



LUNDS  
UNIVERSITET

# International ideals and domestic reality

A qualitative study on Sweden's pre-trial detention practices

Av Elin Jönsson

---

LUNDS UNIVERSITET  
Rättsociologiska institutionen

Kandidatuppsats (RÄSK02)  
Vårtermin 2015



Handledare: Isabel Schoultz

Examinator: Ida Nafstad

## Abstract

Sweden is often described as being at the forefront of protecting human rights, but nevertheless Swedish pre-trial detention practices have received criticism from torture committees upholding human rights standards on regional and international levels. This suggests that a discrepancy exists between the legal ideals and the domestic practices. From a sociology of law perspective, the present study aims to further the understanding of why this discrepancy might exist. The methodological approach was two-fold; on one hand by interviewing judges with experience of pre-trial detention hearings, and on the other by using content analysis to examine reports from the torture committees along with the interview data. By applying Bourdieu's framework and complementing these analytical tools with Cohen's concepts on denial, the committees and the judges could be understood as agents in a legal field, engaged in a struggle for the right to determine the law. As the newer agents, the committees reject some of the current structures in the field and aim for gaining more dominant positions, whilst the judges defend their established positions and try to maintain their legitimacy, with support from their habitus. This study also highlights the close ties between the legal field and the field of state power, which might offer an understanding of the juridical accounts describing a position where judges are bound by the legal norms, resulting in domestic practices that do not appear to fulfill international human rights ideals.

Keywords: pre-trial detention; human rights; habitus; field; Bourdieu; Cohen

## List of contents

1. Introduction .....	1
<b>1.1 Law in the books and law in action .....</b>	<b>1</b>
2. Background .....	2
<b>2.1 Domestic pre-trial detention practices .....</b>	<b>2</b>
<b>2.2 (The lack of) Statistical data.....</b>	<b>4</b>
<b>2.3 International bodies of control.....</b>	<b>4</b>
2.3.1 Legal ideals .....	5
2.3.2 Torture committees .....	6
3. Previous research .....	7
<b>3.1 Harmful acts by the state.....</b>	<b>7</b>
<b>3.2 Pre-trial detention and restrictions .....</b>	<b>8</b>
<b>3.3 State crime victimization .....</b>	<b>10</b>
<b>3.4 The role of the judges.....</b>	<b>11</b>
4. Methods.....	12
<b>4.1 Content analysis.....</b>	<b>13</b>
4.1.1 Sample .....	13
4.1.2 Process.....	14
<b>4.2 Semi-structured interviews.....</b>	<b>14</b>
4.2.1 Sample .....	15
4.2.2 Process.....	15
4.2.3 Ethical considerations .....	17
<b>4.3 Notes on the quality of data.....</b>	<b>18</b>
5. Theoretical framework .....	19
<b>5.1 Pierre Bourdieu .....</b>	<b>19</b>
5.1.1 The field .....	19
5.1.2 Capital .....	20
5.1.3 Habitus .....	20
<b>5.2 Stanley Cohen .....</b>	<b>21</b>
<b>5.3 An integrated approach .....</b>	<b>22</b>
<b>5.4 Theoretical limitations .....</b>	<b>22</b>
6. Results and analysis .....	23
<b>6.1 The legal ideals and the reality of practice .....</b>	<b>24</b>
<b>6.2 The struggle in the legal field .....</b>	<b>24</b>
<b>6.3 Habitus and the appropriation effect .....</b>	<b>29</b>
<b>6.4 The field of state power.....</b>	<b>33</b>
7. Concluding discussion.....	35
List of references .....	38
Appendix 1 .....	44
Appendix 2.....	45

# 1. Introduction

Human rights are defined as basic rights, claimed by all individuals simply by being human (Blake & Amatrudo 2015:1), hence also those accused or convicted of crime have legal rights protecting them on international, regional and domestic levels (Hydén 2011:31). Today they are embedded within the criminal justice system (Blake & Amatrudo 2015:151) to place restraints on the exercise of coercive power by the state and its authorities (ibid: 154). Sweden is known to be a leading country for human rights (Silander 2011:80) but nevertheless Sweden has been continuously criticized by international bodies for their pre-trial detention practices, which suggests that there exist a discrepancy between the theoretical ideals of human rights law, and the reality of domestic legal practice. The criticism has been thoroughly discussed within the Scandinavian researcher community, and the practices have been critically examined in a number of writings (for example Barker 2012; Scharff Smith 2012; Engbo & Scharff Smith 2012). Much of the criticism concerns the length of detention, and the isolation due to having restrictions; practices described as being “painfully embarrassing” for the nation states involved (Mathiesen 2012:20).

By studying the criticism along with the reasoning of legal professionals, the interplay between ideals of international law and the reality of domestic practice will be highlighted from a sociology of law perspective. This qualitative study therefore limits itself to the use of documents from torture committees on international and regional levels, and interview data from the domestic legal field, with the aim of answering the following research questions:

- What themes can be found in the criticism from the torture committees within the United Nations and the Council of Europe?
- How do judges describe their decision-making with regards to pre-trial detention?
- How can the domestic practices be understood through a Bourdieusian framework?

## 1.1 Law in the books and law in action

Within the field of sociology of law this distinction once made by Roscoe Pound is well known, and as written by Banakar and Travers:

[...] the fact that the law allows new ideas and values to enter its internal domain of operations does not necessarily change the organization of the law or modify the courts' practices, which creates a gap

between legislation, or the intention of the legislature, and the practices of the courts (Banakar & Travers 2013:5).

The distinction between law in the books and law in action suggests that the expectations of the written law are not always fulfilled (Treviño 2013:46). In the present study, the criticism Sweden has been receiving could illustrate such distinction between the human rights standards and the domestic pre-trial detention practices.

## 2. Background

This chapter offers an overview of the current practices and its support in Swedish legislation, to understand when and why detention will take place according to legal norms. It is followed by a short notion regarding the lack of statistical data available in this field, and finally, the main international bodies of control will be introduced along with human rights standards that are of particular relevance for the present study.

### 2.1 Domestic pre-trial detention practices

An individual accused of a criminal offence can be temporarily deprived of his or her liberty when there are plausible reasons to believe that the sanction will be a prison sentence for one year or more. According to the general principle this has to be accompanied with a risk that the individual will interfere with the investigation or destroy evidence, not participate in the legal process or avoid the legal sanction, or continue to commit offences (Wennberg 2011:97-98). However, exceptions can be made if there is not sufficient evidence to detain someone according to this principle, which might be the case in the beginning of an investigation (ibid: 98). If the sanction in question is imprisonment for at least two years the suspect *has* to be detained unless it is obvious that reasons for a detention are missing (Lindberg 2012:108). This is set out in the 24<sup>th</sup> chapter, 1<sup>st</sup> paragraph of the Code of Judicial Procedure (SFS 1942:740).

The purpose for pre-trial detention is not only to secure the investigation, but also to secure the society and others living in it (Wennberg 2011:98). But using such means of coercion is a balancing act and results in tension between the need to effectively investigate crime, and the respect for the individual (Lindberg 2012:15). After all, a detention does not always lead to a conviction since the individual can be innocent (Wennberg 2011:99). In the Instrument of Government (SFS 1974:152) the individual is protected against, for example, acts of

intrusion in integrity and deprivation of liberty committed by public authorities (2<sup>nd</sup> chapter, 6<sup>th</sup> and 8<sup>th</sup> paragraphs). These rights can be limited, but only for purposes considered to be acceptable in a democracy (2<sup>nd</sup> chapter, 20<sup>th</sup>-21<sup>st</sup> paragraphs). But as in all cases concerning coercive measures there is a need for proportionality, and several places in Swedish legislation makes it clear that the reasons for such measures have to outweigh the intrusion on the individual's integrity (for example in the Code of Judicial Procedure, SFS 1942:740, 24<sup>th</sup> chapter 1<sup>st</sup> paragraph) (Wennberg 2011:97).

The detained individual is usually placed in a remand prison and may engage with other detainees and have some contact with people from the outside, through visits, letters and phone calls *if* it does not affect the individual with regards to the oncoming trial (Wennberg 2011:99-100). But in cases where suspects change their initial statements, or where victims and witnesses are threatened to silence, there can be a need for restrictions on the individuals contact with the outside world (Lindberg 2012:795). In Swedish legislation, this is referred to as the risk of collusion (in Swedish, "kollusionsfara") (ibid: 796); cases where the suspect might interfere with or obstruct the investigation (ibid: 197). It is in the hands of the court to permit restrictions, but only after the prosecutor explicitly request it (ibid: 797). However, the restrictions may only be used if they are proportionate to their purpose, and should be maintained no longer than necessary. The benchmark is that as few of the detainees as possible should have restrictions, and negative consequences due to being cut off from the outside world shall be antagonized (ibid: 795). The restrictions do not necessarily mean that the individual is completely cut off from contacts with the outside world, and the prosecutor can agree to relieve them under certain circumstances, as in the case with special visits (ibid: 796). However the suspect has always right to private contact with his or hers lawyer, and their correspondence cannot be subjected to any surveillance (Wennberg 2011:100).

Nonetheless, the restrictions do result in isolation, which is very hard on the individual, especially if they are detained for longer periods of time. In theory, the individual has opportunities to legally try their restrictions (SOU 2006:17, s. 127) but in practice this can appear fruitless. The prosecutor and the judge tend to be the same that participated in the first hearing and the decision cannot be appealed to a higher court (SOU 2006:17, s. 128). However this was sought to be amended through the Act on Detention (SFS 2010:611), and this right is now set out in the 6<sup>th</sup> chapter, 4<sup>th</sup> paragraph. When someone is subjected to pre-trial detention the general principle is that he or she shall be prosecuted within two weeks

after the decision, but the court can decide to prolong this time (Lindberg 2012:109). Some are held for weeks and some for months; there is no limit to how long someone can be detained (Wennberg 2011:100).

## 2.2 (The lack of) Statistical data

Examining statistical data and viewing annual changes in the proportion of detainees with restrictions, along with the length of restrictions and detention overall, could have been very helpful in order to monitor the development of the Swedish pre-trial detention practices. However sufficient statistical data could not be found. The length of restrictions and detention overall is only available for the years 2010 – 2014, and the proportion of detainees with restrictions is only available for the years 2008 – 2014 (in the annual reports from the Swedish Prosecution Authority). Through contact with authorities such as the Prosecution Authority, the Prison and Probation Service, and the National Council for Crime Prevention, I found that earlier statistics did not exist, or were only used within the authority. Adding to this, there was a change in registration within the Prosecution Authority in 2012, meaning that the statistics from before and after 2012 are not completely comparable (Åklagarmyndigheten 2013:38). This is problematic since a quantitative mapping of the pre-trial detention practices could be very useful for grasping the extent of the practices, and therefore understand the criticism better. Not having reliable statistics could thus be seen as another issue for the Swedish pre-trial detention practices, which has also been noted by the international torture committees (for example, CAT 2008:5).

## 2.3 International bodies of control

In times of legal pluralism due to globalization, the nation state has to give way to other legal sources to define the juridical order (Banakar 2015:28). Thus, the role of the national boundaries are less important since international law offers new points of reference (ibid: 27). This can particularly be seen when discussing human rights, since the United Nations and the Council of Europe are considered to be two of the most important bodies for securing such rights (Hydén 2011:31-32). However, it is the responsibility of every country to put the aims of international conventions and declarations into practice (ibid: 34). Once ratified the state needs to protect and promote the rights given (Schoultz 2014:32).

The Universal Declaration of Human Rights (UDHR) of 1948 was the starting point for the development of human rights (Hydén 2011:25). Not much later, the European Convention for Protection of Human Rights and Fundamental Freedoms came in 1950 and was ratified two years later by the Swedish state (Mänskliga rättigheter, n.d.). The purpose was mainly to create a minimum standard for human rights that cannot be exceeded by any European member state (Danelius 2012:51), so that individuals can have their rights protected against the state and its authorities (ibid: 53). The convention became a part of Swedish legislation in 1995 and no law or other rule can be made that conflicts with the responsibilities set out by the convention (ibid: 41). Thus, it has the same status and applicability as all Swedish laws (Lindberg 2012:13).

### 2.3.1 Legal ideals

The legal ideals of the present study are part of the human rights law, and particularly concern the attempts to prohibit torture and other cruel treatment or punishment, since this study will look into the criticism Sweden received from the torture committees of the United Nations and the Council of Europe. There are several other legal standards set out to protect prison inmates, but as a means of limitation the present study is only concerned with the notion of torture. This is regulated by Article 5 in the UDHR (United Nations n.d.), which has developed into a convention of its own; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It was formed in 1984 and ratified by Sweden in 1986 (Mänskliga rättigheter, n.d.). According to a handbook on pre-trial detention from the United Nations, this convention is nowadays a “norm of customary international law” (United Nations 1994:2). The following quote is their definition of torture:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. (Article 1:1) (United Nations 1)

The United Nations highlights the overall weak position of detainees, and states that “No country can claim a pre-trial detention system that could not be improved” (United Nations

1994:4-5). The guiding principle on how to treat detainees should always be the absence of torture or ill-treatment as a means of obtaining information. Thus any accusation of torture needs to be carefully investigated (ibid: 26).

When discussing the European convention, Article 3 concerns the prohibition of torture, and through case-law from the European court, the term “torture” can be further clarified (Danelius 2012:72-73). Among some examples, long-term solitary confinement may violate the rules of the convention (ibid: 80). The court has also made it clear that authorities are responsible for the protection of those detained and their well-being given that they are in a vulnerable position (Engbo & Scharff Smith 2012:97). The instance of torture, inhumane or degrading treatment or punishment cannot under any circumstances be exceeded (ibid: 91). Therefore, any treatment causing physical or psychological suffering may be a violation against Article 3 (ibid: 97). Accompanying this article is the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 1987, which was ratified the year after (Mänskliga rättigheter, n.d.). However, the convention is mostly concerned with the role of the torture committee, to which focus will now be shifted.

### 2.3.2 Torture committees

Monitoring the implementation of the UN torture convention is the Committee Against Torture (CAT). It is required that state parties submit reports on the implementation of rights every four years, which is followed by concerns and recommendations in the form of “concluding observations” made by the committee. CAT may also consider individual or inner-state complaints, and undertake inquiries of their own. Alongside CAT the Subcommittee on Prevention of Torture (SPT) exists that can visit places of detention and make recommendations on the implementation of rights (United Nations 2). The Council of Europe has a supervising committee similar to CAT, which aims to secure the prevention of torture and therefore highlights cases where treatment might not be in accordance with the convention. The committee is called the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and consists of experts from all across Europe (Scott & Flynn 183-184). The CPT visits places of detention and submits reports to the state concerned, including recommendations and comments on the implementation of the convention. The states are also requested to respond to the issues raised by the CPT (Council of Europe n.d.).

### 3. Previous research

In this chapter, the aim is to shed some light on different perspectives that can be important for a discussion about pre-trial detention. Firstly, the role of the state and its harmful acts will be highlighted, since a detention practice not in accordance with international human rights norms can be considered to be harmful. In the following sections, some existing research on Scandinavian conditions will be discussed along with a general notion on the consequences of being detained, before the focus turns to the role of individual detainees and their ‘right to rights’. Finally the role of legal professionals – in the present study, judges – will be highlighted to offer an understanding of their position and the decisions they make.

#### 3.1 Harmful acts by the state

A pre-trial detention practice that does not follow the international legal norms can violate human rights standards and thus be seen as a harmful act against individuals. This makes it interesting to discuss perspectives that focus on the role of the national state and its actions. The state has authority to define laws, which excuses state behavior from being labeled as criminal, and it has the monopoly of force to protect and implement such laws (Sharkansky 2000:36). Therefore attempts have been made to distinguish between behaviors and actions that may not be in violation with the domestic criminal law, but still amount to harmful acts. Among these, we find “unrecognized blameworthy harms”; harms characterized by not being strongly sanctioned since the harm is minimized or excused. This can be the case where the victims might be seen to deserve the harm, or where the harm is hidden (Agnew 2011:38). The power aspect of the state might also contribute to this, since the power allows the state to put certain interests above others, such as ‘national security’ over having humane criminal justice processes (Kauzlarich, Matthews & Miller 2002:183). Thus, Rothe et al. highlights the importance of studying all harms caused through actions of the state, regardless of the power being used by dictators or bureaucrats (Rothe et al. 2009:7). In spite of Sweden being a leading country for human rights, crimes against those rights can be committed here too. Limiting our analysis just because Sweden is prominent in the protection of human rights can lead to a less critical approach to the state’s respect for them (Silander 2011:80-81). Along similar lines, Schoultz included “routine failures and non-sensational issues” in the concept of state crime when researching the Swedish state, since it can further develop the understanding of state crimes although they might only cause limited harm (Schoultz 2014:51).

It has in the discourse on state crime been argued that scholars should use international law, which is already incorporated in the legislation of many nations in order to define what rights individuals have and how they may be violated (Agnew 2011:23). An example of this is Lomell in her discussion on human rights violations and the role of the state. She argues that the authorities are the potential offenders while individuals are the potential victims. In the case of human rights, individuals have rights but no duties, while the state and its authorities have duties but no rights (Lomell 2012:66). But when discussing the human rights and the state, it is also important to mention the role of globalization, and its impact on the nation state and the law. Since the state has a monopoly of force to create and enforce laws (Michaels 2013:297), territoriality has been an important characteristic since the laws can only be applied within state borders, and no other laws from another state can be used within its territory. However globalization challenges the state's sovereignty (ibid: 294) and lawmaking powers are nowadays also rooted in institutions such as the United Nations and the European Union (ibid: 297). By using a broader concept of crime, there is a possibility of capturing new insights and raise new research questions that can have implications for future policies (Agnew 2011:42). Furthermore they have been neglected by mainstream criminology, and the international human rights law has the advantage of conceptualizing a universally accepted definition of "harm and blameworthiness" (ibid: 43).

### 3.2 Pre-trial detention and restrictions

The Nordic countries are often described as penal exceptions, with low imprisonment rates and resistance to tougher policies – however, Nordic researchers have been less positive in their description of the penal climate (Dullum & Ugelvik 2012:1). When places like the Nordic countries are taken in their own terms, they might not be as idealized (ibid: 5). Scharff Smith writes that even though the Scandinavian countries have humane and rehabilitative penal policies, there exists an effective social control through disciplinary practices (Scharff Smith 2012:41). In particular, he states that the use of pre-trial solitary confinement is an example of "how originally humane intentions created a more or less inhuman prison practice" (ibid: 42). Concerning the usage of restrictions in a Swedish setting, Djukic explored the views and opinions of prosecutors in her essay. Her results showed that in general, the prosecutors viewed the ability to impose restrictions as a prerequisite for successful investigations, the consequences of not using them could be disastrous, and that the criticism from the CPT was unwarranted (Djukic 2012:3).

In an attempt to understand the practices of solitary confinement and why “Scandinavians continue to employ a practice which is documented to be detrimental to prisoners’ health”, (Scharff Smith 2012:51) researchers have highlighted different areas of interest. Scharff Smith describes the breakthrough of the Pennsylvania prison model in Scandinavia, which created a system where solitary confinement systematically could be used (ibid: 52-53). He also emphasizes the “tough on crime” wave that influences penal policies internationally (ibid: 53) and states that in Denmark, one of the effects has been that the rights of the detained individuals are less of a priority nowadays (ibid: 46). Barker on the other hand writes that the use of restriction and isolation is not simply due to increasing levels of punitiveness, but that practices of Nordic countries are “mild and harsh simultaneously” (Barker 2012:7). Despite having a strong welfare state to guarantee the individual’s autonomy and material standards, individual’s human rights have a weak legal position against the state (ibid: 11). Furthering this line of reasoning is Hydén, writing that the human rights cannot be claimed by individuals toward authorities unless they are specifically outlined in law. He describes this as being “like giving someone something – in this case rights – with one hand, and then immediately taking these rights away with the other hand” (Hydén 2011:49, my translation). The state therefore has the power to determine when individuals’ rights can be limited out of consideration for a public good (Barker 2012:11). But she also points out that “The pattern of human rights violations does not necessarily discount the relative leniency of the Swedish penal order, but there exists a duality”, and that the restrictions on human rights are not meant to degrade the individual but is used as a mechanism of control and discipline (ibid: 19).

With regards to the harms and consequences that may follow a detention, the Centre for Crime and Justice Studies published an overview on how the detention might affect the detainees in general. The charity states that it is a “draconian ruling for a court to make” since the detainees are at risk of losing their jobs and homes, and can suffer physical and psychological damage (Schönteich 2013:19). They also highlight the wider social context of pretrial detention; since the criminal justice system is more likely to deal with individuals living under tough economic conditions, the practices of detention disproportionately affect the poor (ibid). Furthermore, the notion of isolation in particular has been prominent when discussing Scandinavian pre-trial detention conditions. Isolation has been defined as individuals being physically isolated for twenty-two to twenty-four hours a day. It is the most excessive sanction, apart from the death penalty, used by liberal democratic states in times of peace. The stimuli available for those individuals are described as often being monotonous

and not freely chosen (Engbo & Scharff Smith 2012:121). The most harmful aspect of isolation is therefore the lack of meaningful social contact with others (ibid: 146), and the latent effects of the isolation can be that the individual feels pressured to confess a crime, regardless of their actual guilt (ibid: 124). Furthermore, studies have documented the effects of isolation and some of the mentioned consequences are concentration difficulties, anxiety and depression, hallucinations, suicidal thoughts and self-harm. In a Danish study it was shown how individuals in solitary confinement were twenty times more likely of being admitted to a hospital due to psychiatric reasons, compared to someone who was not in solitary confinement (ibid: 128). In relation to the background section and the legal ideals; in over-viewing some of the international laws concerning isolation and the human rights, Engbo and Scharff Smith finds that the torture committees from the UN and the Council of Europe are both critical to the use of isolation (ibid). The UN Human Rights Committee states that solitary confinement is only justifiable under exceptional circumstances, and then only for limited periods of time, otherwise the practice can be inconsistent with international law. According the European Court of Human Rights solitary confinement cannot be prohibited all together, but prolonged detentions are undesirable (ibid: 130).

### 3.3 State crime victimization

Despite the progress in the study of harms caused by the state and its agents, the field has not been given enough attention (Kauzlarich, Matthews & Miller 2002:174), with victimological aspects being studied the least (ibid: 175). When actions of the state are labeled as unlawful, it also shows who should be seen as the victims (Schoultz 2014:25). However, these individuals may not get the legitimate status as victims. In a summary of the research about victimology of state crime, it is shown how the victims are some of the least socially powerful individuals, while the victimizers (i.e. the state and its agencies) often fail to recognize the suffering the institutional practices caused (Kauzlarich, Matthews & Miller 2002:183-185). Furthermore, there tends to be a degree of victim blaming because, in the case of prisoners or suspects, individuals are marginalized given their status as offenders. Nevertheless the victims have to rely on their victimizers for amends (ibid: 186).

Lomell uses Christie's framework of ideal victims and offenders in the context of human rights violations. She describes the not-so-ideal victims of such violations, i.e. victims characterized by being big and strong, not having a respectable occupation when the crime is committed, and being able to defend themselves (Lomell 2012:65). The most important

function of the human rights is to secure the fair and worthy treatment of those who cannot get this through respect, sympathy, or empathy from others. Therefore, it is the ones we categorize as potential offenders that need their human rights protected, so that their right of being seen as fellow human beings is not being taken away (ibid: 73). In the same spirit as Lomell, Hudson also describes the development of human rights, and suggests that in our risk society the rights are no longer universal to all just because we are all human. Rather, the rights have to be earned through acting responsible. Thus, there is no solid foundation for offenders' rights, since committing a crime is not perceived as being responsible (Hudson 2003:189). Her chapter concludes with the notion that human rights are for all humans, even the most dangerous (ibid: 190).

### 3.4 The role of the judges

Scandinavian legal culture in general, and Swedish in particular, has overlooked the role of judges, and instead the discussion has been focused upon the institutions, i.e. the courts (Ställvik 2009:63). But while all members of a society are legal subjects, the legal professionals are the ones involved in law by their occupation (Deflem 2008:182). They are experts of law and therefore play a central part in securing social integration and in regulating behavior (ibid: 181). Hence the legal profession has a power aspect to it, and law is a way for states to express norms and values (Hammerslev 2012:325). In Scandinavian research a typical way of understanding the law is to view it as being derived from, and at the same time exercising, power (Ställvik 2009:57). Judges in particular have control over the state's deployment of power, if their decisions are influencing other state organizations (Reeves 2010:163). Thus, according to Reeves, judges should be concerned with the legitimacy of their decisions, since they are in fact deploying power (ibid: 164). In his in-depth interviews with Swedish judges, Ställvik noted how most participants considered themselves to be representatives of the state (Ställvik 2009:218) and showed loyalty toward the written law (ibid: 230). In discussing the judges' decision-making he also suggests that they are socially controlled through their very profession, and that their acts are the result of intertwined factors such as education, professional values, and experience (ibid: 62).

Social research has not really been considered relevant for the field of jurisprudence, and sociology of law in particular has been considered having a radical agenda and thus been regarded with suspicion (ibid: 55). However the adjudication process cannot be mechanical and only directed by the sources of law (ibid: 49), even though jurists tend to view their own

role as unproblematic. But through the law different values are conveyed, and exercising the law can have substantial consequences for the individual at the receiving end (ibid: 50). Therefore the challenge for sociology of law when researching the legal profession might be legal professionals' "aspiration to maintain occupational autonomy" (Deflem 2008:182). So interestingly, when asking about their career choice, the participants in Ställvik's previously mentioned study said having an autonomous position where they could use their professional judgment was one of the things that tempted them (Ställvik 2009:209-210).

#### 4. Methods

To answer the questions set out in the introductory part of this study two qualitative methods were used; semi-structured interviews and textual content analysis. They were chosen in order to understand the interplay between law in theory and law in practice at an international and a domestic level. The methods are both of qualitative nature, and aimed at the study of few components resulting in many perspectives (Ryen 2004:29). Thus the social world is understood through the eyes of those studied, so the researcher needs to interpret values or behaviors as derived from a certain context (Bryman 2011:361-363). Furthermore, qualitative research usually holds a constructivist standpoint meaning that social practice is a result of interaction between individuals (Björkqvall 2012:341). The social world is therefore ever changing due to different constructions by the individuals living in it (Bryman 2011:41).

The first descriptive research question (what themes can be found in the criticism) will be answered by using content analysis, and the second question (how do judges describe their decision-making) will be answered through analyzing interview data. Thus the methods provide primary and secondary textual material that will be discussed in the light of theoretical standpoints and previous research later on. The methodological process started with the development of initial codes of the reports, in order to gain knowledge and to be prepared for the interviews. Whilst conducting the interviews, the reports were further categorized, and therefore the first method helped steering the direction of the second. After transcribing the interviews the raw data was also subjected to content analysis to find important codes and categories, hence the two methods were closely intertwined and worked with on a parallel basis.

## 4.1 Content analysis

The content analysis is designed inductively meaning that the categories are derived from the actual data (Hsieh & Shannon 2005:1279), and therefore tends to place focus on the hermeneutic perspective which is sensitive to contexts (Bryman 2011:507) in line with the constructivist standpoint described above. The aim of a content analysis is to provide an understanding of phenomena by examining the content and meaning of the given texts (Hsieh & Shannon 2005:1278). But since the information comes directly from actual data, the risk is that the researcher does not fully understand the context, and the categories identified might not represent the data (ibid: 1280). This risk is touched upon in the oncoming section concerning the quality of data.

### 4.1.1 Sample

To ensure quality of the analysis, the documents should be chosen carefully (Bergström & Boréus 2012:43). In the present study available reports from the previously mentioned torture committees – the United Nation’s CAT and the Council of Europe’s CPT – are the objects of study. Since the committees are set out to monitor the implementation of torture conventions, they provide a frame of reference on how to interpret the international legal standards and highlight cases where states do not fulfill their responsibilities. This sample also helps the study to avoid a “methodological nationalism”, since the state is not the source of legal authority within these documents (Banakar 2015:27). The focus for the textual analysis will be to understand the meaning of the text through the perspective of the senders (Bergström & Boréus 2012:32). However researchers should also have a critical perspective on the senders and their intentions (ibid:43). In this case, the committees are in a power position since they define what behavior does not live up to the intentions of the law. This surely allows the committees to have a particularly critical eye, but my impression is not that it is in their interest to exaggerate or in other ways distort their findings. But also regarding the quality of the documents, Scott and Flynn refers to the CPT reports as important but very similar since the writes rely on a “cut and paste” approach (Scott & Flynn 2014:184). This was noted during the coding of the material and allowed large sections of text to be summarized in a few sentences, since many of the reports at time stated the exactly same thing.

In total, seven reports were studied between the years of 1992 and 2014. Only two of these were from CAT since their earlier reports did not concern pre-trial detention practices, meaning that they were left out. The reports found at the official websites of the committees

(see links in the list of references in the back), and were not chosen in any particular manner apart from being from the committees and concerning pre-trial detention. The reports from CAT were read all in all, since they were only 16 pages in total. However the reports from CPT amounted to 338 pages, which did not all concern pre-trial detention. In each report, there is a chapter aimed at describing prison conditions, among which remand prisons are discussed. These chapters were about 80 pages all in all. The secondary textual data is therefore much more extensive than the interview data in terms of the number of pages, since it amounts to about 96 pages.

#### 4.1.2 Process

The success and trustworthiness is to a large extent depending on the process of coding and the development of such a scheme. As previously stated, by using this method the codes will be derived from the data (Hsieh & Shannon 2005:1285-1286), and the following process is in accordance with the steps suggested by Hsieh and Shannon. Their approach starts by highlighting words that seem to capture key concepts, and goes on to developing codes that can reflect more than one key concept, which becomes the coding scheme. Codes that resemble each other are sorted into categories (Hsieh & Shannon 2005:1279). The content analysis in the present study therefore started with a more detailed coding close to the wording of the documents, and then sorted the codes into different categories since they implied similar themes or phenomena. The codes used in the present study are however a bit broader than one might expect, since otherwise they would be too many to explore in detail due to the extensive material overall. As an example of the process, some of the initial codes were 'proportion', 'proportionality' and 'requests' which all describe key concepts in the documents. They were later sorted into a category labeled 'imposition of restrictions', since the codes were all concerned with the proportion of inmates with restrictions, the proportionality of the imposition, and the requests for restrictions in court.

## 4.2 Semi-structured interviews

The qualitative interview focuses on the experiences and opinions of the interviewee, and highlights aspects that they find important (Bryman 2011:413). Since the interviews are semi-structured the researcher uses a guide with different themes for discussion, giving the interview some direction whilst still remaining in-depth and flexible (ibid: 415). Qualitative interviews have been criticized due to their subjectivity and that their result cannot be generalized (ibid: 370). However, the aim of the study is not to generalize, but to offer

subjective insights into the reasoning of legal professionals. The statements of the participants are connected to the context in which they are created, thus the knowledge from one situation cannot automatically be transferred to another (Kvale & Brinkmann 2009:71).

#### 4.2.1 Sample

The sample consists of judges in Swedish courts since they are the ones deciding whether or not a criminal suspect should be detained. They also give a general permission to impose restrictions on the suspect. Their position can be linked to the powerful position of elites, i.e. leaders or experts within certain fields (Kvale & Brinkmann 2009:163). This is also supported by Hammerslev, writing that Western states were constructed around the law and the legal experts therefore became “elite agents with state expertise” (Hammerslev 2012:67, my translation). Interviewing elites can be difficult since they are used to get questions about their opinions and therefore might have prepared answers, which the interviewer tries to avoid (Kvale & Brinkmann 2009:163). All in all, six judges participated in the study. Their motives for participating, since they are a powerful group in society, might be to promote a specific idea or understanding, or to respond to some of the criticism, which I as an interviewer needed to keep in mind while conducting the interviews and the oncoming analysis. The participants were found by contacting several district courts across Sweden, and in some cases, e-mail addresses to judges could be found on websites and they could therefore be contacted directly. The only request was that the participants would be judges and having experience from pre-trial detention hearings. The sample is limited to two large areas of southern Sweden, and the accounts might therefore differ if compared to courts in, for example, Stockholm or northern Sweden. Hence this is one of the limitations with this study, although qualitative research is not concerned with being statistically representative (Bryman 2001:495). Not having the entire sample from one district also helps the confidentiality of the participants.

#### 4.2.2 Process

An interview guide was used (appendix 1, in Swedish) during the interview. The guide cannot be too specific since focus is still on the interpretation of the actor, but it is a help for the researcher to get the information needed to answer the research questions (Bryman 2011:419). Having theoretical knowledge is a way of creating meaning when conducting interviews (Kvale & Brinkmann 2009:103), hence the chapters concerning background and previous research was already written when the interviews were conducted. As noted previously I

finished the coding process for the secondary textual data (the reports) which helped me knowing what themes or subjects could be used during the interview to get different perspectives whilst still having a clear focus on the criticism of pre-trial detention practices. However, I tried not to depend too much on my interview guide. Rather, a variety of questions such as follow-up and probing questions were used to highlight the experiences of the participant (Bryman 2011:423). Although the judges highlighted similar things during the interviews, the discussions were very different, with some giving very long and explicit answers, and some simply responding with one or two sentences.

One of the interviews was conducted over the phone. There are certain aspects about conducting interviews this way that needs to be addressed; the researcher cannot see and interpret body language, and the distance makes it easier for the participant to end the interview earlier making it shorter than an interview conducted face to face (Bryman 2011:433). Nevertheless this approach also has benefits, such as a variety in participants and flexibility since the individual could decide the time and I could call from my home, rather than travel to them. The other interviews were conducted face to face, in locations of their own choosing, which in all cases were their own offices or other places within the court. All interviews were recorded, and later on transcribed, to capture the details in the participants answers (ibid:420). The interviews were between 35 and 60 minutes long, and the transcripts amounted to around 38 pages in total.

In qualitative interviews knowledge is socially created between the interviewer and the participant. The knowledge is therefore inter-subjective and created through questions and answers (Kvale & Brinkmann 2009:70). Hence the interviewer's skill and knowledge is essential for the quality of data (ibid: 98). This is particularly the case when interviewing elites, i.e. those with powerful and leading positions; showing knowledge about the subject is a way of gaining respect and thus some symmetry in the relationship between the interviewer and participant (ibid: 163). This was noticed during the interviews; at times, the relationship was quite asymmetrical in regards of power and respect. The more I portrayed my knowledge by using technical terms, the more openly they discussed. Sometimes during the interviews – not in all of them, and not all of the time – the judges were a bit 'closed off' and it could be difficult for them to explore the social aspects of their work, and not only the strictly legalistic ones. However, there is no such thing as ideal participants – even though some appear to be

more accommodative, those less complaisant might still offer strong images of their situation (ibid: 181).

When transcribed, the interviews were analyzed by using a qualitative content analysis in a similar manner as mentioned earlier; developing codes from highlighting words that seemed to describe key thoughts, and allowing codes to be sorted into categories (Hsieh & Shannon 2005:1279). This was more challenging than the process of coding the secondary data since many of the prominent thoughts among the judges' accounts blended together, and overall described similar things. Therefore the initial codes were quite broad, such as 'individual conditions' and 'responses to criticism'. However when all the transcripts were coded, it was easier to get a better overlook of the material and sort codes into three categories – or themes, as they will be called in the analysis. One example is that the 'responses to criticism' became part of the theme regarding 'legislative changes', but all themes will be discussed in detail further in the analysis. However, there were of course also individual variations and descriptions that stood out in the accounts. It thus becomes clear that the strength of a qualitative approach is the ability to highlight individual cases and deviations, since it is less concerned with being representative or generalizable (Bryman 2001:495). The analysis also contains a number of quotations to illustrate the juridical accounts, to offer further insight and understanding in the interviews. However in some cases the quotations needed to be modified to protect the anonymity of the judges, since some of them referred to specific locations, cases, or similar things that could possibly have given their identity away. The quotations were also slightly modified in some cases to make them more comprehensible, so that they would be easier to read and understand without altering their original meaning.

#### 4.2.3 Ethical considerations

The basic ethical principles to follow when conducting interviews is information (the participants know of the purpose with the study) (Bryman 2011:131), consent (to participation), confidentiality (that information about the participants is confidential), and that the gathered data is only used for the purpose of the study (ibid:132). These theoretical principles were conceptualized in an information sheet that was sent to the participants via e-mail, and in some cases handed to them directly during the interviews (appendix 2, in Swedish). The information sheet also contained my phone number and e-mail address, and encouraged participants to contact me if they no longer wanted to participate, or if they had further questions about the study and the interview. Apart from this they were also informed

in the beginning of every interview about the study and the ethical principles, and in all cases we had an open discussion both before and after the interviews about the study and their participation.

### 4.3 Notes on the quality of data

Researchers from a constructivist standpoint have criticized the criteria validity and reliability in relation to qualitative interviews, suggesting that since there is no objective reality “out there” it is not possible to gain direct knowledge about it. Different individuals can provide different constructions of reality (Ryen 2004:137). Lincoln & Guba support this by stating that there exist more than one descriptions of the social world, and suggest that other terms instead of reliability and validity could be used in contexts of qualitative research: trustworthiness and authenticity (Bryman 2011:353-354). The interviews have been used in the aim of offering a fair picture of the social world as described by the participants (ibid: 355; 357). With regards to this criterion, the study is using both quotations and more descriptive sections in the analysis to highlight both recurring themes and individual variations, and allowing all judges to be part of the analysis and not only those who were most compliant or gave the most ‘interesting’ accounts during the interview (ibid: 357).

To ensure transparency in this study, some of the identified categories derived from coding textual material were included as examples of the process (see 5.1.2 and 5.2.2). Furthermore, in the analysis, the question was often included when using quotations suggesting it would help the reader understand the interviewer’s (i.e. my) role, and to give further insight in the social context of the interview (which is in line with the constructionist standpoint made previously in this chapter). However a challenge has been the translation of quotations, since the interviews were conducted and transcribed in Swedish. When the quotations were chosen, they were translated on different occasions to discover any potential discrepancies in the translating process before they were used for the analysis. To help with the dependability of a study, it is preferable to have a colleague to audit the research process overall (Bryman 2011:355) which in this case has been my supervisor.

Before conducting the analysis, a few words should be said about the results gathered from the empirical data. The material from the torture committees was very extensive, and highlighted many different aspects concerning the pre-trial detention practices. In order to make it manageable to analyze, and overall to make the analysis coherent, the derived

categories were synchronized with the material from the interviews. This means that not *all* aspects from the reports could be included but had to be limited, and in the same manner, not everything that the judges said during the interviews could make it into the analysis.

## 5. Theoretical framework

The present study will utilize Bourdieusian concepts as analytical tools, in order to understand the international committees and the domestic judges as agents in a legal field, struggling for the right to define the legal norms concerning pre-trial detention practices. The focus is placed on the judge's position by commenting their habitus, since this study is concerned with the legal practices in particular. It is also suggested that the pre-trial detention practices overall can be understood by examining the field of state power and its influence. However, to further highlight the individual accounts, the present study will also make use of Cohen's framework on neutralizing techniques. This will hopefully work as a way of further shedding light on the legal practice and the reasoning of the individual judges.

### 5.1 Pierre Bourdieu

In "The Force of Law", Bourdieu suggests a way of sociologically analyzing the law (Dezalay & Madsen 2013:111) since the law is "not by nature and by theoretical definition independent of other social realms and practices as the formalists claim. Instead, it is closely tied to these" (Bourdieu 1987:808). In the article, Bourdieu is concerned with how the law is constructed, which in part is through the competition between legal agents, and how law can be seen as a discourse of power contributing to state legitimacy. Thus, "The Force of Law" has influenced sociology of law by linking Bourdieusian concepts to, for example, the power of law and legal culture (Dezalay & Madsen 2012:435). This section will offer a general notion on some of Bourdieu's sociological tools.

#### 5.1.1 The Field

A social field is described as a system of relationships between positions, hold by specialized agents and institutions (Engdahl & Larsson 2011:243). If the agents and institutions want to participate in the activity in the field (such as doing politics in the political field), they have to follow a set of rules and norms that are specific to that field (ibid: 244). The more independent the field is, the more it operates according to a logic of its own (ibid: 243). Such autonomous and well-established fields are part of a larger societal power field (ibid: 250).

The elite groups in society, such as legal professionals representing interests of the state, are found in the power field (ibid: 251). These interactions and relations between fields are possible since fields do not have fixed boundaries (Dezalay & Madsen 2012:441).

The agents in the field share a common interest; they all want the right to define what constitutes as the struggle in a field (Engdahl & Larsson 2011:247-248), which can be very different depending on what field we are looking at (ibid: 245). This struggle intensifies when new agents enter the field; the already established ones try to defend their positions whilst new agents try to create positions of their own. This leads to a development of the field, but although it evolves it still maintains its fundamental structure (ibid: 248-249).

### 5.1.2 Capital

To be able to participate in activities on the field, the agents need capital (Engdahl & Larsson 2011:244). Their positions in the field are dependent on their accumulated capital, and the mentioned struggle between agents is for them a way to gain more dominant positions (Dezalay & Madsen 2012:441). There are different types of capital, such as economic, cultural, and social capital (Engdahl & Larsson 2011:244). The present study however is not a study of capital, but the analysis will briefly highlight the notion of a symbolic capital. This capital can be any property, which is recognized as valuable by other agents in the field (Bourdieu 1994:8). There also exist types of capital that are specific to a particular field, such as having a trust capital in the political field, concerning politicians ability to maintain their public support (Engdahl & Larsson 2011:245). Thus, the notion of a specific juridical capital as suggested by Dezalay and Madsen (2012:438) will be also be touched upon and discussed in the analysis in relation to the habitus.

### 5.1.3 Habitus

Habitus is described as being “internalized schemes guiding agents’ behavior” (Dezalay & Madsen 2012:442). It is the system of dispositions making individuals orienting themselves in specific ways (Engdahl & Larsson 2011:39). Our habitus can make it easier – or more difficult – for us to obtain certain positions in a field, since it generates strategies that can be used in that particular field (ibid: 246). The behaviors and practices in the juridical field are guided by the agents’ habitus, and can therefore influence how the law will be used in different cases (Bourdieu 1987:807). However, each field “has a different logic and taken-for-granted structure of necessity and relevance which is both the product and producer of the habitus” (Jenkins 1992:84). The notion of the habitus therefore allows for an understanding of

the interplay between field and agent, which is known as the action/structure approach aimed at the relationship between society and the individual (Banakar & Travers 2013:6). This is also an explanation to why the analysis is not strictly focused on a micro perspective but also allows for discussions on other levels, since the relationship between the agent and field is constantly present in this study.

## 5.2 Stanley Cohen

Through his work, Cohen highlights the way actors engage in neutralizing techniques when being accused or confronted with human rights violations. When there is a gap between the thought expectations and the actions taken to fulfill them, actors have routinized accounts to draw upon (Schoultz 2013:221). Hence, the outline for this theory fits well with the purpose of this study, which is concerned with the gap between legal expectations and actions. Cohen draws on the neutralization techniques originally proposed by Sykes and Matza: denial of injury, denial of responsibility, denial of the victim, condemnation of the condemners, and appeals to higher loyalties (Schoultz 2014:41). Denying injury is a way of allowing that something has happened, but the actor either minimizes or disregards the consequences of the acts or behavior (Cohen 1996:526). Sometimes the actors instead acknowledge that something happened but that they are not directly responsible for it, hence denying responsibility (ibid: 528). The denial of responsibility is the master account for political actors (Cohen 2001:61) who implement rather than create policies, and thus refer to their obedience to an authority (ibid: 89-89). By denying the victim the blame is placed on the individual in the sense that they got what they deserved (Cohen 1996:531-532). By condemning the condemners the actors imply denial to the allegations through attacking the observer, for example, by viewing human rights organizations as biased (ibid: 524). Appealing to higher loyalties is present when other values are described taking precedence over others (ibid: 230).

However since it is not a question of violent or gross human rights violations in the present study, there is also the notion of acknowledgements, most common for countries with “a democratic image to maintain” (Cohen 2001:113). These accounts include spatial isolation, where actors agree that something has happened but it was an isolated incident; temporal containment, when actors acknowledged that something used to happen but it is not happening anymore; and finally self-correction, where actors show awareness that there is a problem and that they are trying their best to deal with it (ibid: 537).

### 5.3 An integrated approach

The present study suggests that by integrating Cohen's theory in this otherwise Bourdieusian framework, it will add more depth to the individual accounts and help understand the analytical concepts developed by Bourdieu. On one hand, the neutralization techniques can be understood in relation to the field as suggested by Schoultz, i.e. as a means for agents in the struggle to gain legitimacy, and thus a stronger position on the field when accused of crime (Schoultz 2014:42-43). However, in this study it is also suggested that the neutralization techniques could be used when aiming to understand the habitus of the agents in the field, so on the other hand, the techniques can be complementing the concept of habitus as well. Bourdieu has described habitus as "patterned ways of understanding, judging, and acting" derived from our positions in the field, which have been influenced by conditions such as profession (Bourdieu 1987:811). Habitus has also been described as agents' internalized schemes (Dezalay & Madsen 2012:442). In a not too different manner, Cohen suggests that the "study of denial is the study of giving and receiving accounts" which applicability vary between social contexts (Cohen 2001:63). Through socialization agents' learn which motives that can be accepted for specific actions (ibid: 59). The present study therefore suggests that the neutralization techniques might be seen as a practice stemming from and influencing the habitus. Furthermore, the habitus do not only guide the practices in the field, but it also a product of the field itself (Jenkins 1992:84), meaning that the relationship between the field and habitus can be seen as dialectical. The neutralization techniques can thus also been seen as dialectical, in the sense that they are a product of the field (because the activities in the field might require neutralization) as well as reproducing the field (if the activities in the field were not neutralized, they might not be happening). The accounts of denial and neutralization should therefore be seen as complements to Bourdieusian concepts, to further understand the dynamics of the struggle in the field and the habitus. This integration between theories and concepts will be commented upon during the analysis to aid the reader in the understanding of the theoretical approach chosen, and to offer a fuller understanding of the gathered empirical data.

### 5.4 The theoretical limitations

The Bourdieusian concepts might appear to be slightly abstract and lacking conceptual clarity. According to Järvinen, Bourdieu wishes to distance himself from structuralism and instead describe a reciprocal effect between structure and agency, but this makes it difficult to talk

about how a structure was created in the first place (Järvinen 2007: 276). Furthermore, Bourdieu does not highlight any chances of transformation of social fields, and therefore has a tendency of understanding agents as forced into such fields (ibid: 277). However the notion of the field is not a concept set in stone but should instead be used as a thinking tool and thus needs to be placed within the empirical context (Schoultz 2014:39). This study therefore suggests in similar lines that although the theoretical concepts developed by Bourdieu might seem a bit abstract or difficult, they will be clearer throughout the analysis when using them as tools for understanding the empirical data. With regards to the integrated approach, it should be noted that Cohen does not situate his own work in any Bourdieusian terms. But as described earlier, it is in the present study suggested that Cohen's theory can work as a complement to Bourdieu, although Cohen does not have the concepts of field and habitus as his theoretical vantage point.

## 6. Results and analysis

As described in the methodological chapter, the main categories from the torture committees' reports were used as inspiration for the interview guide, and at times during the interviews the criticism was used as a vantage point for discussion. This was a way of making it easier to focus the interviews without steering the participants in specific directions. However for the analysis, the focus is shifted and instead the main themes developed from the interviews are used as a frame. The two-folded empirical data are both of qualitative nature but still stem from different materials, and thus describing the same phenomenon but in different ways and highlighting different aspects. To place analytical focus upon the legal practice and the reasoning behind it the analysis will be structured through the interview data, and the main categories from the torture committees will be used overall in this chapter. This way, the analysis answers the first research question a bit more fluently throughout the analysis while it answers the second one in a more structured sense by using the juridical accounts to divide the analysis into sections. The final research question – how the pre-trial detention practices can be understood through a Bourdieusian framework – will penetrate the analysis as a whole.

The main themes in the criticism concerned the imposition of restrictions on detainees, limiting their contact with the outside world and other inmates. Furthering these lines, the length of restrictions has also been continuously criticized since having full restrictions can amount to placing individuals in solitary confinement. Finally, the effects of restrictions

among detainees have been highlighted since the committees noticed signs of psychological harm within remand establishments. As previously explained, this criticism will be discussed in detail throughout this chapter whilst the recurring themes in the interview data will structure the analysis. There were three recurring themes in the transcriptions from the interviews; firstly, it was noted how the judges described themselves as not being in a position with lots of discretionary power. Secondly, the accounts suggested that individual conditions had to be down-prioritized in the legal hearings. Finally, the last theme showed that if other pre-trial detention practices are wanted, there might be a need for legislative changes. In an attempt to make the analysis as comprehensible as possible, each of the themes will be analyzed by highlighting specific Bourdieusian concepts on each theme (for example, the experienced lack of discretionary power will be understood through the notion of the field, and so forth).

## 6.1 The legal ideals and the reality of practice

In the introducing part of this study it was described how it would examine the interplay between ideals of international human rights law, and the reality of domestic practices. By doing so, the study might offer some insights in the possible discrepancy between the two. The legal ideals were described earlier and can be summarized by the notion that no one should be subjected to cruel, inhuman or degrading treatment or punishment. With regards to the European convention, it has been suggested that any treatment that may cause suffering – psychological or physical – could be violating the ideals (Engbo & Scharff Smith 2012:93). By highlighting the Swedish practices in the reports, the torture committees notice cases where the legal ideals are not fully implemented. This discrepancy due to the shortcomings in domestic practice can, in Bourdieusian terms, be understood as a struggle. If we imagine a national legal field, with its own structures and taken-for-granted logic, the committees' remarks and criticism can be understood as ways of rejecting the prevailing practices. The struggle is for the “monopoly of the right to determine the law” (Bourdieu 1987:817), and will be explored in detail in the following section.

## 6.2 The struggle in the legal field

A social field can be described as a system of relations between agents and their positions (Engdahl & Larsson 2011:243), and the legal field is a concept referring to a professional world with its own structures and characteristics (Bourdieu 1987:806). However we are all

inside the legal field since the law does not only form the lives of professionals but affects all of us (ibid: 811). When studying judges in order to gain understanding and insight in domestic practices, it should be noted that the present field is national; although the committees are international and thus represent international legal standards, they are entering a national field. The agents have different positions but are still in relation to each other because of the earlier mentioned struggle, which is specific to the field (Engdahl & Larsson 2011:247-248) and concerns the “right to determine the law” (Bourdieu 1987:817). The different positions depend on agents’ accumulated capital, allowing them to participate in the field (Dezalay & Madsen 2012:441). This is however not a study of capital, but it may be suggested that the agents have a symbolic capital, i.e. a symbolic wealth, which is any capital that is recognized as valuable in the field (Bourdieu 1994:8). This capital might have been accumulated through their authority, reputation, and knowledge due to their academic and professional backgrounds (see Bourdieu 1987:812). This is especially the case for the legal professionals since they have been described as being societal elites (Hammerslev 2012:67).

By drawing on the empirical data the struggle in the field is materialized in the way the committees criticize the domestic pre-trial detention practices, and in some cases direct criticism at judges directly. This can be understood as a way for the committees to gain more dominant positions in the legal field, in order to have more influence on determining what legal norms should be put into practice (i.e. ‘winning’ the struggle and determining the law). This can be shown through the following notions remarking on the imposition of restrictions in Swedish remand prisons, which was one of the themes in the documents. The proportion of inmates with restrictions has been an issue frequently discussed, since numbers throughout the reports have been fluctuating around 45 and 50 percent. In some years and in specific establishments they have been as high as 63 (CPT 2004:23) and even 70 percent (CPT 2009:25). This is one of the comments from the first time CPT visited Sweden back in 1991, where particularly the last sentence is of interest as it displays legal ideals in a concrete sense:

67. It is indisputable that the imposition of restrictions on contacts between a prisoner on remand and other persons will on occasion be necessary in the interests of the investigation. However, great care must be exercised in this area. The general principle of proportionality, widely applied in national legal systems and upheld by the European Commission and European Court of Human Rights, requires that a balance be struck between the requirements of the investigation and the imposition of restrictions, which is a step that can have very harmful consequences for the person concerned. *In the CPT’s view, the fact that a half of the remand prisoners at Stockholm Remand Prison were subject to restrictions at the time of*

*the delegation's visit is in itself prima-facie evidence that such restrictions are being applied too liberally.*  
(CPT 1992:28, my italics)

However the pattern in restrictions is described as being unchanged in the reports, with inmates being denied association with others and their contact with the outside world being subjected to censorship. In recent years CAT also expressed concern over the proportion of inmates with restrictions (2014:3). Both committees throughout their reports highlight that Sweden does not strike a proper balance between the requirements of an investigation and the imposition of restrictions, and that the latter should be seen as an exceptional measure rather than the rule. This is expressed in the following quotation:

9. The Committee appreciates the various measures taken by the State party to reduce pretrial detention periods. However, the Committee remains concerned at the absence of a maximum time limit for such detention and the minimal attention given to alternatives to such detention. [...] The State party should use pretrial detention as a measure of last resort, in particular for minors. In that regard, the State party should consider alternative measures to its use and ensure that the decisions imposing pretrial detention are based on objective criteria and supporting facts. (CAT 2014:3)

Overall, the committees have encouraged Sweden to take greater action in order to be in complete harmonization with the international human rights standards. Therefore the committees can be viewed as new agents entering the field, since other sources than the national legislation can define the juridical order in times of legal pluralism (see Banakar 2015:28). The struggle between new agents and already established ones are described as being the toughest, since the latter try to defend their position while the new agents reject the prevailing structures in order to create a position of their own (Engdahl & Larsson 2011:248). The rejection has been quite clear, but what about the defense? The committees direct most of their criticism at the Swedish state, and thus do not hold individual judges accountable for the shortcomings in the implementation of legal ideals. But if viewing the law as a way for states to express norms (Hammerslev 2012:67) when aiming to understand the practices in the legal field, focus can be put on the role of judges, since they exercise the law and thus its norms.

Well-established fields operate according to a specific logic (Engdahl & Larsson 2011:250), which is particularly the case when discussing the legal field where social practices are defined by the legal profession and the discipline of law (Bourdieu 1987:806). Therefore conflicts that enter the legal field can only be resolved through resorting to the rules of the field, which in this case is the law itself (ibid: 831). This suggests a way of understanding the

practices on the field, since the entering conflict – if someone should be detained and be given restrictions, or not – is solved through the application of legal prerequisites. It is therefore not surprising that on the subject of the proportion of inmates with restrictions, the transcriptions from the interviews showed very similar discussions: if there is a risk that someone will interfere with the investigation, they will get restrictions, as set out in law (see Lindberg 2012:796). The following section illustrate the juridical reasoning:

Interviewer (I): How often do you usually permit restrictions, I'm thinking... Like is it common or only in rare cases or...

Participant (P): No it's common, definitely common, because the risk of collusion is common and the restrictions often follow the possibility that... There's a natural connection you'll have to say, if you've gotten as far as having enough risk of collusion, so sure there's enough to permit restrictions (Judge K).

This practice though, as a reminder, was not seen as fulfilling the legal ideals, since restrictions according to the committees should be a last resort measure, hence the struggle. More particularly concerning the role of judges, and showing further rejection of the practices of the field, CPT noticed throughout its reports how judges rarely refused a request for restrictions in court. On one occasion, the requests were described as being “rubber-stamped by the court” (2004:26). The following quotation offer a notion on how such decisions can be explained, and further illustrates the logic of the field, stating that conflicts can only be solved through field-specific rules:

I: And you also try the proportionality when you announce restrictions, right, that you do the same... Because that's something Sweden's been criticized for, that we have a big proportion [of inmates] with restrictions, but is it then because it's difficult as a judge to deny restrictions in individual cases?

P: Yeah it is, because we don't have... I think a part of it is about the judge's role in different legal systems [...] And we don't really have any real insight, but instead the prosecutor is steering everything. And a prosecutor claiming there is risk that the suspect will mess with the investigation if they don't get restrictions, it's difficult to... As a judge you kind of got your hands tied (Judge D).

This, along with similar juridical accounts, appears to describe a situation where it can be difficult to avoid permitting the imposition of restrictions due to the legal norms (i.e. the rules in the legal field). Thus, it could be suggested that the accounts follow a light pattern of denying responsibility; something has happened, but they cannot be directly responsible for it

(Cohen 1996:528). There is also the notion of interplay here, since the conflict is solved through the rules of the field at the same time as the agents are participating in the activities on the field, hence contributing to their reproduction.

As mentioned earlier, the struggle between new and already established agents is the toughest since the new ones tries to create positions of their own while the established one defend theirs (Engdahl & Larsson 2011:248). The international bodies have already gained some legitimacy in the field since their conventions are ratified by the Swedish state, however the transcripts of the interviews show some tendencies of defense against the committees. This was particularly the case in the following quotations, where the judges were asked about their opinion on the criticism:

P: But who's coming with that criticism, you have to separate between criticism and criticism, because the one we got about taking too long [referring to other sources of critique on the length of detentions] is about the fact that we got sentenced for it and that we violated the international regulations.

I: Okay, yeah I'm looking at the reports from the torture committees, which I regard as being criticism...

P: Yeah and they're a bit... Slightly biased, I'd say... You have to see that everyone has their own role and if, if you're caring about something based on an idealistic purpose then... Then you're pursuing certain questions and there might not always be reason for that criticism. But I can still experience that there is some reason for it, because we do have too lengthy detentions (Judge O).

This quotation also illustrates the way the judge tried to neutralize the criticism by instead condemning the condemner, such as viewing the torture committees as being biased (Cohen 1996:524). However, as noted earlier, at the end of the quotation the judge does admit that there are some problems with the practices, but still seem to try and downplay the extent of it. The next quotation shows another judge taking a similar defensive stand:

P: I can't say I've taken part of it very much [the criticism from the committees]... So I don't really know what it says. What I've read in the newspapers, when it's about the Council of Europe, isn't more that they're kind of questioning and wondering if it's really necessary [the current practices], that it's more like questioning rather than directing any criticism... I don't know, you should know this, but I don't sit around and read what the Council of Europe writes about pre-trial detention, I don't (Judge L).

Furthermore, when asked if there are any issues with the pre-trial detention practices in general, Judge L quite simply said no, based on the judge's experience from that specific

court. This could be interpreted in terms of being a literal denial (Cohen 1996:523), however the judge bases the discussion on the realities of a specific court, and not as a larger problem. At one point in the interview though the judge discussed about lengthy periods of detention at other courts and said that it could be problematic, which could be interpreted as spatial isolation; a neutralizing technique acknowledging that something has in fact happened but it is not a pattern, only isolated incidents (ibid: 537). This could also be a way of maintaining dominance and legitimacy in the field, to remain in their established positions (Schoultz 2014:43). So to summarize; the torture committees – i.e. the new players – entered the legal field and reject some practices, such as the imposition of restrictions. The judges, as legal experts, describes a situation where their hands are tied due to the rules in the field and thus not being accountable for the practices, and in some cases appears to reject the criticism, maybe to maintain their own legitimacy in the field.

### 6.3 Habitus and the appropriation effect

When conducting the interviews and later on analyzing the transcripts, there were certain accounts among the legal professionals in the field that could be understood through the notion of habitus. Habitus is the “patterned ways of understanding, judging, and acting” derived from our positions in a field, which are dependent on conditions such as educational background and profession (Bourdieu 1987:811). The habitus is therefore appropriate to the particular field, since the relationship between the field and the habitus is of dialectical nature (Jenkins 1992:79). In the legal field, the agents’ habitus guides them into neutralizing intense realities by imposing distance (Bourdieu 1987:830). Such an internal mechanism of the legal field was expressed in the juridical accounts when discussing the impact of restrictions and isolation on the detainees, where social realities (such as psychological suffering) were downplayed in favor for the legal interpretation. This is suggested by the following quote from one of the judges when asked about whether or not they incorporate such individual aspects into the legal judgment (which was in line with what the other judges expressed):

P: Both, because on one hand we’re aware of it, we know what we’re doing, we know what happens, but at the same time it’s quite a... A legal judgment that has to be made so it’s a bit difficult to incorporate it into an individual case, if the prerequisites are met, if it’s someone suspected for a very serious crime and there’s people this individual can talk to or if we know that it’s not good if this person can see everything that’s written in the newspapers, because witnesses that will be interrogated later on could already have been contacted by the newspapers and they’ve written what they’re saying in high profile cases, then even

if you understand that it's not good for that individual's psychological well-being there are still legal reasons, and then it's difficult to not detain, and to not give that permission [for restrictions] (Judge G).

When understanding this in relation to the legal ideals, the notion of individual suffering is a prominent theme in the reports from the committees. This is particularly the case for CPT, who during their visit in 2009 noted the following:

(...) And the delegation gathered direct evidence of the damaging effects of isolation due to restrictions imposed on inmates. Significant periods of isolation induce disorientation in time, lack of concentration, memory disturbance, impaired communication skills, as well as various somatic ailments. Further, symptoms of anxiety disorder are commonly seen, post-traumatic stress disorder and depression develop, and there is agitation, self-harm and a risk of suicide. The younger the prisoners are, the worse the effects of restrictions can be on their health. (2009:26)

In general, both committees have however expressed serious concerns about the impact of restrictions since they can amount to placing the individual in solitary confinement. The legal ideals clearly state that torture, degrading or inhumane treatment cannot be accepted under any circumstances (Engbo & Scharff Smith 2012:91) and long-term solitary confinement can in special cases amount to a violation of the rules set out in the European convention (Danelius 2012:80). Although of course not responsible for such conditions, the judges (in line with the quotation above) described that it was difficult allowing possible consequences of permitting restrictions to influence the legal hearing. This can in Bourdieusian terms be understood as the appropriation effect; the way legal language creates a rhetoric of neutrality and universality, where chances for individual variations are slim and where normative statements seem neutral through the use of impersonal language (Madsen & Dezalay 2013:111). It could be suggested that such rhetoric help the judges to create a degree of distance towards the realities of what the imposition of restrictions might lead to. The power to turn social reality into legal reality means that judges have a specific juridical capital, which allows them to produce such distance (Dezalay & Madsen 2012:437-438). This can be illustrated by using a section from one of the interviews:

I: [...] That's something Sweden's heard quite a lot of, about prolonging detentions, and that it can lead to lengthy periods of detention for individuals...

P: Yeah it can definitely be lengthy detentions [...] there are investigations that necessarily take a lot of time and where it's not very difficult to see that a very sad effect is that there are lengthy deprivations of

liberty without a real trial but where the crimes are of such nature that it's no doubt that it is proportionate anyway (Judge K).

However, it is in the present study not argued that the appropriation effect is produced by the judges themselves and that their decisions are wrong (as previously noted, they are solving conflicts by following the rules of the legal field, i.e. the law). But it is rather a demonstration of how the structures in the legal field helps producing a habitus where the written law is dominant in guiding behaviors and practices. According to Bourdieu's own writings, the legal field often works as an "apparatus" (Bourdieu 1987:818) and the law produces its own fundamental foundation of norms while deducting those considered to be of less importance (ibid: 819). The habitus thus have close connections to the legal field, which also can be linked to the judges appealing to higher loyalties, another neutralizing technique suggested by Cohen. This means that some values are considered more important than others under certain circumstances (Cohen 1996:530), such as upholding state security (Schoultz 2014:222). Based on the interviews, it appears that the investigation and the severity of the crime are considered to be of greater importance in the judgments in the legal field. Thus in Bourdieusian terms, the judges contribute to a subtraction of lower ranked norms, which can be understood as being a part of their habitus.

So, the language used in the legal field reveals the appropriation effect and how it is inscribed in the operations in the field (Bourdieu 1987:819), and might therefore be rooted in their habitus, since habitus helps guiding agents' behavior on the field (see Engdahl & Larsson 2011:246). It is therefore suggested that an anecdotal reflection might go with the next quotation. When asked about the position of the detainee, the participant actually picked up the legal dictionary and started flipping through the pages until finding the specific sections containing the legal norms, and used them for guidance to answer the question. This might not be considered remarkable within the field, however the question was casually phrased and did not ask about the legal judgment per se, as the following section shows:

I: But you also discussed that you could take into consideration if the detainee might have started a program or an education, do you usually place weight at the position of the detainee?

P: Yeah but the principle of proportionality is to be based on his or hers... What does the law say, let's see [looking in the legal dictionary] A detention can only be made if the reasons for the measure outweigh the intrusion or injury the measure causes the suspect, so that's for the suspect, or any other

corresponding interest, and it... It can be about the kids or something like that. And then, then you take it into consideration and it can, if it's someone that's never been... Sentenced before and has a work to go to, a detention is... Quite a big injury. It's very intrusive, the entire subsistence falls apart [...] If you've started an education, or got a job... Or started rehabilitation against substance abuse there are quite strong reasons against detention that needs to be weighed against the reasons for detention (Judge O).

This quote displays the juridical discretion and what considerations might be done in relation to the detention practices, which can be seen as a partial acknowledgement, where the judge expressed awareness over the possible issues with pre-trial detention and described ways of trying to deal with it (Cohen 1996:537). Although the judges described the effects of the detention as being difficult to incorporate in their judgment based on the structures of the field and their habitus, there were also signs (for example in the previous quotation) of allowing pre-existing individual conditions to influence the decision-making. However, it should be noted that the discretion might have been used only because allowed so by the legal dictionary, which could support Bourdieu's idea of the legal field as an apparatus.

The notion of habitus is best understood through viewing national fields, since the structure of transnational fields might be different (Dezalay & Madsen 2012:442). When discussing the international legal ideals and what impact they might have on judgments (and in theoretical terms, what impact they might have in the field and the agents' habitus), the judges discussed in a similar manner. This is however not very strange since habitus helps reproducing groups making their individual habitus resemble each others (Bourdieu 1987:811-812). Overall, most agreed with the criticism and expressed that they found it problematic that individuals could be detained for lengthy periods (six months was a common frame of reference) with full restrictions. However when asked if the international conventions played any part in their decision-making, most stated that since they were incorporated into Swedish laws it was in the back of their minds but did not take an active part in their considerations. This also allows for an understanding of the way habitus is appropriate to the national field, since it is derived through interplay between the field and the agents (Jenkins 1992:84).

Sovereignty is one of the most important features of a national state (Michaels 2013:294), and since states express norms and values through the law, the legal profession has a power aspect to it (Hammerslev 2012:325). The present study suggests that in Bourdieusian terms, this power aspect is known as the symbolic power of law, since the outcome of the appropriation effect (supported by the judges' juridical capital) is the ability of "ordering politics without

necessarily doing politics” (Dezalay & Madsen 2012:438). Thus the focus at this point of the analysis will be shifted towards the role of the state.

#### 6.4 The field of state power

So far, the analysis has highlighted the imposition of restrictions and the individual conditions of detention through the material from the documents and the interview data. Now the focus will shift towards the final theme in the juridical accounts; the role of the state. The state is important when discussing law and legal practice, since the state has a monopoly of force through their power of both the creation and enforcement of laws (Michaels 2013:297). Many of the judges discussed the difficulty of not detaining and permitting restrictions due to the legal norms, which has been illustrated through some of the previous quotations, and can be further understood by the following:

P: Both as a judge and as a prosecutor you get a lot of legal support for your decision, you can basically look at the rules one by one and cross them over, and then it's not like I'm sitting here detaining assiduously but it's because we've got support for it in the law. It would be a lot worse if we're sitting here and don't really have any legal support but still detain (Judge G).

Most of the criticism from the committees is not a rejection of the judges per se, but a rejection of the practices in the field. To Bourdieu, the legal field has particular ties with the field of state power (Dezalay & Madsen 2012:436). This notion might offer an understanding to the reasoning that the position of individual rights in Sweden is weak towards the state (Barker 2012:11). Since law is a way for states to express norms (Hammerslev 2012:325) it could be suggested that the state, as creator of laws, sets the rules of the legal field and influence the habitus of the professionals in it, and thus showing what interests should be prioritized. This notion can be traced back to the interviews. As mentioned already, the judges did not really see themselves as being in a position with a great amount of control and power. This was particularly the case when discussing the legal norm stating that anyone suspected for a crime where the minimum punishment is imprisonment for at least two years has to be detained, unless obvious reasons suggesting otherwise. One of the judges referred to this as being a ‘mandatory detention’, and another one expressed the following opinion:

P: [...] It also shows clearly what importance it's getting, the wording that's in the law and what presumptions you've got. If you've got the presumption that someone should be detained until it's

obvious that you shouldn't be that anymore, well... Then you've said as a legislator to the judge that almost everyone should be detained (Judge G).

According to Bourdieu the state is the “*culmination of a process of concentration of different species of capital*” meaning that the state has a meta-capital, a statist capital, enabling it to exercise power over other fields and agents (Bourdieu 1994:4, italics in original). This capital could be illustrated in the way the state has the authority to define laws, and thus excusing its own behavior from being labeled as criminal (Sharkansky 2000:36). Some of this behavior concerning individual conditions has been highlighted in the documents, and Swedish remand prisons have been criticized by CPT for having “cage-like” outdoor exercise areas (2009:31), for holding individuals locked in cells for up to 23 hours a day (2004:30), and for allowing children as young as 15 being subjected to isolation (2009:26). Furthermore, both committees have reacted on the number of suicide attempts within establishments. The following quotation is a part of how the most recent criticism describes the situation:

8. The Committee notes with regret the position of the State party on the necessity of the use of restraints, such as isolation, during the preliminary investigation in the Swedish legal system. In particular, the Committee remains concerned at: (arts. 2, 11 and 16)

(a) The high percentage of remand prisoners who are subject to restrictions and the differing restrictions which exist concerning their communications with the outside world;

(b) The widespread and, in some cases, prolonged use of solitary confinement in pretrial detention;

[...] (d) The incidents of suicide or suicide attempts in places of detention, in particular in remand prisons, suggesting they are the result of the use of restraints such as isolation measures. (CAT 2014:3)

These remarks show that from the committees' point of view the legal ideals are not fulfilled, however it is the responsibility of each state to put the aims of the ideals in legal practice (see Hydén 2011:34). The struggle in the legal field over the right to define the law might therefore not primarily concern the individual agents such as the judges, but rather displays the way the committees try to enter the legal field and reject the practices that are a result of the implementation of written domestic law. When asked about the international criticism, the following section is part of the participant's discussion:

P: [...] And they're placing it on Sweden [the criticism], the international committees are placing this on Sweden as a state, and then the question is which part of the public administration that's responsible. Is it the legislative power that's been failing, well you could say that, the legislative power could have done

something to shape this up, and not have the two-year-presumption and have certain boundaries (Judge G).

Following this line of reasoning, some of the judges attempted to explain the lengthy periods of detention with restrictions. They touched upon similar things such as a lack of resources in other organizations, which prolonged the periods of detention, and that the investigations were large and complex, often with international connections and multiple actors (such as having several suspects). However some of the accounts showed how answers could also be found in the legal dictionary:

P: I think that it has become a bigger and bigger problem so to speak [talking about lengthy periods with restrictions], and is probably connected to the investigations getting bigger and bigger. If you go twenty, thirty years back in time they didn't exist... These giant investigations where people are detained for years awaiting their trial [...] And the Code of Juridical Procedure came in the 1940s, it's not a very modern thing. It was very potent for its time and still is but the rules are like, adapted to a different type of cases than the ones we've got today (Judge D).

These individual accounts offer an understanding, although in no way generalizable, of the importance of the written law and the power of legislators. Because, as Bourdieu writes, the juridical power allows for imposition of physical restrictions such as depriving someone of their liberty, however such acts exceed individual perspectives and are instead a demonstration of the “sovereign vision of the State” (Bourdieu 1987:837-838).

## 7. Concluding discussion

The aim of this study has been to contribute to the understanding of the Swedish pre-trial detention practices. These have caught the attention of international and regional torture committees and received criticism, in spite of Sweden generally holding high human rights standards and being prominent in protecting them. Three research questions were set out in the introduction and two qualitative methods were chosen to answer them; content analysis and semi-structured interviews. The first research question concerned the themes in the criticism from the torture committees, which were found by viewing their reports. The committees criticized the imposition of restrictions and their length, and found signs of inadequate conditions in remand establishments and symptoms of psychological suffering among the detainees. The second question concerned the way judges described their decision-making and experiences when interviewed about pre-trial detention. The main themes derived

from their accounts showed an experienced lack of discretionary power, that legislative changes might be needed, and that it was difficult incorporating individual conditions into legal judgments. The third question sought to combine the materials and was thus concerned with how the pre-trial detention practices could be understood by using a Bourdieusian framework. Through this the committees and the judges could be understood as having different positions in a legal field, struggling for the right to define the law. The committees, as new agents entering the field, reject some of the prevailing practices and aim for gaining more dominant positions, while the judges try to defend their positions and maintain their legitimacy. The habitus of the judges – their internalized schemes guiding their behavior – is both a product of the field and reproduces it, thus there is interplay between the field and the agents. To shed further light on the individual juridical accounts, Cohen's concepts on denial was brought into the theoretical framework to complement Bourdieu, and aided the understanding of how the judges tried to maintain legitimacy in the field by drawing on techniques of neutralization. These techniques could also be seen as a part of their habitus and having the same dialectical relationship with the field. The present study also highlights the role of the state, and the close ties between the legal field and the field of state power. Through its meta-capital the state expresses control over other fields and agents, which could offer an explanation of the accounts describing a position where judges might be bound by legal norms, resulting in domestic practices that do not appear to fulfill international legal ideals.

However, as mentioned throughout the study, it has certain limitations impacting the conclusions that can be drawn from it. In line with what was written in the introduction and in the background (chapter 1 and chapter 3.3), this study only focuses on the criticism from the torture committees and only describes the legal ideals in direct relation to these. Hence, it is not concerned with other parts of human rights law concerning the rights of detainees (such as having the right to a fair trial). Further limitations about the used material can be found in chapter 4, where the general notions about the quality of the interview data and the documents can also be found. The conclusions drawn by using the juridical accounts can of course not be generalized to include all Swedish judges. But as for all qualitative studies, being representative has never been the aim for the present study, which gives depth into a subject instead of breadth.

This study can be said to be in line with what Barker previously has written about the duality of the Swedish state. In spite of Sweden being a strong welfare state, individual's human rights can be restricted due to a need for control and discipline (Barker 2012:19). It has been noted through the analysis that the individual conditions were downplayed due to legal norms set out by the state, which can be understood as a means of controlling individuals by placing them in remand establishments with full restrictions. Thus, this study may offer a picture of the legal practices as tightly bound to the field of state power. Therefore one might believe that a change in legislation is needed, since the risk of having practices that are rejected by international agents could be a loss of legitimacy for the agents in the domestic legal field.

This raises the question of whether or not it is possible to change a field and what it might take. As some of Bourdieu's critics suggest, he has a tendency of pushing agents into social fields where the chances of change are slim (Järvinen 2007:277). However, Bourdieu has acknowledged that the legal field is sensitive to external changes that might direct the present conflicts in the field (Bourdieu 1987:850). An example of such external forces might, based on the present study, be new players entering the field due to globalization. Furthermore, there is a close connection between political power and the legal field, and politicians whose interests are closest to the corresponding law determine the power positions within the field (ibid). This suggests that a change might be possible but depends on the external conditions such as political will and pressure from agents like the torture committees. This has actually recently been the case; Swedish prosecutors received new guidelines to help with the imposition of restrictions (see ÅFS 2015:2 and RåR 2015:1), which however does not concern the role of judges or the legal concerns raised in the interviews. Since a field through a struggle can develop but still maintain its fundamental structure (Engdahl & Larsson 2011:248-249), continuous revisions of the legal prerequisites might be needed to avoid difficult social realities for the ones at the receiving end. Furthermore, as a suggestion for future research, it would be very useful with a comparative study aimed at understanding the differences in pre-trial detention practices between Sweden and other European countries, to open up for developments in national practice and policy.

## List of references

### Literature

- Agnew, Robert (2011). *Toward a unified criminology: integrating assumptions about crime, people and society*. New York: New York University Press.
- Amatrudo, Anthony & Blake, Leslie William (2015). *Human rights and the criminal justice system*. Abingdon: Routledge.
- Banakar, Reza (2015). *Normativity in legal sociology: methodological reflections on law and regulation in late modernity*. Heidelberg: Springer.
- Banakar, Reza & Travers, Max (2013). Introduction. In Banakar, Reza & Travers, Max (ed.) (2013). *Law and social theory*. 2<sup>nd</sup> edition. Oxford: Hart publishing, pp. 1-11.
- Barker, Vanessa (2012). Nordic Exceptionalism Revisited: Explaining the paradox of a Janus-faced penal regime. *Theoretical Criminology*. 17 (1): 5-25.
- Bergström, Göran & Boréus, Kristina (2012). Samhällsvetenskaplig text- och diskursanalys. In Bergström, Göran & Boréus, Kristina (ed.) (2012). *Textens mening och makt: Metodbok i samhällsvetenskaplig text- och diskursanalys*. 3<sup>rd</sup> edition. Lund: Studentlitteratur, pp. 13-48.
- Björkvall, Anders (2012). Visuell textanalys. In Bergström, Göran & Boréus, Kristina (ed.) (2012). *Textens mening och makt: Metodbok i samhällsvetenskaplig text- och diskursanalys*. 3<sup>rd</sup> edition. Lund: Studentlitteratur, pp. 307-352.
- Bourdieu, Pierre (1987). The Force of Law: Toward a Sociology of the Juridical Field. *Hastings Law Journal*. 38: 805-853.
- Bourdieu, Pierre (1994). Rethinking the State: Genesis and Structure of the Bureaucratic Field. *Sociological Theory*. 12 (1): 1-18.
- Bryman, Alan (2011). *Samhällsvetenskapliga metoder*. 2<sup>nd</sup> edition. Malmö: Liber.
- Cohen, Stanley (1996). Government Responses to Human Rights Reports: Claims, Denials, and Counterclaims. *Human Rights Quarterly*. 18 (3): 517-543.
- Cohen, Stanley (2001). *States of denial: knowing about atrocities and suffering*. Cambridge: Polity Press.
- Danelius, Hans (2012). *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna*. 4<sup>th</sup> edition. Stockholm: Norstedts juridik.

Deflem, Mathieu (2008). *Sociology of law: visions of a scholarly tradition*. Cambridge: Cambridge University Press.

Dezalay, Yves & Madsen, Mikael Rask (2012). The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law. *Annual Review of Law and Social Science*. 8: 433-452.

Djukic, Sandra (2012). "Tvångsmedel är något av det mest ingripande vi håller på med": En intervjustudie om restriktionerna på svenska häkten. Examensarbete. Stockholm: Stockholms universitet.

Dullum, Jane & Ugelvik, Thomas (2012). Introduction: Exceptional prisons, exceptional societies? In Ugelvik, Thomas & Dullum, Jane (ed.) (2012). *Penal exceptionalism? Nordic prison policy and practice*. London: Routledge, pp. 1-10.

Engdahl, Oskar & Larsson, Bengt (2011). *Sociologiska perspektiv: grundläggande begrepp och teorier*. 2 uppl. Lund: Studentlitteratur.

Engbo, Hans Jørgen & Scharff Smith, Peter (2012). *Fængsler og menneskerettigheder*. København: Jurist- og Økonomforbundet.

Hammerslev, Ole (2012). Professioner, eliter og strategier: Nordiske og internationale studier af juridiske eliter. *Praktiske Grunde. Tidsskrift for kultur- og samfundsvidenskab*. 2-3: 67-76.

Hsieh, Hsiu-Fang & Shannon, Sarah E. (2005). Three Approaches to Qualitative Content Analysis. *Qualitative Health Research*. 15 (9): 1277-1288.

Hudson, Barbara (2003). *Understanding justice: an introduction to ideas, perspectives, and controversies in modern penal theory*. 2<sup>nd</sup> edition. Buckingham: Open University Press.

Hydén, Håkan (2011). Olika perspektiv på mänskliga rättigheter. In Staaf, Annika & Zanderin, Lars (ed.) (2011). *Mänskliga rättigheter i svensk belysning*. 2<sup>nd</sup> edition. Malmö: Liber, pp. 23-51.

Jenkins, Richard (1992). *Pierre Bourdieu*. London: Routledge.

Järvinen, Margaretha (2007). Pierre Bourdieu. In Andersen, Heine & Kaspersen, Lars Bo (ed.) (2007). *Klassisk och modern samhällsteori*. 3<sup>rd</sup> edition. Lund: Studentlitteratur, pp. 263-278.

Kauzlarich, David, Matthews, Rick A. & Miller, William J. (2002). Toward a Victimology of State Crime. *Critical Criminology*. 10: 173-194.

Kvale, Steinar & Brinkmann, Svend (2009). *Den kvalitativa forskningsintervjun*. 2 uppl. Lund: Studentlitteratur.

Lindberg, Gunnel (2012). *Straffprocessuella tvångsmedel: när och hur får de användas?* 3 uppl. Stockholm: Karnov Group.

Lomell Heidi Mork (2011). Menneskerettigheter er vel og bra, men for hvem? Offeret eller gjerningsmannen? In Tham, Henrik & Lernerstedt, Claes (ed.) (2011). *Brottsoffret och kriminalpolitiken*. Stockholm: Norstedts Juridik, pp. 179-198.

Madsen, Mikael Rask & Dezalay, Yves (2013). Pierre Bourdieu's Sociology of Law: From the Genesis of the State to the Globalisation of Law. In Banakar, Reza & Travers, Max (ed.) (2013). *Law and social theory*. 2<sup>nd</sup> edition. Oxford: Hart publishing, pp. 111-128.

Mathiesen, Thomas (2012). Scandinavian exceptionalism in penal matters: reality or wishful thinking? In Ugelvik, Thomas & Dullum, Jane (ed.) (2012). *Penal exceptionalism? Nordic prison policy and practice*. London: Routledge, pp. 13-37.

Michaels, Ralf (2013). Globalisation and Law: Law Beyond the State. In Banakar, Reza & Travers, Max (ed.) (2013). *Law and social theory*. 2<sup>nd</sup> edition. Oxford: Hart publishing, pp. 287-303.

Reeves, Anthony R. (2010). Do judges have an obligation to enforce the law? Moral responsibility and juridical-reasoning. *Law and Philosophy*. 29 (2): 159-187.

Rothe, Dawn L., Ross, Jeffery Ian, Mullins, Christopher W., Friedrichs, David, Michalowski, Raymond, Barak, Gregg, Kauzlarich, David & Kramer, Ronald C. (2009). That Was Then, This Is Now, What About Tomorrow? Future Directions in State Crime Studies. *Critical Criminology*. 17: 3-13.

Ryen, Anne (2004). *Kvalitativ intervju: från vetenskapsteori till fältstudier*. Malmö: Liber ekonomi.

Scharff Smith, Peter (2012). A critical look at Scandinavian exceptionalism: welfare state theories penal populism and prison conditions in Denmark and Scandinavia. In Ugelvik, Thomas & Dullum, Jane (ed.) (2012). *Penal exceptionalism? Nordic prison policy and practice*. London: Routledge, pp. 38-57.

Schoultz, Isabel (2013). Seeking Asylum and Residence Permits in Sweden: Denial, Acknowledgement, and Bureaucratic Legitimacy. *Critical Criminology*. 22: 219-235.

Schoultz, Isabel (2014). *Controlling the Swedish state: studies on formal and informal bodies of control*. Diss. Stockholm : Stockholms universitet.

Schönteich, Martin (2013). The overuse of pre-trial detention: causes and consequences. *Criminal Justice Matters*. 92 (1): 18-19.

Scott, David & Flynn, Nick (2014). *Prisons and Punishment: the Essentials*. 2<sup>nd</sup> edition. London: Sage Publications.

Sharkansky, Ira (2000). A State Action May Be Nasty But Is Not Likely To Be a Crime. In Ross, Jeffrey Ian (ed.) (2000). *Controlling state crime*. 2<sup>nd</sup> edition. New Brunswick, NJ: Transaction Publishers, pp. 35-52.

Silander, Daniel (2011). Bäst i klassen? Respekten för mänskliga rättigheter i Sverige 1995-2010. In Staaf, Annika & Zanderin, Lars (ed.) (2011). *Mänskliga rättigheter i svensk belysning*. 2 uppl. Malmö: Liber, pp. 79-97.

Ställvik, Olof (2009). *Domarrollen: rättsregler, yrkeskultur och ideal*. Diss. Uppsala: Uppsala universitet.

Treviño, Javier A (2013). Sociological jurisprudence. In Banakar, Reza & Travers, Max (ed.) (2013). *Law and social theory*. 2<sup>nd</sup> edition. Oxford: Hart publishing, pp. 35-51.

United Nations (1994). *Human rights and pre-trial detention: a handbook of international standards relating to pre-trial detention*. New York: United Nations

Wennberg, Suzanne (2011). *Introduktion till straffrätten*. 9<sup>th</sup> edition. Stockholm: Norstedts Juridik.

## Internet sources

Council of Europe (n.d.). The CPT in brief. Available at: <http://www.cpt.coe.int/en/about.htm> (accessed 04-04-2015).

Council of Europe European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (1992). Report to the Swedish Government. CPT/Inf (92) 4. Available at: <http://www.cpt.coe.int/documents/swe/1992-04-inf-eng.pdf> (accessed 27-03-2015).

Council of Europe European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (1995). Report to the Swedish Government. CPT/Inf (95) 5. Available at: <http://www.cpt.coe.int/documents/swe/1995-05-inf-eng.pdf> (accessed 27-03-2015).

Council of Europe European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (1999). Report to the Swedish Government. CPT/Inf (99) 4. Available at: <http://www.cpt.coe.int/documents/swe/1999-04-inf-eng.pdf>

(accessed 27-03-2015).

Council of Europe European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2004). Report to the Swedish Government. CPT/Inf (2004) 32. Available at: <http://www.cpt.coe.int/documents/swe/2004-32-inf-eng.pdf> (accessed 27-03-2015).

Council of Europe European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2009). Report to the Swedish Government. CPT/Inf (2009) 34. Available at: <http://www.cpt.coe.int/documents/swe/2009-34-inf-eng.pdf> (accessed 27-03-2015).

Mänskliga rättigheter (n.d.). Human Rights Conventions Ratified by Sweden. Available at: <http://www.manskligarattigheter.se/Media/Get/153/Human20Rights20Conventions20to20whi ch20Sweden20has20acceded> (accessed 04-04-2015).

United Nations (n.d.). The Universal Declaration of Human Rights. Available at: <http://www.un.org/en/documents/udhr/> (accessed 04-04-2015).

United Nations 1 (2015). Convention against Torture and Pther Cruel, Inhuman or Degrading Treatment or Punishment. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> (accessed 04-04-2015).

United Nations 2 (2015). Committee Against Torture. Available at: <http://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIntro.aspx> (accessed 04-04-2015).

United Nations Committee against Torture (CAT) (2008). Consideration of reports submitted by state parties under Article 19 of the Convention: Concluding observations of the Committee against Torture. CAT/C/SWE/CO/5. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fSWE%2fCO%2f5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fSWE%2fCO%2f5&Lang=en) (accessed 27-03-2015).

United Nations Committee against Torture (CAT) (2014). Concluding observations on the sixth and seventh periodic reports of Sweden. CAT/C/SWE/CO/6-7. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/SWE/CO/6-7&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/SWE/CO/6-7&Lang=En) (accessed 27-03-2015).

Åklagarmyndigheten (2013). Åklagarmyndighetens Årsredovisning 2013. Available at: <http://www.aklagare.se/PageFiles/12988/Årsredovisning%202013.pdf> (accessed 06-04-2015).

## Legal sources

Häktesutredningen (2006). *Ny häkteslag* (SOU 2006:17). Stockholm: Edita Sverige AB.

SFS 1942:740. *Rättegångsbalk*. Stockholm: Justitiedepartementet.

SFS 1974:152. *Kungörelse om beslutad ny regeringsform*. Stockholm: Justitiedepartementet.

SFS 2010:611. *Häkteslag*. Stockholm: Justitiedepartementet.

RåR 2015:1. *Riktlinjer gällande restriktioner och långa häktningstider*. Available at: <http://www.aklagare.se/PageFiles/14744/RåR%202015%201.pdf> (accessed 16-05-15).

ÅFS 2015:2. *Åklagarmyndighetens föreskrifter och allmänna råd om restriktioner*. Available at: <http://www.aklagare.se/PageFiles/14746/ÅFS%202015%202%20ändrad%20med%202015%203.pdf> (accessed 16-05-15).

# Appendix 1

## Intervjuguide

Berätta om hur det brukar gå till vid en häktningsförhandling, enligt din erfarenhet.

Brukar de vara lätta eller svåra?

- Vad ligger bakom deras beslut? Social praktik.

Varför häktas människor?

När används restriktioner? Stor andel?

Hur ser du på användandet av restriktioner?

Högt antal kan utgöra isolering enligt kommittéerna. Hur ser du på det?

Vilka möjligheter har de häktade att pröva sina restriktioner? Hur brukar det gå?

Omhäktning – hur ser du på det?

Hur ser de på att det inte finns någon tidsgräns?

- Proportionalitet och restriktioner i förhållande till internationell rätt

Hur gör man en bedömning av balans mellan häktningsskäl och de som häktas?

Vad brukar väga tyngst i sådana bedömningar?

Hur tror du att restriktioner och långa tider påverkar den häktade?

Sverige har ratificerat många konventioner – tror du de påverkar häktning?

Hur ser du på kritiken som kommit? Tar man hänsyn vid den vid häktning?

- Synen på den tilltalade

Hur reflekterar du över de som häktas?

Vilken vikt läggs vid deras perspektiv?

Kan man se deras position som en utsatthet?

Finns det, som du ser det, några problem med häktningspraktikerna överlag?

## Appendix 2

### Informationsblad inför medverkan

Det här informationsbladet är till för att Du som medverkar ska veta vilka etiska principer jag utgår från i studien. Syftet med min uppsats är att belysa hur mänskliga rättigheter förstås i en häktningsskontext. Därför undersöks samspelet mellan internationella konventioner och regleringar i förhållande till svensk lagstiftning. Studien placerar fokus på den häktade och dennes position.

Deltagandet i studien bygger helt på frivillighet. Känner Du innan, under eller efter intervjun att Du inte längre vill medverka, är det bara att kontakta mig. Personliga uppgifter som till exempel namn, ålder och arbetskommun är konfidentiella. Du kommer alltså vara helt anonym. Den information jag får genom intervjuerna kommer inte heller användas i något annat syfte än för studien i fråga.

Intervjun spelas in men endast jag kommer ha tillgång till inspelningen och transkriberingen, som kommer raderas när uppsatsen är klar.

Är det någonting som känns oklart, antingen innehålls- eller utförandemässigt, går det bra att kontakta mig på uppgifterna nedan.

Tack för Din medverkan!

Elin Jönsson

Telefon: 0768 86 46 64

Mejl: [kri12ejo@student.lu.se](mailto:kri12ejo@student.lu.se)