during which any person could be held and questioned at the police station, for a maximum period of 4 hours.

²⁹ Apart from organized crime, 84h in Sweden v. 48h in France.

³⁰ In France, "le juge des libertés et de la détention" and "le juge d'instruction", article 706-88 §1 of the CCP.

³¹ Article 706-88 of the CCP; however this provision applies only to those offences specified in article 706-73 of the CCP namely to organized crime.

³² Terrorism, security and border controls Act 2006 (n°2006-64).

cooperation requires it, an extension of 24 hours can be decided or approved by the liberty and custody judge. This extension is renewable once. Consequently altogether the periods of police custody can reach 144 hours.

As for pre-trial detention, any deprivation of liberty will fall within the jurisdiction of a judge³³. In Sweden, provided there are plausible reasons for guilt and if the suspect needs to be held in custody for more than 84 hours³⁴, a judicial pre-trial detention decision will be necessary and the prosecutor will have to refer the issue to the judge in permanence that day.

Furthermore in both criminal justice systems, a decision of pre-trial detention cannot be made, unless an adversarial debate has taken place. The advocate for the defence has to be duly summoned³⁵ and, subsequently, the judge may impose on the detainee a ban against communicating, which cannot, under any circumstances, be extended to his counsel³⁶. Finally, the European court of Human rights has made it clear that any infringement of liberty should meet the requirements of reasonableness with regard to the seriousness of the case and the complexity of the investigations necessary to the search for truth³⁷. Being part of the European convention, both France and Sweden have to comply with the European court's case law.

Defence rights do exist in both legal systems. The Swedish system allows the defence to contest some investigatory decisions made by the prosecutor. The matter is usually brought to court where a judge decides, after a pre-trial hearing. The defence also has the right to pursue lines of inquiry in order to clear the suspected person of any suspicion. This might entail the hearing of witnesses, forensic and technical investigations. As the investigation is headed by the prosecutor, the defence usually approaches the prosecutor with these demands carried out by the police. Should the prosecutor refuse a demand from the defence, the suspect has the right to request the court to order the prosecutor to carry out the measure. Under the French legal system, the accused holds similar rights³⁸. Additionally the defence can appeal decisions³⁹ on judicial supervision

³³ See article 137 onwards of the CCP.

³⁴ If no request is made demanding that the suspect be remanded to custody then he has to be released.

³⁵ See article 145 onwards of the French CCP.

³⁶ See article 145-4 of the French CCP.

³⁷ ECHR, March 17, 1997, *Muller v. France*; ECHR, *Medvedyev and others v. France*, July 10, 2008 & Grand Chamber, March 29, 2010; ECHR, *Moulin v. France*, November 23, 2010.

³⁸ A new law was enacted in France on the 14th of April 2011 with better safeguards available for the suspect held in custody. The new provisions intend amongst others, to provide the suspect with a stronger legal aid from defence counsel during the entire police custody process, including police questioning and confrontation phases.

and on pre-trial detention ordered by the investigating judge or the liberty and custody judge. The appeal will be heard by the indictment division of the court of appeal, also called in short the investigating chamber. More generally, the investigating chamber has jurisdiction over any matter connected with the judicial investigation and controls their legality and compliance with the law.

Consequently, regardless of the authority competent in the course of a criminal investigation-the prosecutor and the judge under Swedish law, or the investigating magistrate, the liberty and custody judge and the investigating chamber under French law - any person involved in a criminal offence benefits from some rights that shall be considered as a counterbalance of the existing powers of coercion granted to relevant authorities.

Finally, even though there is no such equivalent as the judicial investigation in the Swedish legal system⁴⁰, in both systems the prosecution authorities' powers are limited and the fundamental rights and liberties guaranteed by the necessary involvement of a judge.

4. Decision of indictment, diversion from prosecution and no further action

a) The principle of legality vs. the opportunity principle

While France has chosen to follow the opportunity principle, also called the principle of expediency⁴¹, Sweden follows the principle of legality, also called the principle of compulsory prosecution⁴². Under the former, the prosecution authority is under no obligation to systematically prosecute a criminal offence and, as such, is free, according to the specific and concrete circumstances of the case, to make a decision whether or not to prosecute. Conversely, under the latter, the

³⁹ Article 186 of the CCP.

⁴⁰ The use of 'judicial investigation' refers to the French criminal inquiry led by the investigating judge. Although this judge has some powers of coercion, he represents under article 66 of the French constitution *the* "Judicial Authority and as such is the guardian of the freedom of the individual". Thus, the sharing of competence can be summarized as follows: while the prosecution authority holds some powers of coercion in order to bring the guilty before court, the investigating judge working towards the discovery of the truth, has to make sure fundamental rights are preserved and, therefore, in case those rights need to be infringed for a certain period of time, only a judge will be entitled to order so.

⁴¹ Article 40, 40-1 of the CCP: any prosecutor holds a broad discretionary power and can decide to prosecute, to divert the case from prosecution or to end it straightforwardly with a no further action decision.

⁴² See Swedish prosecution authority website at www.aklagare.se/In-English/; Exceptions are made for certain offences where it may be felt that the interests of the general public in instigating legal proceedings are not strong enough. Examples of such offences include defamation, breach of domiciliary peace and crimes of unlawful appropriation, or stealing, within the family (i.e. theft etc.). See also Chapter 20 § 6-7, Swedish Code of judicial procedure 1948.

prosecution authority is legally bound to prosecute a criminal offence that would come to its attention.

Although in theory, the French and the Swedish legal systems follow two opposite principles, in practice this distinction turns out to be without much of a difference for several reasons. Firstly, even though the French prosecution holds a discretionary power in its decision to prosecute, the obligation for the prosecutor to give an answer to criminal cases as often as possible was reassessed with the enactment of the Act 2004⁴³. Consequently when the behaviour falls clearly and without any doubt into the legal definition of a criminal offence (*i.e.* *actus reus* and *mens rea* are constituted) and when the offender has been identified, the prosecutor has to consider whether it is more appropriate to prosecute, and a no further action decision is to be chosen, if and only if, "this would be justified by particular circumstances directly linked to the facts themselves" (e.g.: factors related to the public order or the specific situation of the offender). This way of proceeding reminds us of the Swedish rule by virtue of which the prosecutor is bound to prosecute unless there exist relevant reasons connected to the evidence of guilt, the public interest, and the circumstances in which the offence was committed⁴⁴.

As a matter of fact, in both systems, the relevant question that needs to be answered is whether there are sufficient evidences of guilt in order to determine whether or not the case will enter the criminal justice system. Thus the French and Swedish prosecutors will both have to evaluate the realistic and objective prospect of guilt and the case should not enter the criminal justice process unless prosecutors of both systems are satisfied that the offender has performed an illegal action with the appropriate mind-set.

Secondly, in both systems, the no further action decision is to be considered as final since it can be overruled if new facts emerge (e.g.: evidence of guilt). Thirdly, regardless of the system, the victim does not play a major role in the decision making process. However the victim has the right to pursue criminal proceedings, should the prosecutor deny doing so⁴⁵.

Finally, whereas in Sweden no order to prosecute can be made by any superior prosecutor, in France such an alternative does exist⁴⁶. Yet, any Swedish superior

⁴³ See article 40-1 of the CCP, the legislator rephrased in terms of priority the three options offered to the prosecutor. Regarding the new provision, the prosecution is under a duty to find a systematic answer so as to clear a criminal case.

⁴⁴ Swedish Code of judicial procedure 1948, Chapter 23, § 4.

⁴⁵ Swedish Code of judicial procedure 1948, Chapter 20 § 8; under French law, see article 40-2, article 85 which refers to articles 52 and 706-42 of the CCP.

⁴⁶ Article 30 of the CCP: "the Minister of Justice (...) may denounce violations of the criminal law of which he has knowledge to the prosecutor general, and charge him, by

prosecutor might, under special circumstances, change a decision already made or the government may formally abolish indictments as an outflow of the government's right to distribute mercy, but this has not happened since the nineteen sixties⁴⁷. Hence, even though this is not likely to happen, it is not impossible and in practice in both countries, the prosecutor's decision may be overruled due to opportunity considerations.

The seriousness of the offence is another element of paramount importance to be taken into account before making any decision to prosecute⁴⁸.

b) The criterion of the seriousness of the offence

When a minor offence is committed, the public prosecution's decision, in both countries, can take the form of a fine but there will be no deals whatsoever. It is a way to divert the case from a court sentencing. Thus even though the prosecutor may feel that there is sufficient evidence to prove that the crime has been committed, a preliminary investigation does not always lead to a prosecution and/or trial. Criminal justice systems generally resort to diversion from prosecution⁴⁹ and guilty plea or summary trial procedures.

Summary punishments can take place if the suspect admits that he or she has committed the offence and it is clear what the punishment should be. This is voluntary and the suspect may choose, instead, to allow the prosecutor to bring charges and have the case tried in a court of law. Summary punishment is possible in the case of an offence for which the punishment is restricted to a fine and/or conditional sentence. Examples of such offences are, under Swedish law, theft, shoplifting and traffic infringements⁵⁰.

means of written instructions attached to the case file, to initiate prosecutions or to cause them to be initiated, or to seize the competent court of such written orders that the Minister considers to be appropriate".

⁴⁷ Swedish women having an abortion in Poland, at the time illegal in Sweden but not in Poland—now the situation is exactly the opposite.

⁴⁸ The personal features of the offender and as such factors like the offender's criminal record, his or her age and personality or the complexity of the case and the probative evidence may affect the final outcome as to whether or not a case should enter the Criminal Justice process.

⁴⁹ There exist, under French law, two procedures mentioned in articles 41-1, 41-2, 41-3 of the code of criminal procedure, by which the offender who admits his or her guilt has to accept one or several legal measures imposed by public authorities (e.g.: directing the offender towards a public health, social or professional organisation, requiring the offender to regularise his situation under any law or regulation or redressing the wrong/damage caused by the offence, paying a mediatory fine to the Public Treasury, etc). No prison sentence can be imposed if the "*alternatives réparatrice ou punitive*" measures are chosen.

⁵⁰ For further details on the French procedure, see the simplified procedure mentioned at article 525 onwards of the CCP.

Under the pre-trial guilty plea procedure, a hearing will take place after the offender has acknowledged his guilt. As no discussion on the guilt will be necessary, the only purpose of the hearing will be to determine whether the sentence imposed by the prosecution services and agreed by the offender is appropriate and proportionate to the seriousness and circumstances of the offence⁵¹. As a consequence French and Swedish prosecutors hold a broad discretionary power to avoid prosecution or to avoid a court trial. Those who commit offences are not necessarily brought before the courts for an open determination of guilt and, if convicted, for sentencing. Furthermore, both French and Swedish young offenders who commit minor offences are usually treated more leniently than adult offenders⁵².

As for indictable offences, the decision of indictment will mainly concern serious offences. In France, as such offences lead to the opening of a judicial inquiry, it implies, as a prerequisite condition, that a decision to prosecute has been made by the prosecutor.

In both countries and because diversion from a court sentence or, even more from prosecution, do exist in relation to summary offences, it is obvious that, in relation to indictable offences, prosecutors will be likely to direct the case towards prosecution.

Provided the crime is serious, the same treatment will apply to juveniles, who can thus be deprived of their freedom and be remanded in custody in appropriate and specific centres. In Sweden young offenders will be directed, in the course of an "institutional juvenile care" decision, to a juvenile centre for a maximum period of 4 years with or without remand. Similarly in France, in addition to the existence of special courts' jurisdiction over young offenders⁵³, juveniles, if found guilty, will be

⁵¹ The "comparution sur reconnaissance préalable de culpabilité" (CRPC) is a procedure of pre-trial guilty plea introduced in France in 2004. For more specific details, see article 495-7 onwards of the CCP.

⁵² See Swedish Law on juvenile delinquents, § 16; the prosecutor will call the young suspect to a hearing at the prosecutors chambers and personally deliver a decision not to prosecute (waiver), often together with some words on the necessities of law-abiding conduct in the future etc. (Sometimes it works); see French penal code p.1887 onwards: Ordinance n°45-174 on childhood delinquency, February 2, 1945. The 'Varinard' Commission, an ad hoc government committee tasked with formulating far-reaching recommendations to improve France's juvenile delinquency system, released its final report in December 2008. Several recommendations were formulated, among which the most important is to lower to 12 the minimum age of criminal liability. In 2010, a bill will be discussed taking into consideration this recommendation and the possibility to set a threshold beyond which the criminal liability of young offenders will be upheld.

⁵³ Juvenile court concerning offenders whose age is below 16 and Juvenile Assize Court regarding indictable offenders aged between 16 and 18. Though the new provisions have

directed either to closed educational centres⁵⁴ or to juvenile penitentiary/detention centres.

Finally, once French and Swedish prosecutors are satisfied with their respective inquiries and deem that the investigations have been completed, they decide on indictment by sending a formal statement to the appropriate court, describing the offence and the evidence of guilt on which lies the decision to prosecute⁵⁵. The formation and composition of these statements are remarkably similar in the two countries.

5. The French reform and its consequences on the unification of law

The Léger Committee, an ad hoc government committee was tasked with formulating far-reaching recommendations to improve France's criminal justice system. As a result, a pilot study on the new Criminal Code of Procedure was released for consultation in March 2010.

Several recommendations were formulated, among which the most important were the abolition of the investigating judge system and as a consequence the increased prosecution presence throughout the criminal justice process. Even though the government has decided to postpone most of the issues prone to modification, a discussion on the French reform still remains topical particularly as far as the prosecution's position is concerned⁵⁶.

a) The strengthening of the French prosecutor's position

not yet come into force, some changes will occur in a near future through the "participation of the citizens in the functioning of the criminal justice and the judging of juvenile offenders" Act 2011 available on *légifrance* website.

⁵⁴ Closed educational centres are aimed at minors who are persistent offenders and who are the subject of a judicial supervision measure or of probation. They represent an alternative to imprisonment and are always used after educational measures have failed. The term "closed" refers to the legal definition of the placement, that is, any serious violation of the centre's regulations is likely to lead to detention.

⁵⁵ The Swedish prosecutor may also assist the victim or plaintiff in a claim for damages. In more complicated cases involving real persons, however, these claims are the duty of the plaintiffs' lawyer; see Swedish Code of judicial procedure, Chapter 22 §2. Once the French judicial investigation is over, the file is sent to the prosecutor for him to make his written and reasoned submissions on the case; for French statutory provisions see Article 175 §2 of the CCP.

⁵⁶ Due to the European Court of Human rights recent position, so far, the reform on police custody is the only issue that has been resolved. The police custody Act 2011 introduces better safeguards available for the suspect held in custody. For further details see also ECHR November 27, 2008, *Salduz v. Turkey*; ECHR October 13, 2009, *Dayanan v. Turkey*; ECHR June 16, 2009, *Karabil v. Turkey*; ECHR October 14 2010, *Brusco v. France*.

According to the committee, it was obvious that if of the decision is made to eliminate the investigating judge, all his powers would naturally be transferred to the prosecutor. But the additional competences to the prosecution were soon widely suspected as being part of an attempt by political authorities to increase their influence on the handling of sensitive cases. Thus, a part of the legal society demanded, as a prerequisite condition to these new powers, a review of the status of the prosecutorial services in favor of independence from the executive branch and the police services. Members of the committee did not share this point of view, considering the dependent relationship between the prosecution and the Executive as being a positive rather than a drawback. In order to counter-balance this dependency on the executive branch, the commission suggested that an independent judge to be known as the “inquiry and liberties judge” be appointed.

Irrespective of that, under these recommendations, the district prosecutor turns out to be the primary beneficiary of the future reform. The strong hierarchy in the French prosecution system is consequently another issue, since in other European countries where there is no investigating judge; prosecutors do not depend on political power and have no power to deprive suspects of their freedoms. Besides, the situation appears all the more problematic since the French prosecutor who, for a long time, has been considered as part of the judiciary⁵⁷, seems to be no longer entitled to claim this right. The European Court of Human rights, indeed, has recently asserted, that the French “*public prosecutor cannot be regarded as a competent legal authority*”⁵⁸ for the purpose of the article 5, § 3 of the Convention. Although the government does not seem yet to be willing to surrender, France will be bound, sooner or later, to draw the appropriate inferences from these European decisions and reform its system accordingly. Hence, the debate remains open and in that context and for now, it could be

⁵⁷ The Constitutional Council used to consider, “that the judicial authority which, under article 66 of the French Constitution is the guardian of the freedom of the individual, includes both public prosecutors and judges”; Cons. Council, dec. n° 93-326, August 11, 1993.

⁵⁸ ECHR, *Moulin v. France*, November 23, 2010; A. Taleb, *Quelles perspectives d'évolution pour le parquet français ? Etude des systèmes français et anglais à la lumière de la jurisprudence européenne (à propos de l'arrêt CEDH, 23 nov. 2010, Moulin c. /France)*, *chron. Int. Rev. Pen. Law* 2011, n° 1/2, p. 235-245; see also ECHR, *Medvedyev and others v. France*, July 10, 2008; in the same way as far as the sentencing power was concerned, the Constitutional Council, when seized in 1995, stated that a sentence could not be imposed by the a public prosecutor but required the intervention a judge so that the measure would be in conformity with the Constitution; Cons. Council, Decis. n° 95-360, February 2, 1995; ECHR, *Medvedyev and others v. France*, Grand Chamber, March 29, 2010; the formulation used in *Medvedyev* case has been at the basis of the Court's long-established case –law and dates back to the early case of *Schiesser v. Switzerland*, ECHR, December 4, 1979.

interesting to underline the key factors that would go for or against unification of law.

b) The interaction of French and Swedish laws: towards a potential unification

Public prosecutors, in Sweden as well as in France, are connected to the government and the executive power. Yet each status remains specific and the Swedish public prosecutor benefits from a stronger independence, since the prosecution service is apart from the police as well as from the courts. All prosecutors are state-employed and are said to be sovereign. The independence of the judiciary in France is a basic condition of a state truly governed by the rule of law. In France such independence is laid down in the Constitution which entrusts the President of the Republic with being its guarantor⁵⁹. A High Council of the Judiciary assists him in this task and is also the monitoring body with power over appointments and discipline. Yet, its prerogatives are more significant concerning judges of the ordinary courts, whose permanence is constitutional⁶⁰, than it is with public prosecutors who come under the responsibility of the Minister of Justice⁶¹.

Although Swedish prosecutors are more independent, their status is far from being perfect due to their potential impact on the criminal justice process. Even if the procedure is relatively informal, flexible and fast, there are backdrops. The requirements of speed, especially when the suspect is under detention, originally installed for the benefit of the suspect, tend to make investigations superficial; the typical criminal investigations are made to be “good enough”, not “excellent”, which, paradoxically, can enhance the risk for, at the worst, miscarriages of justice or, at least, judgments that are also “good enough”, not “excellent”. The strong accusatorial principle leaves the process very much in the hands of the parties; many judges feel they are not allowed to guide the parties or even hint at blunders, even at the price of a faulty outcome; and if one of the parties (most often the defence) is not that resourceful this attitude can create dilemmas⁶².

Consequently each system has its advantages and disadvantages. Even though France is currently experiencing a significant reform of its criminal procedure tending to introduce some strong elements of the accusatorial model of criminal

⁵⁹ Article 64 of the French Constitution: “The President of the Republic shall be the guarantor of the independence of the Judicial Authority”.

⁶⁰ Article 64 of the French Constitution: “Judges shall be irremovable from office”.

⁶¹ Article 5 Ord. 58-1270, December 22, 1958: “members of the prosecution report to their immediate superiors and are under the authority of the Keeper of the Seals, Minister of Justice”. See also article 30 of the CCP.

⁶² E.g. the Thomas Quick serial killer’s case during the 1990’s, where the suspect in therapy confessed to committing several murders that he may or may not have committed; it seems that the reason for his confessions was that he gained notoriety

justice, this needs to be done sparingly. Similarly, in the Swedish legal system, safeguards have to be implemented and/or strengthened to preserve rights to a fair trial along with a good or efficient administration of justice. The balance for both countries is to be found, as often as practicable, in European rules and regulations promoting an adversarial standard model of criminal justice.

As an effect of globalization, states today are increasingly facing crimes that cross national borders. During the last ten years, international cooperation in criminal matters has grown exceptionally⁶³. Certainly, the day of a uniform European Code of criminal procedure is far off in the future⁶⁴, yet there are signs of the different countries learning and receiving inspiration from each other.

The arrival on the European crime-fighting scene of a new actor, the European Prosecutor is not dormant and its arrival may not be that far in the future. First envisaged in the proposal of a European Code of criminal procedure, the *Corpus Juris*⁶⁵, a preliminary study made by European academic jurists on behalf of the European Parliament in the 1990's⁶⁶, the European Prosecutor is supposed to be conducting investigations and presenting indictments to local courts, on the basis of national rules of jurisdiction, for a certain set of crimes against the European Union, especially on the economic level, such as fraud or corruption directed against the European institutions. The Treaty of Lisbon, signed by the European Union member states on 13 December 2007, came into force on 1 December 2009, reinforced the idea of judicial cooperation in criminal matters and reasserted the pressing need for a European prosecutor to be established⁶⁷.

In whatever circumstances, from a practical viewpoint, it is an absolute necessity that practitioners and academics, alike, study and evaluate criminal procedures in countries with which they have to cooperate. It is with this end in mind we have ventured herein to compare two procedural systems, both within the European Union, but on the surface very different from each other. Our conclusions, however, are that in the end, formalities aside, the resemblance is greater than the difference, which foretells well for the future.

⁶³ See for instance, the European Arrest Warrant (EAW) which has replaced the old extradition conventions and is functioning surprisingly well.

⁶⁴ A harmonization of legal codes and rules is difficult to reach, some member states seeing it as impinging on their sovereignty.

⁶⁵ Keeping in mind that the European prosecutor's priority is to preserve the Union's financial interests, the very first proposal to reach this aim actually dates back the year 1976 with a modification to the EU Treaty accordingly; COM(76)418 (JO C 222 du 22.9.1976).

⁶⁶ Introducing provisions for the purpose of the financial interests of the European Union, under the direction of Mireille Delmas-Marty, Economica, Paris, 1997.

⁶⁷ Article 69 E of the Treaty which was inserted as article 86 of the Treaty on the Functioning of the European Union.

RÉSUMÉ

Dans tout Etat de droit, l'objectif premier de la procédure pénale est de résorber le phénomène criminel sans toutefois porter atteinte aux libertés fondamentales des citoyens. Malgré leurs spécificités, la France et la Suède sont profondément concernées par la poursuite de cet objectif dont l'intérêt est aujourd'hui considéré comme une priorité européenne. Le procureur, à qui il incombe de déterminer si une affaire doit ou non, faire l'objet d'un traitement judiciaire, constitue le pivot du processus pénal. Cette étude a donc pour objet l'examen des pouvoirs et devoirs des procureurs français et suédois au sein de modèles de justice pénale à dominante respectivement inquisitoire et accusatoire. Dans ce contexte, la question de l'étendue de la convergence des systèmes pénaux européens demeure entière.

SUMMARY

In all legal States, the overall objective of criminal justice is to reduce crime without unjustified infringement of the citizens' fundamental rights. Despite national specificities in their legal traditions, France and Sweden are both deeply involved in pursuing this goal whose concern is nowadays considered as a European priority. Prosecutors, whose legal obligation lies in determining whether or not a case shall enter the criminal justice process, turn out to be the linchpin of the process. Therefore this study examines the powers and duties of French and Swedish public prosecutors within judicial systems based on opposite models, respectively the inquisitorial and accusatorial models of criminal justice. Thus, the debate regarding the potential unification of European criminal justice systems remains topical.

RESUMEN

En todo Estado de Derecho, el objetivo principal del proceso penal es reducir el fenómeno criminal sin violar las libertades fundamentales de los ciudadanos. A pesar de sus especificidades, Francia y Suecia están profundamente involucradas en la consecución de este objetivo cuya preocupación es ahora considerada como una prioridad para Europa. El fiscal, que es responsable legal de determinar si un caso debe o no debe ser sometido a un proceso penal, es la columna vertebral del proceso penal. Por ello, este estudio examina las atribuciones y deberes de los fiscales francés y sueco, en los modelos de justicia penal predominantemente inquisitivo y acusatorio, respectivamente. En este contexto, sigue siendo un tópico el debate en relación a la extensión de la unificación de los sistemas penales europeos.