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# Right to Counsel for Injured Party

*A Comparative Study of Sexual assault Victims' Rights in  
Sweden, Arizona & Massachusetts*

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# Summary

Since the late 1980s when the Counsel for Injured Party Act (1988:609) was introduced, Swedish victims of sexual assault have had the right to a special legal counsel in the form of a government funded counsel for injured party. The underlying idea behind the Act was that sexually assaulted women are in need of extra support and assistance through the legal proceedings, especially during the preliminary investigation and the following trial. Several studies have shown that many sexual assaults are never reported to the legal authorities, and if they are reported many crimes are not prosecuted since the victims do not have the strength to carry on with the legal proceedings. This is a problem that both the Swedish judicial system and the judicial systems in the United States struggle with and are trying to solve.

Sexual assault, particularly the crime rape, is recognized as a sever offence to the victim's integrity that may result in horrifying physical and psychological consequences for the victimized person. Through history, sexual assault has been seen as a natural outcome and by-product of warfare. The view of sexual assault has, however, changed. Recent history has showed that sexual assault is being utilized as an effective and inhuman weapon to battle enemies. Today, the international community recognizes the crime rape as a war crime and a crime against humanity under international humanitarian law.

This thesis is a comparative study of the judicial systems and legal proceedings in Sweden and in the United States. It is also a comparative study of the rights provided to victims of sexual assault in these two countries. The aim of the thesis is to examine if, and if so to what extent victims of sexual assault are provided with legal counsels in the legal proceedings in Sweden and in the United States. In order to examine this, the thesis studies and analyses what rights sexually assaulted victims have in the Swedish legal system, the intent behind the Counsel for Injured Party Act and what the Act means for victims of sexual assault. Furthermore, the thesis examines what rights the federal judicial system in the United States provides to victims of sexual assault as well as what rights are provided to them at a state level, exemplified by the state of Arizona and the state of Massachusetts.

Although the work with this thesis has shown that crime victims' rights in Sweden and in the United States have developed over the years, there are still things that need to be done and that need to be improved. The Swedish Counsel for Injured Party Act needs to be more effective and more far-reaching to fully support all victims of sexual assault in the legal proceedings. In the United States, neither the federal government nor the state governments provide sexual assault victims with the legal counsels that they so desperately need in relation to the legal proceedings. In a modern society this cannot be acceptable and something needs to change.

# Sammanfattning

Sedan slutet av 1980-talet då Lagen om målsägandebitråde (1988:609) introducerades har svenska sexualbrottsoffer haft rätt till ett särskilt juridiskt biträde i form av det statligt finansierade målsägandebiträdet. Den bakomliggande idén till lagens införande var att kvinnor som utsatts för sexuella övergrepp är i behov av extra stöd och hjälp genom det straffrättsliga förfarandet, särskilt under förundersökningen och den efterföljande rättegången. Ett flertal studier har visat att många av de sexuella övergrepp som begås aldrig anmäls till myndigheterna. Om övergreppen trots allt anmäls så leder många av fallen inte till åtal eller dom, då offren inte orkar fortsätta processen. Detta är ett problem som både det svenska och det amerikanska rättssystemet brottas med och försöker att lösa.

Sexuella övergrepp, särskilt våldtäktsbrottet, är ett allvarligt intrång i offrets integritet och kan resultera i fruktansvärda fysiska och psykologiska konsekvenser för offret. Genom historien har sexuella övergrepp setts som en naturlig följd av krigsföring, men synen på dessa övergrepp har dock kommit att förändras. Nutida händelser har visat att sexuella övergrepp används som ett effektivt och brutalt vapen i väpnade konflikter och idag betraktar det internationella samfundet våldtäkt som en krigsförbrytelse och som ett brott mot mänskligheten enligt internationell folkrätt.

Denna uppsats är en komparativ studie av rättssystemen och straffrättsförfarandena i Sverige och i USA. Det är även en komparativ studie av de rättigheter som tillerkänns sexualbrottsoffer i dessa två länder. Målet med uppsatsen är att undersöka om och i så fall i vilken utsträckning som sexualbrottsoffer ges rätt till juridisk assistans genom biträden i det straffrättsliga förfarandet i Sverige och i USA. För att undersöka detta studerar och analyserar uppsatsen de rättigheter som sexualbrottsoffer ges i det svenska rättssystemet. Uppsatsen utreder också de avsikter som fanns då Lagen om målsägandebitråde infördes och vad lagen i sig innebär för offer som utsatts för sexuella övergrepp. Utöver detta undersöker uppsatsen de rättigheter som det amerikanska federala rättsväsendet tillhandahåller sexualbrottsoffer samt de rättigheter som tillhandahålls offer på delstatsnivå, exemplifierat genom delstaterna Arizona och Massachusetts.

Trots att arbetet med denna uppsats tydligt har visat att sexualbrottsoffrens rättigheter i Sverige och USA har utvecklats genom åren, så finns det fortfarande åtgärder som behöver vidtas och saker som bör förbättras. Den svenska Lagen om målsägandebitråde behöver bli mer effektiv och långtgående för att till fullo tillgodose alla sexualbrottsoffers behov av stöd. I USA tillhandahåller varken det federala rättssystemet eller rättssystemen i Arizona och Massachusetts en rätt till statligt finansierade biträden för sexualbrottsoffer, en rätt som de så väl behöver i det straffrättsliga förfarandet. I ett modernt samhälle kan inte detta anses acceptabelt och en förändring bör därför ske.



# Preface

With this thesis, I am ending my studies at the Faculty of Law in Lund. I would like to take the opportunity to express my gratitude to my thesis advisor Professor of Law *Per Ole Träskman*, Faculty of Law Lund University, for his support and reflections in connection with my work on this thesis.

Furthermore, I would like to express my gratitude to my thesis advisor and friend Professor of Law *Jeffrey J. Pokorak*, Suffolk University Law School, for his aid and good ideas. Without him, the American part of this study might not have become a reality.

Finally, I would like to thank *friends and family* that have assisted and supported me, both in relation to my work with the thesis and throughout my law studies.

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*Johanna Carlsson*

# Abbreviations

Art.	Article
BRÅ	The Swedish National Council for Crime Prevention
Dir	Swedish Committee Directive
Ds	Swedish Ministry Publications Series
DV	The Swedish Courts Administration
et al.	And others
Ibid.	The same place; the same source as above
Ju	Swedish Committee Directive Ministry of Justice
NJA	Swedish case law published in the official publication Nytt Juridiskt Arkiv I
p.	Page
para.	Paragraph
Prop	Government Bill
RFR1	Report from the Government
RH	Swedish case law from Courts of Appeal
SEK	Swedish kronor
SOU	Swedish Government Official Reports
The Act	The Counsel for Injured Party Act (1988:609)
The Congress	The United States Congress
The Constitution	The United States Constitution
The Genocide Convention	The Convention on the Prevention and Punishment of the Crime of Genocide
The Supreme Court	The United States Supreme Court
USD	American dollar

# 1 Introduction

## 1.1 Introduction to the Subject

“Being the victim of a crime is extremely traumatic, like falling into a dark hole. That’s when you may need a helping hand.”<sup>1</sup>

During the year of 2009, approximately 15 700 cases of sexual assault were reported to the authorities in Sweden, an increase with 9 % compared to 2008.<sup>2</sup> These numbers should be seen in relation to the number of inhabitants living in Sweden in 2009 - slightly over 9.3 million.<sup>3</sup> In reality, many more crimes of sexual assault were committed, seeing as studies and reports consistently show that the number of reported assaults differ greatly from the actual number of committed offences.<sup>4</sup> These statistics and the daily reminders from newspapers and media, makes it obvious that the crime of sexual assault is very much present in today’s society, whether it is the Swedish society or the American society. As a matter a fact, the chances that someone you know is or will be a victim of a sexual offence is fairly high. In light of the present situation, victims need to be supported by the judicial authorities and their suffering and troubles need to be recognized.

During the last few decades, especially since the 1990s, great work has been made and large progress has been reached in recognizing victims’ rights, both in Sweden and in the United States. The judicial systems and the legal authorities in both countries have become aware of the difficult and stressful situation the sexual assault victims are confronted with, when reporting crimes and going through legal proceedings. The Swedish government has pointed out that matters concerning crime victims should be one of the most important fields for the legal authorities. In the Budget Proposal for the year of 2000, the government expressed the opinion that one of the best ways to achieve law and order is by effective victim-supporting work.<sup>5</sup> It is vital for a democratic state governed by law, such as Sweden and the United States, to provide support to crime victims for humanitarian reasons as well as to sustain the trust in the judicial system. If the judicial systems and their legal proceedings mean yet another hardship for victims of sexual assaults, the victims will not report crimes to the same extent. If they nevertheless do report the crimes, many victims will not have the strength to follow through with the legal proceedings. Thus, for a state governed by law it can be very destructive not to provide crime victims appropriate support and assistance since the state will not be able to effectively punish the crimes committed to their citizens.

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<sup>1</sup> <http://www.boj.se/boj/ung/uploads/file/engelska.pdf> (retrieved 2010-03-26).

<sup>2</sup> BRÅ publikation 2009, p. 7.

<sup>3</sup> [http://www.scb.se/Pages/PressRelease\\_\\_\\_\\_287538.aspx](http://www.scb.se/Pages/PressRelease____287538.aspx) (retrieved 2010-05-03).

<sup>4</sup> Author’s note: see for example [http://www.bra.se/extra/news/?module\\_instance=2&id=9](http://www.bra.se/extra/news/?module_instance=2&id=9) (retrieved 2010-05-03) and [http://www.svd.se/nyheter/inrikes/statistik-avslojar-morkertal\\_334792.svd](http://www.svd.se/nyheter/inrikes/statistik-avslojar-morkertal_334792.svd) (retrieved 2010-05-03).

<sup>5</sup> Lindgren & Qvarnström, p. 6.

## 1.2 Purpose of the Thesis

The purpose of this thesis is to study and to analyse what rights sexually assaulted victims have in the Swedish legal system and in the American legal systems, exemplified by the states Arizona and Massachusetts. Furthermore, the aim of the thesis is to examine if and if so to what extent victims of sexual assault are provided with legal counsels in the legal proceedings in these systems. In order to achieve this purpose, the thesis will answer the following questions:

- How are the criminal judicial system and the criminal legal proceedings constructed in Sweden compared to in the United States in general and which are the differences and similarities?
- What rights are provided to sexual assault victims in the Swedish judicial system? What is the Swedish Counsel for Injured Party Act, why does it exist and what does it mean for victims of sexual assault?
- What rights are provided to sexual assault victims in the United States at a federal level and at a state level in the state of Arizona and in the state of Massachusetts?
- What rights do sexual assault victims have pre-trial, at trial and post-trial in the judicial systems in Sweden, Arizona and Massachusetts? Do the state constitution and/or statutes in Arizona and Massachusetts provide sexual assault victims with a counterpart to the Swedish legal system's counsel for injured party?

## 1.3 Theory

The theoretical foundation for this thesis is the perspective of every citizen's legal right to security and safety within his or her respective judicial system (*ett rättstrygghetsperspektiv*). This perspective is derived from one of the most fundamental principles in a democratic society and is closely connected to the principle of rule of law (*rättssäkerhetsprincipen*). In addition, the thesis does to some extent apply a criminological perspective (*ett kriminologiskt perspektiv*) when analysing the effects of the crime sexual assault and the effects of governmentally funded legal counsels for victims and injured parties. Furthermore, the theoretical foundation for the thesis is a *de lege de ferenda* perspective since the thesis considers what interests the Counsel for Injured Party Act has taken into account and examines how the relevant concerns have been protected.

## 1.4 Method and Material

The adopted method in this thesis is a comparative legal method. The method is to analyse the similarities and differences between the rights provided to victims by the judicial systems in question. In the thesis, the legal elements of the chosen judicial systems are examined on two levels. Firstly, the study examines the characteristic features of the Swedish legal system and of the American legal system in large, to present similarities and differences within the systems. Secondly, the study compares elements in three different judicial systems: the judicial system in Sweden, the judicial system in the state of Arizona, and the judicial system in the state of Massachusetts. When examining the judicial systems in Sweden, Arizona and Massachusetts separately the thesis adopts a traditional legal method. In the examination of the Swedish system the analysed materials consist of preparatory legislative materials, laws, legal doctrine, and case law. In the examination of the systems in Arizona and Massachusetts the analysed materials consist of laws, legal doctrine, and case law. Furthermore, the analysed materials consist of data and information retrieved from web pages of official authorities and non-governmental organizations as well as reports and publications from official authorities and non-governmental organizations. Other materials analysed in the thesis are international conventions and case law from international tribunals.

Besides a comparative legal method and a traditional legal method, this thesis also adopts a law and politics method. With this method the public interests taken into account and the relevant concerns protected by the creation of the Swedish Counsel for Injured Party Act are analysed.

Finally, my idea for this thesis developed when I participated in the Suffolk Summer Law Programme 2009 and came in contact with professor of law Jeffrey J. Pokorak. We came to discuss the Swedish system of government funded legal counsels for injured parties and the lack of such counsels in the United States. As a result of this discussion, I came to write a considerable part of my thesis in Boston at Suffolk University Law School under the supervision of Jeffrey J. Pokorak. He provided me with a deeper understanding of the American judicial system from an American perspective, something that has fundamentally helped me in my appliance of the comparative method.

## 1.5 Terminology

The thesis frequently refers to the term victim of crime (*brottsoffer*) as well as the term injured party (*målsägande*). The study uses the terms in a rather nuanced way, depending on the context in which they are discussed. Therefore, this terminology will be presented and developed further in *Chapter 3.3.2*. However, as a brief introduction it can be said that when the terms victim of crime/crime victim/victim and the term injured party are

used in a legal context, it means an adult victim of sexual assault who takes part of the criminal proceedings of the offence in some way, and who in that role may have certain rights. Furthermore, when the terms victim of crime/crime victim/victim are used in a general context the terms have a broader definition and mean an adult person who has been victimized of a sexual assault.

In the study, the crime sexual assault is discussed and analysed. The term sexual assault is a broad catchall term, which is used more and more to replace the term rape in the American criminal legislation and legal doctrine. Since the term sexual assault is not used in the same way in the Swedish criminal legislative acts, the term will be further presented and developed in *Chapter 3.3.1*. When discussing victims of sexual assault, whether this is done in a legal context or in a more general context, the victims will at times be referred to as women. The reason for this is that women are the typical victims of sexual assault, particularly when it comes to rapes. Sexual assault is not a gender-neutral crime and women are overwhelmingly represented in the related crime statistics.<sup>6</sup> For instance, one can look at the rapes reported to Swedish authorities in 2009 where adult women constituted 97 % of the victims.<sup>7</sup> In the United States, 92 % of all reported rapes had adult female victims in 2005.<sup>8</sup> Furthermore, when referring to the defendant or the perpetrator of a criminal offence this person will at times be referred to as a man. This is done to separate the defendant from the injured party or the victim.

## 1.6 Delimitations

In this thesis I am using a selection of the rights that a crime victim is provided with. The aim of the thesis is to examine whether and to what extent victims of sexual assault have a right to government funded legal counsels in the legal proceedings in Sweden, Arizona and Massachusetts. Therefore, the rights concerning the legal counsels and the rights related to the victims' participation in the legal proceedings are the focus for this thesis. It should be mentioned that when the victims' rights are divided into rights pre-trial, at trial and post-trial this is a simplification that I have chosen to illustrate the rights in an easily comprehensible way. Some of these rights are in reality provided to victims during more than one stage of the legal proceedings, but are divided in this way to make the comparison clearer. Additionally, in the division of the rights I have delimited the comparison by not accounting for the rights provided to American victims at a federal level. The reason for this is that adding the federal rights to the comparison would make the subject field too extensive. Furthermore, I have limited the discussion of the victims' legal rights by only discussing the

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<sup>6</sup> McGregor, p. 37-38.

<sup>7</sup> BRÅ publikation 2009, p. 7.

<sup>8</sup> <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32369#1> (retrieved 2010-04-15).

rights provided to persons considered as adults by the law. The legal reality for children victimized by sexual assault looks different in the examined systems.

A very important delimitation done in this thesis is which judicial systems I have chosen to examine. The Swedish judicial system was chosen because of the Swedish Counsel for Injured Party Act, which has been a source of inspiration to this thesis. The reason for why I have chosen the judicial systems in the state of Arizona and the state of Massachusetts is that these two states have been active in the national victims' rights debate. The state of Arizona is by many regarded as a state that has come very far in their development of victims' rights. The state of Massachusetts has been involved in several of the federal initiatives taken to improve the victims' situation in the legal proceedings. The two systems were chosen because I wanted to examine how far the two states, looked upon as more "victim friendly" states, had come in their victims' rights work and if they had developed a counterpart to the Swedish counsel for injured party. Finally, since this is a study written first and foremost for Swedish readers familiar with the legal system in Sweden, the illustration of the Swedish judicial system in chapter 2 is less extensive than the illustration of the judicial system in the United States in general in the same chapter.

## **1.7 Disposition**

*Chapter 1* of the thesis presents an introduction to the subject matter. It also describes the purpose of the thesis and the theory, method and material used in the study. *Chapter 2* analyses the general construction and the different features of the Swedish judicial system and the American judicial systems as well as their different criminal proceedings. *Chapter 3* explains the general definitions used in the study, and the possible physical and psychological effects of a sexual assault. Additionally, the chapter describes from a human rights' angle how sexual assault, exemplified by rape, was historically perceived and how it is perceived today within the international community. *Chapter 4* looks at how the victims' legal rights have developed in Sweden, and analyses the Swedish Counsel for Injured Party Act (1988:609). *Chapter 5* examines how the victims' legal rights have developed in the United States, and what rights the American victims are provided with at a federal level. Furthermore, the chapter analyses the victims' role in the American legal proceedings and presents some examples of state rights provided to victims in Arizona and Massachusetts. *Chapter 6* illustrates some of the rights provided to a sexual assault victim pre-trial, at trial and post-trial within the judicial systems in Sweden, Arizona and Massachusetts. Finally, *Chapter 7* provides an analysis of the presented material, which concludes the thesis.

# 2 The Legal Systems in Question

## 2.1 Introduction to the Chapter

This chapter examines some of the characteristic features of the Swedish judicial system and of the overall judicial systems in the United States. It also gives an introduction to the two countries' court systems and illustrates what a generalized Swedish and American criminal proceeding look like.

## 2.2 The Swedish Judicial System

### 2.2.1 Characteristic Features

#### 2.2.1.1 Civil Law

Civil law is the dominant legal tradition in most of Europe today and is primarily contrasted against common law. Historically, civil law was developed out of Roman law. In present times, civil law is a judicial system, by tradition inquisitorial, with codified laws and statutes. In contrast, common law systems are dictated by judges. Legislation is perceived as the primary source of law in the civil law system wherein the judges follow predetermined legal rules rather than interpret the law. As a result, the courts have to reason extensively on the basis of general principles of the codified law.<sup>9</sup> The work done in the Swedish judicial system emanates from statute laws, which amongst other things govern the civil and criminal legal proceedings as well as the authority of the courts.<sup>10</sup>

#### 2.2.1.2 The Inquisitorial System

Sweden is one of many countries using a judicial system that is essentially inquisitorial. The inquisitorial method imposes an active role on the judges in the judicial process. The judge is the leading actor in court and shall conduct judicial inquiries into the truth of the charges brought against the defendant.<sup>11</sup> With the introduction of the new Code of Judicial Procedure (1942:740) (*Rättegångsbalken*) in 1948, the Swedish judicial system went from being entirely inquisitorial to being influenced by accusatorial principles. Today, the criminal justice system includes a mixture of both adversarial and inquisitorial elements, and some of the adversarial elements are evident. Examples of these elements include the principles of immediateness and orality during the legal proceedings, the right to cross-

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<sup>9</sup> Apple & Deyling, p. 1.

<sup>10</sup> Tiberg et al., p. 37-38.

<sup>11</sup> Carp et al., p. 229-230.



examine witnesses and the involvement of the public through the use of lay judges.<sup>12</sup> Nonetheless, the Swedish system still bears a strong inquisitorial mark, primarily through the system's devotion to the idea of finding a material truth in preference to the adversarial idea of a procedural truth. As a result, the Swedish prosecutors have a duty to consider both incriminating and exempting evidence in their search for the objective and material truth. Another effect is that it falls on the judge to ask complementary questions to the witnesses and parties in order to find the material truth in the case. Additionally, if required the judge can bring in new evidence or expert witnesses. The inquisitorial idea of finding the material truth is still so strong in the Swedish judicial system, that even if the court is faced with a full confession, a whole trial still must take place.<sup>13</sup>

### 2.2.1.3 The Use of Lay Judges

Distinguishing the Swedish judicial system from many other inquisitorial systems is the participation of lay judges (*nämndemän*) throughout the legal proceedings. The system of lay judges has a long and uninterrupted history and is today considered a matter of democracy.<sup>14</sup> The majority of the cases dealt with in the court system concern individual citizens. The intent behind the participation of lay judges is to guarantee that the courts' rulings are in line with the general values of the public. Additionally, the lay judges' presence helps to maintain the public's confidence in the court system and to provide transparency within the system.<sup>15</sup> Lay judges participate in cases concerning criminal law, family law, and some types of land law. They work both in district courts and in courts of appeal. The use of lay judges has the same principal purpose as the Anglo-American use of juries, which is to assure civilian participation in the administration of justice. In Sweden, the lay judges' participation is the closest the criminal justice system comes to a general jury system since Sweden only makes use of juries in cases concerning freedom of press.<sup>16</sup> The participation of lay judges in Sweden has some distinct characteristics, setting it apart from the common law's jury systems.<sup>17</sup> Since neither the government nor other authorities has the right to interfere with or influence the court's judgment, the lay judges' standing in court is strong.<sup>18</sup> The lay judges are working with legally-trained judges in applying legal rules, and their individual votes are weighted equally with the professional judge's vote.<sup>19</sup> Although it is rare, it is possible for a majority of lay judges to prevail over the opinion of the professional judge. Still, the lay judges generally respect the opinions of the professional judges with whom they work, and the professional judge tends to influence the outcome of the trial.<sup>20</sup>

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<sup>12</sup> Lindblom, p. 212.

<sup>13</sup> Brien & Hoegen, p. 883.

<sup>14</sup> Brien & Hoegen, p. 885.

<sup>15</sup> [http://www.domstol.se/templates/DV\\_InfoPage\\_\\_\\_\\_845.aspx](http://www.domstol.se/templates/DV_InfoPage____845.aspx) (retrieved 2010-03-24).

<sup>16</sup> Lindblom, p. 208.

<sup>17</sup> Terrill, p. 321.

<sup>18</sup> [http://www.domstol.se/templates/DV\\_InfoPage\\_\\_\\_\\_845.aspx](http://www.domstol.se/templates/DV_InfoPage____845.aspx) (retrieved 2010-03-24).

<sup>19</sup> Lindblom, p. 208.

<sup>20</sup> Terrill, p. 321-322.

A lay judge is a layman without legal training who usually has some form of occupation and only works in the court on a part-time basis. Lay judges are elected representatives of the people, politically elected for terms of four years. Lay judges in district courts are usually appointed by the municipal council while the lay judges in courts handling administrative law are appointed by the county council. In the general district courts, the number of lay judges from a certain political party corresponds with that party's representation in the municipal council.<sup>21</sup> Today, there are about 9 000 lay judges working in the Swedish courts and the idea is that the group's composition should reflect the composition of the general public. Statistics from January 2010 shows that 50 % of lay judges are women, and the average age is 59 years.<sup>22</sup>

#### 2.2.1.4 Preparatory Legislative Materials

In Sweden, the preparatory legislative materials (*förfarbeten*) are very important and respected. They are used for interpreting the laws and finding the original intent behind the provisions. Legislative proposals are analysed thoroughly in a number of stages before the law is finalized and published. During this procedure several drafts of text are written, discussed, and criticized and the most important of these preparatory legislative texts are then published. For those interpreting and applying a law within the Swedish judicial system, the documents adherent to the law are almost as important as the finalized act. The law-making procedure usually starts when the government appoints a legislative committee to examine a legal problem under terms of reference given by the government. Eventually, the committee will present its findings in a report (*betänkande*), which is then published in a printed series called the Swedish Government Official Reports, SOU (*Statens Offentliga Utredningar*). The SOU is circulated for comments to a number of different bodies, governmental as well as non-governmental. This consultation procedure is considered an important part of the Swedish legislative processes. It is intended to create high technical quality of the legislative texts and to prepare for a general acceptance of the future law. After the consultation procedure the committee continues the legal preparatory work. In its work, the ministry takes into consideration any criticism that the consulted bodies may have expressed, and they are sometimes forced to prepare a new report. If this is the case, this new report is published in a series of ministry reports called the Ministry Publications Series, Ds (*Departementsserien*), and then circulated for comments.<sup>23</sup> When a final draft of a law is available, the government can decide to consult with one more body, the Council on Legislation (*Lagrådet*). The Council is composed of Justices (*Justitieråd*) from the Supreme Court and the Supreme Administrative Court (*Regeringsrätten*) and examines law proposals from the government or from the parliament. The Council gives their opinion on how the proposal relates to the Swedish constitutions and the legal system in general. They also examine what problems are likely to arise in applying the

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<sup>21</sup> Lindblom, p. 208.

<sup>22</sup> [http://www.domstol.se/templates/DV\\_InfoPage\\_\\_\\_846.aspx](http://www.domstol.se/templates/DV_InfoPage___846.aspx) (retrieved 2010-03-24).

<sup>23</sup> Vogel, p. 57 and <http://www.riksdagen.se> (retrieved 2010-04-15).

law. The Council on Legislation is a very important body of consultation and their opinion can bring a proposed law to a standstill. If there are no major objections from them or if the government decides to present a law proposal to the parliament despite the Council's objections, a governmental bill (*proposition*) is drafted and then introduced in the parliament. If the parliament votes to enact the law, it is published in the official gazette the Swedish Code of Statutes, SFS (*Svensk författningssamling*).<sup>24</sup>

## 2.2.2 The Swedish Court System

Sweden has two parallel types of main courts, the general courts and the general administrative courts. The former deals with criminal and civil cases, meanwhile the latter deals with cases related to public administration. The following chapters deal with the general court system, which is divided into three hierarchical levels: the district courts, the courts of appeal and the Supreme Court.<sup>25</sup> A special feature, distinguishing the Swedish court system from many other countries' systems, is the fact that the system is built on the existence of professional judges. In Sweden, being a judge is a distinct legal profession. Even with experience and qualifications as a practitioner, one cannot become a judge without particular legal training.<sup>26</sup>

### 2.2.2.1 The District Courts

The district courts (*Tingsrätter*) are the courts of first instance, and it is in these courts that the main part of the judicial process is handled. Sweden has forty-eight district courts spread across the country.<sup>27</sup> They vary greatly in size, from only a few judges to over 100 permanent judges. In the courts' handling of a criminal case the court normally has quorum with one legally-trained judge and a panel of three lay judges.<sup>28</sup> The district courts have a local connection, and the cases brought to a district court comes from the municipalities included in that district court's jurisdiction.<sup>29</sup>

### 2.2.2.2 The Courts of Appeal

The courts of appeals (*Hovrätter*) are the courts of intermediate instance in the general court hierarchy. There are six courts of appeals in Sweden, and each of the six courts has supervisory authority over the lower courts within its area of jurisdiction, its circuit. The circuit is geographically based and can vary from five to fourteen district courts.<sup>30</sup> The courts of appeal have jurisdiction of appeals from the general lower courts in matters relating to civil and criminal cases as well as other matters already addressed in a

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<sup>24</sup> Vogel, p. 58-59.

<sup>25</sup> Lindblom, p. 203.

<sup>26</sup> Brien & Hoegen, p. 885.

<sup>27</sup> [http://www.domstol.se/templates/DV\\_InfoPage\\_\\_\\_\\_721.aspx](http://www.domstol.se/templates/DV_InfoPage____721.aspx) (retrieved 2010-03-22).

<sup>28</sup> Lindblom, p. 203-204.

<sup>29</sup> [http://www.domstol.se/templates/DV\\_InfoPage\\_\\_\\_\\_721.aspx](http://www.domstol.se/templates/DV_InfoPage____721.aspx) (retrieved 2010-03-22).

<sup>30</sup> [http://www.domstol.se/templates/DV\\_InfoPage\\_\\_\\_\\_719.aspx](http://www.domstol.se/templates/DV_InfoPage____719.aspx) (retrieved 2010-03-24).

district court. There are no restrictions on people's right to appeal against the judgment of a district court, although you often need a leave to appeal (*prövningstillstånd*) from the courts of appeal.<sup>31</sup> In some cases, the courts of appeal function as a court of first instance.<sup>32</sup> If a legally-trained judge in cooperation with lay judges has decided a case in the lower court, the court of appeal will have quorum with three legally qualified judges and two lay judges. In cases in which no lay judges assist legally-trained judges in the judgment, the court of appeals will have quorum with only three legally qualified judges.<sup>33</sup>

### 2.2.2.3 The Supreme Court

The Supreme Court (*Högsta domstolen*) is located in Stockholm and composed of Justices appointed by the government. As of March 2010, there were fifteen Justices working in the Supreme Court.<sup>34</sup> The court has jurisdiction in appeals from courts of appeal and its decisions are viewed as precedent (*prejudikat*). A party can only get full review of a case if the court grants a leave to appeal, which may be granted under certain conditions. The most significant of these conditions is that the Supreme Court's review of the case is important for guidance of how a law should be applied.<sup>35</sup> It is worth mentioning that the term "guidance" should be understood quite literally. There are no criminal repercussions for judges that do not comply with a precedent from the Supreme Court since it is not formally binding in that sense. The judges in the lower courts, however, should accept the guidance in order to develop a coherent body of judicial practice, which is important in a community founded on the rule of law. A coherent body of judicial practice makes it possible for individuals who take part of legal proceedings in Sweden to foresee the eventual outcome of the case. The Swedish concept of precedent "for guidance" differs from the concept of binding precedent as it has developed in the United States.<sup>36</sup> In the Supreme Court five Justices constitute a quorum, even though three Justices are enough if it is a case of a more simple character.<sup>37</sup> Besides reviewing cases important for guidance in the appliance of laws, the Supreme Court also examines cases concerning petitions for a new trial (*resningsansökan*); of grave procedural errors (*domvilla*); applications for restoration of lost time (*återställande av försutten tid*); and matters relating to requests from other states for extradition of persons from Sweden. Additionally, the court handles some cases related to attorneys. Anyone who has been refused entry or has been expelled from the Swedish Bar Association can submit a

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<sup>31</sup> Lindblom, p. 204 and [http://www.domstol.se/templates/DV\\_InfoPage\\_\\_\\_\\_719.aspx](http://www.domstol.se/templates/DV_InfoPage____719.aspx) (retrieved 2010-03-24).

<sup>32</sup> Brien & Hoegen, p. 885.

<sup>33</sup> Lindblom, p. 204.

<sup>34</sup> [http://www.hogstodomstolen.se/templates/DV\\_InfoPage\\_\\_\\_\\_4256.aspx](http://www.hogstodomstolen.se/templates/DV_InfoPage____4256.aspx) (retrieved 2010-03-24).

<sup>35</sup> Vogel, p. 60-61.

<sup>36</sup> Vogel, p. 61.

<sup>37</sup> Lindblom, p. 205.

complaint about the decision. In such cases, the Supreme Court is the only judicial authority.<sup>38</sup>

## **2.2.3 The Legal Proceedings**

### **2.2.3.1 The Criminal Case Pre-Trial**

Once a crime has been reported, a preliminary investigation is undertaken by the police to determine who committed the crime or who can be reasonably suspected of being involved in the act. Throughout the preliminary investigation the principle of mandatory prosecution prevails, which means that the authorities are required by law to prosecute anyone whose guilt has been substantially established. The investigation is managed either by the police or the prosecutor and the police normally handle the primary investigations that are fairly straightforward. When the prosecutors conduct investigations they do so with the help from the police if the matter is complex or when a person has been reasonably suspected of committing the crime. The main rule in conducting a preliminary investigation, regardless of who conducts it, is to conduct it in an as objective manner as possible. If the preliminary investigation leads to reasonable suspicion about an individual, that individual must be promptly informed of the preliminary investigation and the reasonable suspicion so that a lawyer can be appointed and retained at public expense.<sup>39</sup>

Every party, whether he or she is a suspect or a witness, is obliged to comply with a request from the police to accompany them to the police station for questioning. A person can be held for a maximum of 12 hours, and if the police and prosecutor want to detain a suspect for a longer period of time, the prosecutor must arrest the person. This deprivation of the suspect's liberty cannot last for more than three days. If a warrant of arrest is issued, and if the person is suspected on probable cause of a crime, the prosecutor shall submit a request for a detention order to the court. Also, people who are reasonably suspected of a crime may be detained in certain situations but only for a shorter period of time.<sup>40</sup>

### **2.2.3.2 The Criminal Trial Proceedings**

In Sweden, there are no separate courts for civil and criminal cases, and the procedure is overall the same. The Swedish procedure is very concentrated and built on the requirements of orality, immediacy and concentration. These fundamental principles were established in the 1940s in connection with the reform of the Swedish Code of Judicial Procedure. The principle of orality is self-explanatory. In the lower courts the principle has been given a special preference, for example, that a judgment must be based only on what

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<sup>38</sup> [http://www.hogstadamstolen.se/templates/DV\\_InfoPage\\_\\_\\_\\_4255.aspx](http://www.hogstadamstolen.se/templates/DV_InfoPage____4255.aspx) (retrieved 2010-03-24).

<sup>39</sup> Terrill, p. 325.

<sup>40</sup> Lindblom, p. 222-223.

the parties and witnesses have stated during the main hearing. This means that the court is not to be influenced by the argumentative documents presented in the case. In addition, the principle indicates that it is forbidden to read from a deposed text since you as a party or a witness are supposed to speak freely from your memory. The principle of immediateness implies that a judgment can rest only on statements made during the main hearing. The principle of concentration means that the case should be concluded during one meeting, the trial, implying that parties must prepare a case to the extent where the principle is fulfilled.<sup>41</sup> Swedish trials are generally governed by rules that are characteristic for many Roman-Germanic law countries, a legal family by which many legal scholars classify the Swedish judicial system. The rules differ in one specific aspect. The Swedish trial proceedings have over the past 60 years adopted the Anglo-American technique of allowing the prosecution and the defense to question both the parties and the witnesses. As a consequence, the structure of the trial and the hearing of parties and witnesses are similar to the Anglo-American counterpart. In Roman-Germanic law countries it has traditionally fallen upon the trial judge to question the parties and the witnesses. A Swedish trial might be perceived as monotonous compared to an American trial since the evidence pertaining to a case has already been revealed during the preliminary investigation. This means that there are few surprises uncovered during a trial in Sweden. Additionally, the rules of evidence do not prohibit the introduction of hearsay evidence, which means that any information that is of significance to the case may be admissible. This allows the parties to submit all their evidence while the court decides the relevance of the submitted evidence.<sup>42</sup>

The standard trial procedure for the main court hearing begins with the prosecutor reading the summons application. This describes the committed offence and the surrounding circumstances, and it includes a statement of the reasons for charging the defendant. If the injured party (*målsäganden*) has a private claim for compensation against the defendant, this claim can be presented by the prosecutor or the injured party. Additionally, if the injured party has been appointed a counsel for injured party (*målsägandebiträde*), the counsel can present the claim. The professional judge then asks the defendant how he pleads and if he is willing to pay the compensation demanded in the case. If the defendant pleads not guilty to the charges, the prosecutor proceeds with the case by accounting for the evidence uncovered in the preliminary investigation.<sup>43</sup> If the injured party is testifying at the trial this is the first testimony that is heard. One thing that strongly distinguishes the Swedish judicial court proceedings from the American judicial court proceedings is the standpoint that the injured party is seen as the natural opponent to the defendant. As a result, and as a matter of balance, neither the victim nor the accused can be heard under oath.<sup>44</sup> The injured party's testimony is followed by a questioning of the injured

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<sup>41</sup> Lindblom, p. 212-213.

<sup>42</sup> Terrill, p. 330.

<sup>43</sup> Terrill, p. 331.

<sup>44</sup> Brien & Hoegen, p. 907.

party, first by the prosecutor and then by the counsel for injured party. The prosecutor's questions aims to prove the criminal case against the defendant, whereas the counsel for injured party's questions aims to secure the injured party's private claim for compensation. Following this questioning, the defense counsel may ask questions to the injured party.<sup>45</sup> The next step in the trial proceedings is that the defendant testifies. As earlier mentioned the defendant is as a party to the case and as such he does not have to take an oath. After the defendant's testimony, the defendant is questioned in the same manner as the injured party. The questioning of the injured party and the defendant is a milder version of the Anglo-American cross-examination. The testimonies of the two parties are followed by the testimonies and questioning of witnesses, one by one and under oath. The witnesses are subjected to interrogation from both the prosecution and the defense. If any other evidence is to be introduced in the trial, it is presented at this time and examined by the court. After the testimonies, the defendant's personal circumstances are taken into consideration by the court. These circumstances may include an examination of the results from a psychiatric examination and an investigation into the defendant's personal finances. In the cases where any doubts are raised about the defendant's mental or emotional state, the court will appoint a psychiatric expert to examine the defendant further. The investigation into the defendant's personal circumstances results in the hearing of the final arguments from the parties. Both the prosecutor and the defense counsel summarize the circumstances and the evidence supporting their case and state what sentence they would find appropriate for the offence if the defendant is found guilty. It is also at this time that the counsel for injured party and the defense counsel present their claims for reimbursement to the court.<sup>46</sup>

The judge declares the trial session closed as soon as the final arguments have been made, and it is now the court begins its deliberations. The only people taking part in the deliberations are the professional judge and the lay judges. The court's judgment is announced in one of two ways. The judgment may be announced in court immediately after the session. If that is the case, the judge briefly explains the judgment and gives directions on how it may be appealed. If the court's judgment is not announced immediately, the judgment is usually available a week or two after the trial when it can be collected at court, read over the phone, or sent to the parties.<sup>47</sup>

### **2.2.3.2.1 Private Claims for Compensation**

In Sweden it is possible for an injured party to consolidate her private claim for compensation against the defendant with the prosecution of the offences. It is stated in § 1 of chapter 22 of the Code of Judicial Procedure that "an action against the suspect [...] for a private claim in consequence of an

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<sup>45</sup> Brienen & Hoegen, p. 904.

<sup>46</sup> Terrill, p. 331-332.

<sup>47</sup> Terrill, p. 332.

offence may be conducted in conjunction with the prosecution of the offence.” Swedish law provides the injured party with the possibility to have a counsel for injured party appointed to her, which will be further examined in chapter 4.4 of this thesis. If such a legal counsel has been appointed, the Swedish judicial system entitles the injured party to have her counsel take care of the private claim for damages in the legal proceedings. If the victim does not make use of the possibility to have a counsel for injured party appointed to her, it is possible for the public prosecutor to present the claim for her.<sup>48</sup> If the private claim is based upon an offence subject to public prosecution, the prosecutor shall upon request from the injured party also prepare and present the injured party’s claim in conjunction with the prosecution. The private claim shall be handled by the prosecutor if no major inconvenience will result and if the claim is not manifestly devoid of merit.<sup>49</sup> Additionally, when an action for private claims in consequence of an offence is handled by the court in a separate case, the court has the power to order that the action should be consolidated with the prosecution.<sup>50</sup> If a prosecution is withdrawn or dismissed, upon the injured party’s request the court may arrange for the action for private claims to be disposed of as a separate case in the manner prescribed for civil actions. However, if such a request is not made by the injured party the action shall be considered to have lapsed.<sup>51</sup>

### **2.2.3.3 The Criminal Case Post-Trial**

Once the trial is concluded the defense and the prosecution both have the opportunity to appeal the court’s judgment to the due court of appeal. The conditions are that that the petition for appeal is received by the district court within a certain time limit and, if it is required, that the court for appeal grants a leave to appeal.<sup>52</sup> An unusual feature of the Swedish trial proceedings is that the injured party may not only appeal the decision on the compensation part but also the sentence imposed on the convicted offender.<sup>53</sup>

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<sup>48</sup> Brienens & Hoegen, p. 890.

<sup>49</sup> § 2 of chapter 22 of the Code of Judicial Procedure.

<sup>50</sup> § 3 of chapter 22 of the Code of Judicial Procedure.

<sup>51</sup> § 6 of chapter 22 of the Code of Judicial Procedure.

<sup>52</sup> Terrill, p. 333.

<sup>53</sup> Brienens & Hoegen, p. 907-908.



## 2.3 The American Judicial System

To describe the American legal system as one uniform system would be thoroughly misleading. Besides a federal judicial system the United States contains of fifty states and consequently of fifty different judicial systems, and all these systems exists alongside one another. Furthermore, there are multiple sources of law, and it is possible for two or more judicial systems to have concurrent jurisdiction over the same case. With this being said, the following description will be a much generalized overall introduction of the states' judicial systems and the federal judicial system in the United States.<sup>54</sup>

### 2.3.1 Characteristic Features

#### 2.3.1.1 Common Law

The legal systems in the United States are strongly influenced by the British judicial system of common law and equity courts. Historically, common law was developed by custom. Today, the legal systems of common law countries are constructed around case law and the systems often take the form of precedent systems. In a completely precedent judicial system, the opinions of judges are regarded as more important than the opinions of legislators. Traditionally, no systematic code of law exists in these common law countries. Instead of a code, the prior decisions of judges constituted the primary material.<sup>55</sup> The judicial system of the United States, however, is built on a code - the Constitution - that amongst other things codifies the federal judicial power and fundamental right for citizens. Nonetheless, the Constitution is a general document that establishes the frame for the judicial systems and it does not regulate the details of the Americans' everyday life. Instead, this is done by statutes and case law.<sup>56</sup> A leading principle in common law systems in general is the principle of stare decisis. The stare decisis principle gives the courts' decisions binding power in later cases unless the decision can be distinguished from the case or overruled. The legal body administrated in the American courts is built on legal principles and rules derived from written opinions explaining the decisions made by courts other than the courts of first instance. However, even though the American judicial system springs from the traditional British common law system, the American system of today is also influenced by federal and state statutory laws as well as administrative laws.<sup>57</sup> This makes is difficult to define the boundaries between case law and statutory law. One scholar expressed these difficulties with saying that the only thing that one could

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<sup>54</sup> Meador & Mitchell, p. 1.

<sup>55</sup> Llewellyn, p. 1.

<sup>56</sup> Meador & Mitchell, p. 9.

<sup>57</sup> Meador & Mitchell, p. 3.

stipulate to an American judge is “what you create can be only on a small scale; you must heed the guidelines given by statute.”<sup>58</sup>

### 2.3.1.2 The Adversarial System

The United States use an adversarial system in its courts as common law countries generally do. The adversarial model springs from a theory that there are two sides to every case or controversy. In the adversarial process, two opposing parties present their versions of the facts and the evidence favourable to their side, thus challenging the other party’s version. In criminal cases, the prosecutor or the state claims that the defendant is guilty while the defendant contends innocence. The adversarial process rests primarily on oral evidence presented through questioning and argumentation. The presentation of the two versions of the facts is done to assist the court, which gives a judgment after hearing both sides and their counter-arguments. According to the adversarial tradition, the judge shall act as a passive referee whose primary role is to see to that both parties follow the accepted rules of legal procedure. The judge decide in due course who the winning party is in accordance with the rules of evidence, but only after both sides have had full opportunity to battle it out. It is up to the parties to persuade the court to believe or to reject a version of the facts since the parties in both civil and criminal cases are solely responsible for presenting the facts to the court.<sup>59</sup> In some states, the judge has the right to ask substantive questions to witnesses and to comment on the credibility of the presented evidence to the jury. In other states, the judge is constrained from any active activities and is only seen as a passive bystander.<sup>60</sup> No matter what role the judge plays it is especially important that the judge supervises the rules of evidence in the case concerning what information the jury is allowed to take part of. In the adversarial process it is up to the judge to exclude questionable information. In contrast to the inquisitorial system, judges have little power to bring out information concealed by the parties.<sup>61</sup>

Those who support the adversarial system perceive competing parties as a better guarantee for the truth rather than a system where a judge makes inquiries and thereby risks being bias. The critics, however, argue that the adversarial system is inadequate and only randomly works as the better guarantee for the truth. Their opinion is that the process puts the truth secondary and that the process all too often develops into a theater to financially benefit the attorneys. Some critics say that the greatest weakness of the adversarial system is its failings in the resolution of complex disputes involving scientific and statistical evidence. Since both the judge and the jury should be without any special knowledge of the underlying subject matter in a case, the opinion is that they cannot effectively evaluate the evidence. This creates large problems that some American federal

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<sup>58</sup> Llewellyn, p. 101.

<sup>59</sup> Carp et al., p. 229 and Hale, p. 31-32.

<sup>60</sup> Carp et al., p. 243-244.

<sup>61</sup> Richards & Rathbun, p. 6.

regulatory agencies dealing with technical matters have resolved with the usage of an inquisitorial method with expert judges and expert staff.<sup>62</sup>

### 2.3.1.3 The Separation of Powers

The American form of government is strongly influenced by Montesquieu's tripartite system. This doctrine of separation of powers is embodied in all American governmental structures and means that the governmental authority is divided in three branches: a legislative branch, the Congress; an executive branch, the president; and a judicial branch, the courts.<sup>63</sup> The doctrine was adopted to prevent and impede the exercise of arbitrary power and to save the American people from abuse by state officials with too extensive concentration of power in their hands.<sup>64</sup> To achieve this purpose each branch should be in the hands of different officials or official bodies. According to the doctrine, the legislative branch should make laws through the passages of statutes and the executive branch should be the ones enforcing the laws. Last but not least, the judicial branch should interpret and enunciate the intention behind the laws through the adjudication in cases of dispute.<sup>65</sup> Noteworthy is the fact that the legislative branch and the executive branch is so detached from one another that both branches can work normally irrespectively of the different changes in the political field. As a consequence, it is possible for a president to be of another political party than the political majority in the Congress.<sup>66</sup>

### 2.3.1.4 The Doctrine of Judicial Review

Under the doctrine of judicial review, all American courts have the power to hold a legislative act contrary to the Constitution or a state constitution and therefore unenforceable. This authority means that both state courts and federal courts have the power to try the law in every case they handle. However, only decisions from the Supreme Court have a precedential effect. Furthermore, the doctrine gives all courts the power to declare acts of executive officials as unconstitutional.<sup>67</sup> The doctrine of judicial review is derived from a Supreme Court decision in the case *Marbury v. Madison* in 1803,<sup>68</sup> the first case where the Supreme Court held an act of Congress to be unconstitutional. "Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument."<sup>69</sup> Since then, the doctrine of judicial review has changed considerably in both range and in significance. A major milestone in the

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<sup>62</sup> Richards & Rathbun, p. 7.

<sup>63</sup> Nergelius, p. 8.

<sup>64</sup> Mendelson, p. 59.

<sup>65</sup> Meador & Mitchell, p. 2.

<sup>66</sup> Nergelius, p. 9.

<sup>67</sup> Meador & Mitchell, p. 2-3 and Nergelius, p. 12.

<sup>68</sup> Nergelius, p. 12.

<sup>69</sup> Mendelson, p. 6.

doctrine's development came in 1954 with the case *Brown v. Board of Education*<sup>70</sup>, which outlawed the official school segregation. In the 1960s and afterwards, more and more issues were opened to judicial cognizance and decision. This development of judicial power is unique for the United States since the majority of countries practicing judicial review practice it within quite limited ranges.<sup>71</sup>

State courts are obliged to apply both the state constitution in question and the Constitution, and the Constitution prevails if there is any conflict of law. Federal courts apply federal law, although they have the authority to apply provisions from state constitutions as well if the meaning of such provisions is questioned.<sup>72</sup> Since such a strong doctrine of judicial review has developed in the United States, concerns have been expressed about how the broad judicial discretion sometimes might undermine the rule of law.<sup>73</sup> In fact, the power of judicial review gives the courts authority to disregard actions taken by publicly elected representatives when the courts find those actions to be contrary to a constitution.<sup>74</sup>

### 2.3.2 The American Court System

One of the strongest features of the American judicial system is the existence of multiple court systems. The federalist system prevailing in the United States has resulted in a judicial structure where a nationwide system of federal courts functions at the side of state courts. These two court systems coexist alongside one another and create a complex judicial picture.<sup>75</sup> The judicial systems in the fifty states as well as the federal judiciary are constructed like a pyramid, usually divided in three levels. Overall the systems are similar, but they vary in detail. At the base of both judicial pyramids are the trial courts. In the federal system and in most state systems, some form of appellate courts follows the first instances on the intermediary level. The intermediary courts are in their turn followed by the Supreme Court at the federal level, and usually some form of state supreme courts at the state level. These courts are the highest courts in the two judiciary systems.<sup>76</sup>

The state courts are the leading adjudicators in the United States since they play an active part of people's everyday lives and affairs. These courts overshadow the federal courts both in number of cases handled and in number of persons involved in the proceedings seen to litigants, judges and attorneys. However, these same numbers also emphasizes the importance of the federal courts. Federal court decisions echoes through the two court

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<sup>70</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>71</sup> Wolfe, p. 7-8.

<sup>72</sup> Meador & Mitchell, p. 2-3.

<sup>73</sup> Wolfe, p. 11.

<sup>74</sup> Meador & Mitchell, p. 2-3.

<sup>75</sup> Baum, p. 22.

<sup>76</sup> Meador & Mitchell, p. 1-2.

systems and effects the operations of government all over the United States.<sup>77</sup> Since the 1960s, the quantities of cases brought in the judicial systems have increased consistently in a rapid rate and today the caseload clearly exceeds what the courts can effectively handle. As a result, American courts have lengthy delays, and some courts the parties might have to wait several years before they get their day in court. This increased caseload has led to some modifications of traditional judicial procedures, which will be described further in chapter 2.3.2.4.<sup>78</sup>

### **2.3.2.1 Determination of Jurisdiction**

The problem of determining the jurisdiction of the state courts and the federal courts is part of a more general problem of how the state and federal powers are distributed.<sup>79</sup>

#### **2.3.2.1.1 State Versus Federal Powers**

The Constitution states that the federal government, the Congress, only has those powers granted to it. The residual powers, besides the ones expressly forbidden for states, are left to the states.<sup>80</sup> Broadly speaking, the states have control over their own affairs. If the matter does not involve individual rights under the Constitution, and if there is no interstate commerce involved, the matter in question lays within state control. Since the Constitution determines the jurisdiction in a matter or in an area and because the Constitution is a general document created some hundred years ago, there are potential for problems. As a result, the Constitution created the Supreme Court as a mediator between the Congress and the states. To resolve potential problems, the Supreme Court reserved to itself to ascertain and determine the meaning of the Constitution. With this power of interpretation the Supreme Court is able to declare a law, state or federal, as unconstitutional. Given the ever-growing body of federal legislation and the laws made by fifty state legislatures, there are inevitably conflicts between federal law and state law every once in a while. When conflicts do occur, the Constitution provides that federal law preempts the conflicting state law, except when the conflict concerns a legislative area specifically reserved to the states.<sup>81</sup>

#### **2.3.2.1.2 Judicial Jurisdiction of the American Courts**

Federal crimes, defined by acts of Congress, relate to areas of particular federal concern such as interstate commerce, national security, and the federal government's functioning. In all areas of particular federal concern, the federal authority's judicial reach has slowly but surely expanded, and

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<sup>77</sup> Meador & Mitchell, p. 8.

<sup>78</sup> Meador & Mitchell, p. 6.

<sup>79</sup> Farnsworth, p. 40-41.

<sup>80</sup> Farnsworth, p. 40-41 and Nergelius, p. 10.

<sup>81</sup> Richards & Rathbun, p. 3-5.

nowadays federal crimes include various drug and gun-related activities, kidnapping, bank robbery and fraud.<sup>82</sup> Bank robbery is for instance a crime under state laws but has also become a federal crime under federal law. A bank robber can be prosecuted in federal court by federal authorities as well as in state court by state authorities. There is a great deal of federal-state cooperation to avoid double prosecutions, but it still sometimes occurs.<sup>83</sup> In the governmental scheme of the United States, the upholding and protection of basic order is state, rather than federal, responsibility. Accordingly, the most common and most severe offences including homicide, rape, robbery, larceny and assault and battery fall within the state courts' jurisdiction.<sup>84</sup>

The scope of the federal court jurisdiction is outlined by the Constitution and is developed in more detail in federal statutes. In general, the greater part of cases brought within the federal court system falls into one of the following three categories of jurisdiction. The first category is the "federal question jurisdiction", which is based on the subject matter of cases. All cases that may be resolved by the Constitution, by treaties with other nations, and by federal statutes fall under the jurisdiction of the federal courts. The second category is the "federal party jurisdiction", which concerns all cases where the federal government acts as a party. Nearly all cases brought against or by the federal government, a federal agency, or a federal official shall be heard in federal courts. The third category is the "diversity jurisdiction", which is based on geography. If there is a suit involving states, citizens of different states, or someone who is a citizen of a foreign nation, the federal courts usually have jurisdiction over the case. This principal rule applies as long as the suit exceeds a certain amount of money. Diversity jurisdiction is the most controversial ground for federal jurisdiction and has often been disputed.<sup>85</sup> In some cases, the Congress has made the jurisdiction of federal courts exclusive, meaning that these matters cannot be brought before state courts. In cases where jurisdiction has not been reserved to federal courts, the federal courts and the state courts have concurrent jurisdiction. This means that a plaintiff can bring the case in either a state court or a federal court. Cases of diversity jurisdiction have concurrent jurisdictions as well as many cases of federal question jurisdiction. Consequently, state-created rights may be enforced in federal courts and vice versa.<sup>86</sup> The greater part of the federal questions decided by state courts arise in criminal prosecution and today the state criminal defendants routinely asserts some defense or right derived from the Constitution.<sup>87</sup>

Cases brought in one judicial system normally stays within the same system. A case initially brought within the federal court system almost always remains in the federal court hierarchy, although it might be sent to the state

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<sup>82</sup> Meador & Mitchell, p. 29-30.

<sup>83</sup> Meador & Mitchell, p. 35.

<sup>84</sup> Meador & Mitchell, p. 17-18.

<sup>85</sup> Baum, p. 23, Farnsworth, p. 40-41 and Richards & Rathbun, p. 3.

<sup>86</sup> Baum, p. 23-24 and Farnsworth, p. 41.

<sup>87</sup> Meador & Mitchell, p. 18-19.

court system if the case shows to not involve a federal issue. A case can also go the opposite way, and a case initially filed within a state judicial system may be brought into the federal court system.<sup>88</sup> This happens in one of two ways. One way is by removal at the outset of the case. The principal rule is that a defendant can remove the case from a state court to a federal court if the pending case is one over which the federal court also has jurisdiction. The way of removal is supposed to safeguard the rights of defendants from other states than the prosecuting state, so that defendants can escape potential state court bias. It also allows federal-law cases especially suited for federal adjudication to be litigated from start to end in the federal judicial system. The other way cases can go from state judicial systems to the federal judicial system is through a form of appellate review by the Supreme Court. This review can come about after a final decision in the case by the highest state court possible, if the state court's decision includes a substantial question of federal law.<sup>89</sup>

### **2.3.2.2 The State Courts**

The American state judicial systems are rather diverse with different backgrounds and inheritance. The states on the east coast derived most of their law from British common law, and several of the western states were influenced by Spanish civil law. The judicial system in the state of Louisiana has traditions from French civil law, and the state of Texas has a strong Spanish and Mexican heritage.<sup>90</sup> The state courts are still strongly affected of historic conditions and obsolete concepts. For instance, when the first court systems were established communications were slow and complicated. To meet this problem, multiple courts of general jurisdiction were established and spread over the country in order to bring justice close to the people. Soon people came to regard the state court in their area as their "own" court. The decentralized state court systems have in part remained until modern times and work is still in progress to change this. Each of the fifty states has its own written constitution and statutes, which dictate to different degrees the structure of the judicial systems. The lack of uniformity is the reason why it is not possible to give a detailed description that fits all states. However, the fifty states' judicial systems resemble each other in broad outline, why the following is a description of some key components of the state judicial systems.<sup>91</sup>

#### **2.3.2.2.1 The Trial Courts**

The state trial courts forms the base of the state judicial pyramid. The courts are the forum in which cases are initially heard and decided, witnesses are called to testify, and contradictory facts are made clear. A single judge presides in court with a general competence to hear both civil and criminal cases and factual issues are resolved either by a jury or by the trial judge

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<sup>88</sup> Baum, p. 22 and Richards & Rathbun, p. 3.

<sup>89</sup> Meador & Mitchell, p. 30-31.

<sup>90</sup> Richards & Rathbun, p. 5.

<sup>91</sup> Farnsworth, p. 37.

alone.<sup>92</sup> Since this is where people commence their civil proceedings and the state commences criminal prosecutions, the trial courts are sometimes referred to as courts of original jurisdiction. In many states the trial courts are subdivided into two levels, the upper level and the lower level. The upper level consists of the major trial courts, referred to as courts of “general jurisdiction”, since they typically have authority to adjudicate any type of civil and criminal cases. The upper level trial courts are called different things in different states, for instance district or superior courts or courts of common pleas.<sup>93</sup> Homicides, rapes, robberies and other felonious breaches of state laws are prosecuted in trial courts of general jurisdiction.<sup>94</sup> The lower level consists of trial courts of “limited jurisdiction” that have relatively restricted power. Typically those courts only have authority to adjudicate a narrow range of cases, sometimes defined in monetary terms such as certain levels of damages.<sup>95</sup> Examples of cases handled in trial courts of limited jurisdiction are misdemeanors and a large number of minor offences, such as traffic violations.<sup>96</sup> The lower level trial courts handle a far greater volume of cases than the higher level trial courts and there have been recent attempts to unify the two levels.<sup>97</sup>

#### **2.3.2.2.2 The Appellate Courts**

The appellate courts are courts of last resort. The highest state courts are usually called state supreme courts, and these courts were originally the only state appellate courts. This changed as a result of the judicial systems’ rising caseload. The state legislatures began creating intermediate appellate courts, and today the majority of the American states have such courts.<sup>98</sup> These new appellate courts were inserted between the trial courts and the supreme courts to increase the appellate capacity of the systems. The intermediate appellate courts are mostly known as courts of appeals and are designed to handle a great number of appeals. Some states organize their intermediate courts on a statewide basis, others on a geographical basis, and still others on a subject matter basis.<sup>99</sup> With the courts of appeals as an intermediate level, the supreme courts became reserved for more challenging cases. Most states organize the appellate courts in a way so that almost all appeals from the trial courts, with very few exceptions, go to the intermediate courts. In that way the supreme courts receive only a few appeals directly from the trial courts and they have the discretion to determine whether a case is in need of an institutional law-developing court. This leaves the intermediate courts with a more error-correcting function than a lawmaking function.<sup>100</sup>

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<sup>92</sup> Farnsworth, p. 38.

<sup>93</sup> Baum, p. 44-46 and Farnsworth, p. 37-38.

<sup>94</sup> Meador & Mitchell, p. 18.

<sup>95</sup> Farnsworth, p. 37-38.

<sup>96</sup> Meador & Mitchell, p. 18.

<sup>97</sup> Meador & Mitchell, p. 11.

<sup>98</sup> Baum, p. 46-47.

<sup>99</sup> Farnsworth, p. 38 and Meador & Mitchell, p. 12-13.

<sup>100</sup> Meador & Mitchell, p. 14-16.



## **2.3.2.3 The Federal Courts**

### **2.3.2.3.1 The District Courts**

The federal district courts are the base in the federal court system and fill the role as the major trial courts of the federal system for both civil and criminal cases. The Congress has divided the United States into ninety-four federal judicial districts.<sup>101</sup> There are at least one judicial district in each state and multiple districts in the larger and more populated states. As a principal rule no federal judicial district crosses the state lines. Every district has a district court, creating ninety-four separate courts. A single judge presides over a case, and if no jury is present the judge acts as a trier of fact as well as of law.<sup>102</sup> The majority of lawsuits brought in the federal system begin in district courts, although a few go directly from state courts to the Supreme Court.<sup>103</sup> Suits arising under federal statutes form an increasingly important segment of the judicial dealings in federal district courts. One reason for this is that many of the regulatory statutes enacted by Congress in recent times give individuals the right to sue for alleged violations. Although private transactions and the affairs of people's everyday life to large extent continue to be governed by state laws, federal laws grows in importance and have gradually become more pervasive. Today, few areas of people's lives are untouched by federal law with the effect that the federal courts handle a widespread and diverse range of cases.<sup>104</sup>

### **2.3.2.3.2 The Courts of Appeals**

The Congress has established thirteen federal judicial circuits as a structural basis for the federal intermediate appellate courts.<sup>105</sup> A circuit consists of the district courts within that circuit's geographical area, and every circuit has its own court of appeals.<sup>106</sup> The courts of appeals have jurisdiction over both civil and criminal cases as well as jurisdiction to review orders of major federal administrative agencies. There is one exception from the federal appellate courts organized on a territorial basis - the Court of Appeals for the Federal Circuit. This court's jurisdiction is partly defined by the subject matter of cases. The court has jurisdiction over appeals from all the ninety-four districts courts in cases concerning patent law and some of the damages suits brought against the federal government. In addition, the court has jurisdiction over some appeals concerning decisions by special courts and over several appeals from administrative agencies. The courts of appeals initially hear and decide cases in panels of three judges.<sup>107</sup> The courts of appeals strive to apply laws consistently within their circuit and to

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<sup>101</sup> Baum, p. 27 and Richards & Rathbun, p. 3.

<sup>102</sup> Baum, p. 29-32 and Meador & Mitchell, p. 21.

<sup>103</sup> Richards & Rathbun, p. 3.

<sup>104</sup> Meador & Mitchell, p. 29.

<sup>105</sup> Farnsworth, p. 39.

<sup>106</sup> Richards & Rathbun, p. 3.

<sup>107</sup> Meador & Mitchell, p. 22-24.

maintain consistency with other circuits, although they are only bound by the Congress and the Supreme Court.<sup>108</sup>

### **2.3.2.3.3 The Supreme Court**

In top of the federal judicial pyramid is the Supreme Court, the only court specifically established by the Constitution. The number of Justices serving at the Supreme Court is set by Congressional enacted legislation and since 1869 it have been nine Justices.<sup>109</sup> The Congress also enacts legislation that sets the range of the Supreme Court's jurisdiction within the boundaries of the jurisdiction authorized by the Constitution.<sup>110</sup> The majority of cases go through the district courts and the courts of appeals before ending up in front of the Supreme Court. It is possible to bring some cases directly to the Supreme Court but it is exercised sparingly and only in cases of special urgency and of great public importance.<sup>111</sup> The Supreme Court has four primary roles: to determine whether an act of the Congress is constitutional or not, to review state laws and court decisions for conflicts with acts of Congress and the Constitution, to adjudicate when conflicts occur between states, and to resolves conflicts between the federal circuits' courts of appeals. The Supreme Court does not have an advisory role, and do not provide advisory opinions on the constitutionality of proposed state and federal laws.<sup>112</sup> This puts the Supreme Court in an exclusive and dominant position in the American judicial systems. The court has an almost discretionary jurisdiction, and litigants petition the court for a writ of certiorari. If a writ is not granted the decision of the court below is left standing. Noteworthy is that a denied writ of certiorari cannot be understood as an implication from the Supreme Court that the lower court decided the merits of the case correctly. It should just be understood as that the legal question raised in the case is not one that the court wishes to address at that time.<sup>113</sup> However, since the court only can decide a small part of the cases presented to them the decision to not review a case has come to influence precedent nearly as much as a Supreme Court decision in a case.<sup>114</sup>

### **2.3.2.4 Modifications of Judicial Procedures**

In view of the fact that the American judicial systems have experienced a rising tide of litigations, some judicial procedural modifications have taken place. In the trial courts, the major change has been the introduction of affirmative case management by judges with the purpose to conclude more cases without undue delay and expenses. Instead of having the opposing attorneys controlling the case and the judges acting as passive referees some trial courts with heavy caseloads have introduced a more active role for the

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<sup>108</sup> Richards & Rathbun, p. 3.

<sup>109</sup> Baum, p. 36 and Farnsworth, p. 39-40.

<sup>110</sup> Meador & Mitchell, p. 24.

<sup>111</sup> Richards & Rathbun, p. 3.

<sup>112</sup> Richards & Rathbun, p. 3 and Farnsworth, p. 42.

<sup>113</sup> Meador & Mitchell, p. 25.

<sup>114</sup> Richards & Rathbun, p. 3 and Farnsworth, p. 42.

judges. Many judges hold conferences with the party's attorneys to take control over the case already at an early stage. In doing so, it enables the judges to schedule pretrial activities such as the discovery process and to encourage settlement discussions. The introduction of an active role for judges has been a fairly controversial development but it has strong support within the trial court in question. The appellate court level has also experienced some changes. One new development is the introduction of truncated processes in which appeals deemed as fairly simple are steered through a shortened process that may be without oral arguments and formal conference of the judges. This means that the court is left relying primarily on the attorneys' briefs or staff-prepared memorandum and as a consequence the opinions are short and concise without elaborated discussions about the judges' reasoning. However, the more complicated cases are still being handled in a traditional appellate process. Noteworthy is that despite the ever-increasing caseload in American courts, the right to a jury trial remains to be a key feature of the American court procedure. The jury trial has only been effected in the sense that today's juries are often composed of fewer members than the traditional jury of twelve.<sup>115</sup>

## **2.3.3 The Legal Proceedings**

### **2.3.3.1 The Criminal Case Pre-Trial**

The most criminal cases starts with the police arresting the person suspected of the crime. The suspect must be brought before a judicial officer - the magistrate - without unnecessary delay. The magistrate will conduct the preliminary examination, an informal public hearing, which determines whether there is sufficient evidence to warrant holding the suspect. If the case is not dismissed, bail will be set by the magistrate as a security for the suspect's release from custody. The hearing before the magistrate usually takes place without any interrogation of the suspect. The accused is informed of the charges by formal accusation, which is usually done through indictment. An indictment is an accusation prepared by the prosecutor and presented to a grand jury, a panel that usually only is confronted with the prosecutor's evidence, which found the accusation sufficiently justified for a trial. The indictment is followed by arraignment before the trial judge in open court. Here, the accused has the charges formally read for him, after which the accused makes a verbal plea of guilty or not guilty. The accused may object to the legal sufficiency of the accusation or plead guilty to a lesser offence than the one he is charged with.<sup>116</sup> Statistics shows that over 90 % of all criminal cases at both state and federal level never go to trial. The cases are ended before, typically because of the possibility of a plea bargain that exists in the American judicial system. A plea bargain means that some form of leniency is promised to the accused by the prosecutor in exchange for a guilty plea from

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<sup>115</sup> Meador & Mitchell, p. 6-7.

<sup>116</sup> Farnsworth, p. 112.

the accused.<sup>117</sup> If the accused pleads not guilty at the arraignment, however, both parties prepare for trial and a “discovery process” takes place through procedures that may be enforced by the court. In civil cases, both sides have the possibility to use procedures such as depositions and interrogations to identify witnesses, gather relevant information, and learn about the opposing party’s evidence. The discovery process is somewhat less extensive in criminal cases. In contrast to civil cases, the rules and statutes for criminal cases does usually not provide formal discovery procedures. Nonetheless, there is a considerable amount of information exchanged informally between the prosecutors and the defense attorneys. Both sides are given access to the written statements of the witnesses who are intended to be called at trial.<sup>118</sup>

### **2.3.3.2 The Criminal Trial Proceedings**

The following describes a typical prosecution since a more summary procedure is used to try petty offences. In criminal proceedings in the United States the prosecutor has a leading role, and on the opposite side of the case stands the defendant. Between the two parties stand the impartial arbiters in the form of the judges and jurors.<sup>119</sup> Again, there is no such thing as a single judicial system in the United States and hence not just one type of criminal proceedings. The following will focus on those norms and similarities that do exist between the federal and state judicial systems.<sup>120</sup>

Assuming no plea bargain has been struck and that the accused pleads not guilty to the crime, a formal trial takes place. The defendant may choose to have a bench trial where the defendant are tried and sentenced by a judge alone. If the defendant chooses to not have a bench trial, the case will be determined by a jury. A formal trial usually begins with opening statements, first from the prosecutor and then from the defense. The opening statements should provide the judge and jury with the outlines for the case, the major objectives of both sides’ cases, the evidence that will be presented, the witnesses that will be called, and what the parties seek to prove from the evidence of their witnesses. The opening statements tend to be longer and more detailed at jury trials since the jury members lacks knowledge in law and investigation procedures.<sup>121</sup> The opening statements are followed by the prosecutor’s presentation of the evidence collected by the state against the defendant and may consist of both physical evidence and testimonies from witnesses. The defense has the opportunity to object to the admission of any of the tangible evidences and this may result in an exclusion of that item from consideration. A great deal of the evidence in criminal trials is testimonies presented in court through a question-and-answer procedure. After each witness has testified under oath for the prosecutor, the defense has the right to cross-examine. After the completion of the cross-

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<sup>117</sup> Carp et al., p. 223.

<sup>118</sup> Meador & Mitchell, p. 4-5.

<sup>119</sup> Farnsworth, p. 111.

<sup>120</sup> Carp et al., p. 202.

<sup>121</sup> Baum, p. 191 and Carp et al., p. 238-240.

examination, the prosecutor has the opportunity to conduct a redirect examination to clarify or correct something brought forward during the cross-examination. When the prosecutor has presented all the state's evidences and witnesses the prosecution rests its case. The defense presents its case in a manner similar to the prosecutor's in both style and arrangement. Physical evidence is less common in the defense's case and the bigger part of the presented evidence is usually witness' testimonies. The defense questions their witnesses in the same manner as the prosecutor questioned theirs, after which the prosecutor holds cross-examination. Finally, the defense has the possibility to a redirect examination, after which the defense rests its case. In reality, the difference between the prosecutor's case and the defense's case lies in their obligation before the law. There are no requirements by law that the defense shall present any new or further evidence. The defense simply needs to show that the state's case is not proved beyond a reasonable doubt. Therefore, a defense may consist only in challenging the legality and credibility of the state's evidence and witnesses. When each party has rested its case, the prosecution can go back on the defense's "attack" and present rebuttal evidence and the defense can offer a rejoinder. The trial then moves on to the final stage, the closing arguments. By summing up the case and condense their strongest arguments, both sides try to convince the judge and jury to believe their version of the facts, and no new facts are allowed at this point.<sup>122</sup> After the closing arguments, the jury deliberates. Before the deliberations, the judge gives the jury some instructions about the meaning of the law in question and how it should be applied.<sup>123</sup> When the jury has reached a decision it returns to the courtroom and the verdict is announced in open court.<sup>124</sup>

### **2.3.3.2.1 The Right to Jury**

The right to jury is a traditional feature of a common law system and a key component in the American legal proceedings. The jury system is looked upon as the means whereby ordinary citizens are involved in the judicial process.<sup>125</sup> A defendant charged with a serious offence has a right to trial by jury whether the case is brought in a federal court or in a state court. In federal court, twelve people must render a unanimous verdict. In state court, the twelve person criteria apply only to the most serious criminal offences. In some states, the jury may consist of fewer than twelve people and it may also be possible to render a verdict by other than a unanimous decision. In contrast to the Swedish system's use of laymen, the American juries are selected after a process of questioning directed by the prosecution and the defense. Once a jury panel is selected the members are sworn in, which puts them on the same level as the trial judge.<sup>126</sup> In a jury trial, the members of the jury are supposed to base their judgment on the material presented in the court and they are not expected to have any special knowledge of the

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<sup>122</sup> Baum, p. 192 and Carp et al., p. 240-242.

<sup>123</sup> Carp et al., p. 245.

<sup>124</sup> Carp et al., p. 249.

<sup>125</sup> Meador & Mitchell, p. 7.

<sup>126</sup> Carp et al., p. 238-239.

matters in the case. Generally, during the jury selection the attorneys ask that persons with knowledge in the matter be struck from the jury panel on account of fear of bias.<sup>127</sup> In an adversarial legal system, the word passive is the word to best describe the jury's role during a trial. The members of the jury are normally not allowed to ask questions but are to listen to the case presented by the two parties. In recent years, there have been some changes allowing jurors a somewhat more active role in the trial proceedings. Nevertheless, the role of the jury still remains principally passive.<sup>128</sup>

### **2.3.3.3 The Criminal Case Post-Trial**

If the defendant is convicted the sentence is imposed after the judgment. The sentence is usually imposed by the trial judge within the limits set by statutes.<sup>129</sup> The process by which the sentence is handed down by the judge varies, but usually the sentence is announced immediately after the trial proceedings or after the defendant's acceptance to plead guilty. In felony cases the sentencing may follow after a sentencing hearing. Previous to this hearing the judge typically receives a report from a probation officer containing information about the defendant's background, for instance prior criminal record and family situation. The probation officer's report often includes a recommendation about whether to impose probation or a prison sentence on the defendant. During the sentencing hearing both parties are heard by the judge. The defendant generally has the option to speak at the hearing, and sometimes the victim has the same option. After the case has been presented in this way, the judge imposes the sentence and offers a brief justification of the sentence.<sup>130</sup> Contrary to the situation for civil cases a high percentage of all criminal cases are appealed by defendants. The appeals are based exclusively on the documentation made in the trial courts, and no rehearing of witnesses or presentation of new evidence is allowed in the appellate courts. The appellate courts typically focus on the questions of law raised in the trial court proceedings. In this, the appellate court's one and only function is to determine whether the judgment from the trial court should be affirmed, reversed, or adapted in any way.<sup>131</sup>

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<sup>127</sup> Richards & Rathbun, p. 6.

<sup>128</sup> Carp et al., p. 244-245.

<sup>129</sup> Farnsworth, p. 114.

<sup>130</sup> Baum, p. 199.

<sup>131</sup> Meador & Mitchell, p. 4-5.

# 3 Victims of Sexual assault

## 3.1 Introduction to the Chapter

This chapter intends to give the reader an illustration of the crime sexual assault. The chapter presents some brief statistics aiming to demonstrate the crime's magnitude in Sweden and in the United States. Additionally, the chapter describes and problematizes the general terms used in the study. Furthermore, the chapter examines the severity of the crime sexual assault and how it is viewed within the international community.

## 3.2 Introductory Statistics

### 3.2.1 Sweden

In a speech held in 2008 by the Swedish Minister for Integration and Gender Equality, she stated that Swedish women had reported 25 412 cases of sexual abuse and 4 189 cases of rapes in the year of 2007. She pointed out that the Swedish National Council for Crime Prevention (*Brottsförebyggande rådet*) paints a dark and alarming picture of the frequency of sexual assault and sexual violence against women in Sweden. The council has estimated that the offences reported to the authorities only represent 20 - 25 % of the committed crimes and that nearly half of the women in Sweden, 46 %, have been exposed to some form of sexual abuse or assault.<sup>132</sup> The most recent statistics from the Swedish National Council for Crime Prevention show that approximately 15 700 crimes of sexual assault were reported in 2009, which is an increase with about 9 % compared to 2008. Of the crimes reported, rape and sexual molestation were the crimes in majority and both categories of crimes showed increased numbers compared to previous years. The number of reported rapes against adults were approximately 5 940 in 2009, which is an increased with 9 % from the year before. The number of reported sexual molestations were about 7 590 in 2009, which is an increase with 5 % from the year before. From their statistics, the Swedish National Council for Crime Prevention came to the conclusion that the number of reported rapes have increased annually during the last ten years. The increase is partially due to the new and revised Swedish legislation concerning sexual assault, which widened the range of crimes classified as rape.<sup>133</sup>

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<sup>132</sup> Speech held by Nyamko Sabuni at Riffi's International Women's Conference 2008  
<http://www.sweden.gov.se/sb/d/8811/a/103199> (retrieved 2010-04-26).

<sup>133</sup> BRÅ publikation 2009, p. 7.

## 3.2.2 The United States

When it comes to sexual assault in the United States, early statistics from the National Violence Against Women Survey carried out in 1998, derived from interviews of 16 000 women and men nationwide, showed that 17.6 % of the women interviewed had been a victim of rape or attempted rape. The rate for completed rape alone was 14.8 %. This translated into the fact that one in every six American women had been a victim of rape or attempted rape in the end of the 1990s.<sup>134</sup> According to the National Center for Victims of Crimes, statistics from an American study carried out in 2005 showed that 73 % of the female sexual assault victims in the United States were assaulted by someone they knew. The crime sexual assault is one of the most underreported crimes, and according to the study less than 39 % of all rapes and sexual assaults are reported to the authorities.<sup>135</sup> More recent statistics from 2007 regarding rapes and sexual assaults shows that approximately 248 300 rapes and sexual assaults were reported in the United States in 2007. This amounts to approximately 680 rapes and sexual assaults per day in the country.<sup>136</sup>

## 3.3 General Definitions

### 3.3.1 The Term Sexual assault

The term “sexual assault” (*sexuella övergrepp*) is a very wide and generalizing criminal term. The crimes within this catchall term may include violence, threats, coercion, or manipulation, and the assailant may be a stranger, friend, family member, or an acquaintance to the victim. In most jurisdictions of the United States, the term “sexual assault” has replaced the term “rape” in the states’ statutes. The reason was to create more gender-neutral laws and to reform the statutes to cover more specific types of sexual victimization and various levels of coercion. The laws concerning sexual assault generally assume that a person do not consent to sexual conduct if she is forced, threatened, or is in any state of helplessness. In the United States, the definition of “sexual assault” includes a broad range of offences from rape and attempted rape to unwanted sexual threats. Other examples of sexual acts that fall under the crime sexual assault are forced oral and anal sexual acts, child molestation, incest, and fondling. It is usually considered a sexual assault if someone touches a part of another person’s body, even through clothes, in a sexual way without that person consenting to the act.<sup>137</sup>

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<sup>134</sup> Figueredo, p. 222.

<sup>135</sup> <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32369#1> (retrieved 2010-04-15).

<sup>136</sup> <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1743> (retrieved 2010-04-26).

<sup>137</sup> <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32369#1> (retrieved 2010-04-15).



In Sweden, the catchall term “sexual assault” is not really applied in the same manner as in the United States. The term has not replaced the term “rape” in legal acts, although the term has become somewhat representative for the crime rape in the general public’s language. If someone talks about or uses the term “sexual assault”, many people in Sweden think of rape. In this thesis, the definition of the term “sexual assault” is based on the American definition of the word, which is quite similar to what the definition would be in Sweden.<sup>138</sup> “Sexual assault” in the thesis will generally be associated with the crime of rape. Furthermore, the crime rape will in some aspects be the main focus of the thesis, notwithstanding all the various offences included in the catchall term “sexual assault”. The reason for using rape in this way is that rape often is viewed as the more grave crime amongst the crimes included in the term “sexual assault”. The offence is well documented and has been the subject of extensive research. In addition, the crime rape and some of its possible effects is usually understood by the public at large. Therefore, by using the crime rape to exemplify circumstances that would apply for sexual assaults as well, the purpose is to project a more distinct picture of the general problems and conditions surrounding many of the crimes included in the term.

### 3.3.2 The Terms Injured Party and Victim

A victim of crime in the Swedish legislation is most commonly known as an “injured person” or “injured party” (*målsägande*). However, the terms injured person and injured party embrace a smaller group of people than the term crime victim. Additionally, a crime victim does not automatically apply to an injured person and an injured party in the Swedish judicial system.<sup>139</sup> The legal definition of injured person is “the one against whom the offence was committed, or who was affronted or harmed by it.” The definition is constructed of three prerequisites, none of which excludes the others.<sup>140</sup> The victim who qualifies as an injured person is granted several rights and opportunities within the Swedish criminal justice system. If the injured person makes use of any one of these rights, she has the status of “party” in the proceedings and is referred to as an injured party rather than an injured person.<sup>141</sup> The authors Brien and Hoegen have classified victimized persons within the Swedish legal systems in three ‘grades’; (1) “Victim of crime” is a person that has been victim of a criminal offence and the term is used in the broader sense of the word; (2) “Injured person” is a person against whom the criminal offence was directed and who as a consequence of the offence suffered damages in accordance with Swedish tort liability laws. An injured person neither presents a private claim of damages for the offence, nor supports the prosecution in the legal proceedings. The injured person is not a party in a legal sense but may be

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<sup>138</sup> <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32369#1> (retrieved 2010-04-15).

<sup>139</sup> Brien & Hoegen, p. 889.

<sup>140</sup> § 8 of chapter 20 of the Code of Judicial Procedure and Ekelöf, p. 66.

<sup>141</sup> Brien & Hoegen, p. 889.

considered a party in an emotional sense; (3) “Injured party” is an injured person who takes active part in the criminal proceedings by entering a claim for compensation against the offender, by becoming an auxiliary prosecutor, or by acting as a private prosecutor. The injured party is a party in both an emotional and a legal sense.<sup>142</sup>

In this thesis, a victim of sexual assault will be referred to as a “victim of crime”, a “crime victim” or a “victim” (*brottsoffer*). In addition, a victim of sexual assault will also be referred to as an “injured party”. According to the Swedish professor of procedural law Christian Diesen, the general term victim represents a factual condition whereas the Swedish legislative term injured party is a procedural term, signifying that the victimized person has a specific position in the legal proceedings.<sup>143</sup> In the following chapters, the two terms may sometimes be perceived as synonymous. The reason for this is that Swedish legislation distinguishes between a crime victim and a crime victim with legal rights, an injured party; meanwhile the American legislation does not. When the thesis uses the terms injured party and victim in a legal context the terms should be understood as fairly synonymous to one another.<sup>144</sup> The definition of injured party, which includes victim for the purpose of this thesis, is inspired by Brienen’s and Hoegen’s third classification of victimized persons. This means that an “injured party” and a “victim” in a legal context, is defined as a victim of a sexual assault who takes part of the criminal proceedings of the offence in some way and who in that role may have certain rights. These definitions are supported by the context in which the term injured party and victim are used in various Swedish and American legislative acts and statutes.<sup>145</sup>

Finally, the thesis sometimes refers to victims in a more general context. When this is done, the definition of the term “victim” is inspired by Brienen’s and Hoegen’s first classification of victimized persons. This means that when the thesis refers to a “victim” in a general context, the term is used in the broader sense of the word, thus defining a victim as a person who has been victimized of a sexual assault. The difference between this definition of the term victim and the definition of the term victim used in a legal context, as described above, is that the definition of the term used in a general context disregards any legal rights. This definition is for instance used when the thesis describes the effects of sexual assault and when statistics are presented to illustrate the extent of the societal problem with sexual assault.

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<sup>142</sup> Brienen & Hoegen, p. 890 and p. 907.

<sup>143</sup> Diesen, p. 31.

<sup>144</sup> Author’s note: However, the reader needs to bear in mind that outside this thesis, there is an actual difference between the two terms.

<sup>145</sup> Author’s note: see for example SOU 1986:49, p. 13; § 8 in chapter 20 of the Swedish Code of Judicial Procedure; art. 2, § 2.1(C) of the Arizona Constitution; § 4401(19) of title 13 of the Arizona statute; and § 1 of chapter 258B of the Massachusetts statute.

## 3.4 The Effects of a Sexual assault

In the light of the assumption that every individual victimized by a sexual assault is different, it is not surprising that victims will respond to the crime in different ways. There are many factors in play that can influence the victim's response to the assault and the victim's recovery from the same. The victim's reaction and behavior may be affected of the victim's age, developmental maturity, and the social support network that is available for the victim. Additionally, the victim's reaction may be affected of the relationship to the offender, the severity, brutality, duration and frequency of the assault, and the level of the injury inflicted. Furthermore, the victim's reaction may be affected of the location for the offence, the response from the criminal justice system, the response from the police, medical personnel, victim advocates, community, and the victim's family and friends. For some victims, the recovery process can go relatively fast, but for some, the recovery process never concludes.<sup>146</sup>

### 3.4.1 Physical Effects

The fact that a sexual assault causes a number of physical effects for the victim is obvious. The effects are well documented, especially when it comes to the physical effects of violent rapes. Some of the documented physical effects are pain and injuries of varying severity, for instance vaginal injuries and diseases.<sup>147</sup> Other documented effects are nausea, vomiting, stomach troubles, headaches, shaking, sweating, and palpitation of the heart. Some victims may develop eating disorders after an assault, for instance anorexia or bulimia, which over time causes physical injuries.<sup>148</sup> Victims of sexual assault are prone to these disorders because the diseases typically stem from low self-esteem, something caused by assaults. Both anorexia and bulimia can be deadly and need to be treated, which in most cases involves dealing with the underlying psychological cause of the disease - the trauma of the sexual assault.<sup>149</sup> Another physical effect of sexual assault may be what people involved in the victims' rights movement call somatic body memories. Body memories are defined as physical problems caused from the stress of the memories of the assault, which are not evident in traditional medical examinations. These physical problems are often called psychosomatic symptoms since the symptoms are due to the connection between the victim's body and mind. The effects that may come from these somatic memories includes migraines, intestinal problems, dizziness, hot or cold flashes, grinding of teeth, and severe sleeping

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<sup>146</sup> <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32369#1> (retrieved 2010-04-15).

<sup>147</sup> <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32369#1> (retrieved 2010-04-15).

<sup>148</sup> Lindgren, p. 9.

<sup>149</sup> <http://www.healthyplace.com/abuse/escaping-hades/physical-effects-of-being-raped-or-sexually-assaulted/menu-id-811/page-2/> (retrieved 2010-04-28).

disorders.<sup>150</sup> As showed, sexual assault and particularly rape often result in some form of physical injuries for the victims, which may be more or less severe. According to a National Victimization Survey, all rapes against females between 1999 and 2000 resulted in some form of physical injury. For attempted rapes the numbers were 39 %, and for sexual assaults the numbers were 17 %. The greater part of female victims subjected to some form of assault did not receive treatment for their injuries, and the number of victims that did seek medical treatment shows a clear correlation to whether the assault was reported or not. For example, the survey showed that between 1992 and 2000, only 45 % of the victims of a reported attempted rape, and only 22 % of the victims of an unreported attempted rape received medical treatment of some form.<sup>151</sup>

### 3.4.2 Psychological Effects

Numerous studies prove that the crime sexual assault can leave a victim with deep psychological scars and that violent crime victimization frequently causes significant traumas in the victim.<sup>152</sup> The victim can develop any type of psychiatric illness or disturbance following a severe trauma, including chronic anxiety, panic attacks, self-mutilation, insomnia, the feeling of shame and embarrassment, or the feeling of guilt and self-blame. Many of the victims' effects are both psychological and physical, in which one effect leads to another effect. Examples of these combined victim reactions are shock, denial, anger, irritability, apathy, depression, suicidal thoughts, social withdrawal, nightmares, flashbacks, concentration difficulties, impaired memory, substance abuse, problems with intimacy and sex, loss of self-esteem, and loss of trust in others.<sup>153</sup>

One type of psychiatric disturbance that frequently follows a severe trauma is the syndrome Posttraumatic Stress Disorder (PTSD). Many of the above described effects are symptoms of such a disorder. The syndrome refers to a specific group of disorders originating in a trauma that can be identified and diagnosed. The syndrome of PTSD first gained acceptance in scientific literature in 1980. Since then, the American Psychiatric Association has explicitly identified rape and sexual assault as belonging to the narrow category of stressors known to cause PTSD.<sup>154</sup> For instance, compared to other forms of traumas, victims of rape show relatively high rates of PTSD. A Scandinavian study found that the acute response to rape for the majority of the victims examined in the study followed the pattern of PTSD.<sup>155</sup> Another American study indicated that nearly one of every third rape victim

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<sup>150</sup> <http://www.rainn.org/get-information/effects-of-sexual-assault/somatic-body-memories> (retrieved 2010-04-28).

<sup>151</sup> <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1133> (retrieved 2010-04-26).

<sup>152</sup> Mclaughlin, § 1.

<sup>153</sup> <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32369#1> (retrieved 2010-04-15).

<sup>154</sup> Mclaughlin, § 1 and § 2.

<sup>155</sup> Dahl, p. 76-77.

develops a rape related PTSD at some point in their lives.<sup>156</sup> Some of the characteristic symptoms of the disorder involve re-experiencing the traumatic event, avoidance of stimuli linked to or associated with the event, numbing of general responsiveness, difficulties in concentrating and exaggerated startled responses.<sup>157</sup> Studies have shown that people in general view the world as good, safe and predictable, a world where you can trust the people in your surroundings. When a person is subjected to intentional harm from another person, such as a sexual assault, this is highly discordant with the victim's view and beliefs of the world. The victim's realization that she cannot take for granted her own safety, the justness of the world, or the basic goodness of people undermines the victim's fundamental view of the world.<sup>158</sup> There are several theories regarding PTSD, but they all share the core assumption that people have preexisting beliefs of the world. To recover from a PTSD, the theories indicate a need for the victim to reconstitute her core beliefs. This is necessary so that the victim is once again provided with a sense that her experiences are understandable and to some extent predictable.<sup>159</sup>

When someone is victimized, one of the first responses is the victim's attempt to figure out how the assault happened. The victim goes through alternative scenarios of the incident and the different choices and actions that might have been possible for her to theoretically change the outcome of the incident. There are often numerous external factors that could have changed the course of events for the victim, but instead of blaming these factors many victims turn to self-blame.<sup>160</sup> According to doctrine the self-blame can be divided into two types, the behavioral self-blame and the characterological self-blame. The behavioral self-blame, in the case of rape, refers to the victim's own acts which in the victim's eyes contributed to or even caused the rape. For example, a victim may reflect on the fact that she was out late at night, walked home alone, drank too much, or was around older men. The characterological self-blame, in the case of rape, refers to natural features of the victim such as being too trusting, overly sociable, a weak person or a poor judge of character.<sup>161</sup> The victim's background can also come into play, for instance, the childhood experiences and violence actions the victim has encountered. It appears that negative early life experiences create larger tendencies to a more activate self-blame after a sexual assault. A rape victim's tendency to self-blame is also influenced by the physical characteristics of the rape, for instance are victims raped by strangers more likely to blame factors external to them rather than themselves.<sup>162</sup> The studies done on the long-term psychological effects of crimes that cause severe forms of victimization, for example rape, show that besides PTSD, victimizations can also produce long-term changes in a

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<sup>156</sup> National Center for Victims of Crime et al., p. 7.

<sup>157</sup> Dahl, p. 13 and p. 71.

<sup>158</sup> Lindgren, p. 9.

<sup>159</sup> Figueredo, p. 223-225.

<sup>160</sup> Figueredo, p. 223-225.

<sup>161</sup> Lindgren, p. 10.

<sup>162</sup> Figueredo, p. 223-225.

victim's social cognition. This might be manifested in self-blame and/or self-depreciation, often causing harmful effects upon the victim's health. The effects of these traumas can become so severe that it impairs a victim's social and occupational functioning.<sup>163</sup>

### 3.5 Secondary Victimization

Already through the very nature of the crime, a sexual offence is extremely invasive, and many victims struggle with the consequences of victimization for years, sometimes for life.<sup>164</sup> In addition, victimology research has showed that the negative psychological effects of victimization can be significantly exacerbated through the treatment of the victim within the criminal justice system. This is commonly referred to as "secondary victimization".<sup>165</sup> For a victimized person who already has problems with anxiety, depression, self-esteem, and so on, the proceedings in the criminal justice system can be fairly demoralizing. During the proceedings, the victims are put in a position where they feel very vulnerable, and they may perceive the parties of the court as callous and insensitive.<sup>166</sup> The following testimony from a victim clearly illustrates the problem:

"I will never forget being raped, kidnapped, and robbed at gunpoint. However, my sense of disillusionment of the judicial system is many times more painful. I could not encourage anyone to participate in this hellish process."<sup>167</sup>

From the point when the crime is reported, many victims have described feeling more stressed and experience more anxiety resulting from how they are treated by the police and the prosecution.<sup>168</sup> Secondary victimization may occur when the very organizations existing to assist the victims in fact causes harm through their personnel, practices and policies. For instance, besides the criminal justice system with its police and prosecutors, harm may also be caused by the insurance system or health care systems. It may occur through the abundance of bureaucratic policies and procedures, ranging from the processing of paperwork to the fact that rape victims may have to wait in a public waiting room of a hospital until examination.<sup>169</sup> Professional insensitivity, unnecessary delays, and poor or absent information are all factors that may contribute to the trauma of victimization.<sup>170</sup>

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<sup>163</sup> Lindgren, p. 11-12 and Figueredo, p. 223-225.

<sup>164</sup> Doak, p. 54.

<sup>165</sup> Wemmers, p. 30.

<sup>166</sup> Wemmers, p. 20.

<sup>167</sup> <http://www.ovc.gov/ncvrvw/2005/pg4d.html> (retrieved 2010-04-05).

<sup>168</sup> Doak, p. 51.

<sup>169</sup> Underwood & Palmer, p. 34-35.

<sup>170</sup> Underwood & Palmer, p. 4.

In referring to secondary victimization, it is necessary to describe the trial process. For most victims, the courtroom is an unfamiliar environment, and they often feel alienated by the formality of the procedure when giving evidence. This is especially the case for rape victims.<sup>171</sup> Usually the prospect of being asked to testify at trial makes it much harder for a victim to work through the victimization and to move forward from the traumatizing incident. It does not help that the trial often takes place a long time after the rape. In rape cases, it is not typically contested that intercourse actually took place. Instead, the crucial question at trial becomes if the intercourse was consented to or not. The issue of the victim's consent creates several evidential difficulties, and since the victim and the defendant are usually the only "witnesses of the rape", it all too often results in a battle of credibility between the two parties. It is not only the possibility of being found not credible by the court that contributes to a secondary victimization at the trial stage.<sup>172</sup> The most stressful aspect for victims in relation to the trial is the nature of the cross-examination and questioning, which nearly all victims find humiliating and distressing.<sup>173</sup> The victim may be asked about intricate details of the rape, details that they might not even have discussed with their closest friends and family. As one scholar explains, "the victim's body becomes something of a crime scene in itself from which evidence must be collected and analysed."<sup>174</sup> In an attempt to discredit the victim's evidence the cross-examiner tries to reduce the victim's trustworthiness. In some countries, there are numerous examples of victims being asked about their social lifestyle, underwear, make-up, and so on. This situation, and the fact that the demoralized victim might feel that no one believes her often creates a hostile trial environment for the rape victim. Nowadays, the cross-examination is usually bound by some form of laws that prohibit certain questions. Nonetheless, the questioning of a victim may still be harsh and make the victim deeply uncomfortable, thereby deepening the vulnerability and causing a secondary victimization.<sup>175</sup>

In addition to the harm the different systems and the cross-examination may cause, the prospect of facing the perpetrator in court will cause significant anxiety for many victims. Sometimes the encounter at trial is the first time the victim meets the perpetrator in person since the offence.<sup>176</sup> In recent years, the media as well as the general public has shown greater and greater interest in the criminal justice system. The media attention drawn to some criminal trials may also contribute to the victim's stress and anxiety, especially if the reporting, investigation, and filming/photographing are intrusive, or inappropriate.<sup>177</sup> The secondary victimization caused by the media has been classified in two levels. The first level occurs due to faulty

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<sup>171</sup> Doak, p. 51.

<sup>172</sup> Doak, p. 54-55.

<sup>173</sup> Author's note: The nature of the Swedish process of questioning and the American cross-examination is somewhat different, why the description of how a cross-examination can give rise to secondary victimization is generalized.

<sup>174</sup> Doak, p. 55.

<sup>175</sup> Doak, p. 56.

<sup>176</sup> Doak, p. 55.

<sup>177</sup> <http://www.crcvc.ca/docs/victimization.pdf> (retrieved 2010-04-28).

reporting practice in the presentation of the news regarding the case. The second level occurs due to the insensitivity of journalists in their gathering of the news.<sup>178</sup>

## 3.6 The Human Rights' Angle

Today, the crime sexual assault is a large societal problem in both Sweden and the United States. To further illustrate the severity of the crime as well as the rising understanding of the consequences the crime may have on the victims, the following will show how the view of the crime, exemplified with rape, has developed and transformed within the international community.

### 3.6.1 The Historical View of Rape

Rape and sexual violence have been elements of war since biblical times and have been considered a matter of course and a natural symptom of war. Rape has been prominently featured in history and immortalized through mythology, art, and religion, which has often portrayed an almost heroic picture of the act.<sup>179</sup> Looking back through history, it becomes clear that rape and sexual violence have been used as a tool of war and as means to reward soldiers, something that unfortunately still exists in some parts of the world.<sup>180</sup> Rape has been such a natural consequence of war that it has even been used as an incentive for soldiers to enlist. Therefore, it is nothing astonishing that rape and other forms of sexual violence emanating from war have been undocumented and unpunished crimes in the past.<sup>181</sup> The historical use of rape can be exemplified with the following quote from William Shakespeare's play, "King Henry V", when King Henry V is standing outside the gates of Harfleur asking the town's citizens to open the gates and surrender:

“[...] and the flesh'd soldier, rough and hard of heart, in liberty of bloody hand shall range with conscience wide as hell, mowing like grass your fresh-fair virgins [...]. [...] What is't to me, when you yourselves are cause, if your pure maidens fall into the hand of hot and forcing violation? [...] take pity of your town and of your people, whiles yet my soldiers are in my command; [...]. If not, why, in a moment look to see the blind and bloody soldier with foul hand defile the locks of your shrill-shrieking daughters [...].”<sup>182</sup>

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<sup>178</sup> <http://cjsjournal.brinkster.net/neeti.html> (retrieved 2010-04-28).

<sup>179</sup> Beltz, p. 169-170.

<sup>180</sup> Fletcher et al., p. 320.

<sup>181</sup> Beltz, p. 171.

<sup>182</sup> King Henry V act 3 scene III, [http://www.shakespeare-literature.com/Henry\\_V/12.html](http://www.shakespeare-literature.com/Henry_V/12.html) (retrieved 2010-03-25).



The accepting view of rape has gradually changed in most countries. The historic acceptance of rape was likely due to the traditional view of rape as a wrongdoing against someone's possession of property, the women being regarded as the property of her husband or her father.<sup>183</sup> This traditional view shined through when rape eventually was acknowledged as a crime. At this time, rape was generally considered an offence against husbands and fathers rather than against the women. The husband would be injured because of the possibility that the woman had become pregnant and there therefore would be a risk that the child would not be the husband's biological child. The father would be injured since he had a businesslike interest in keeping his daughter's chastity to make the daughter more desirable for marriage. As a consequence, the historic laws created to criminalize rape were intended and designed to protect men's interests in their women. In some countries, rape laws did and may still require the "outmost resistance" from women to protect their chastity to consider a forceful sexual act as rape.<sup>184</sup>

The view of rape and victims of rape has changed progressively through the years. Even though many countries criminalized rape a long time ago, sexual abuse within a marriage was not seen as rape until the later part of the 20<sup>th</sup> century.<sup>185</sup> In Sweden, marital rape became criminalized in 1965 while the laws in the United States did not change until the late 1970s and early 1980s and even then to a varying degree.<sup>186</sup>

### **3.6.2 The Present Time's View of Rape**

Recent history has exposed rape and sexual violence as more than a mere by-product of warfare and showed that it is being utilized as a weapon with which to wage an effective and inhuman battle towards enemies. The use of rape and sexual violence as a weapon serves two purposes for perpetrators. Firstly, the act is used as an offence against the victim and sometimes used with the underlying purpose to subjugate and demoralize the victim. Secondly, the acts are purposed to be an act of aggression towards the victim's male relatives, humiliating them and attempting to destroy the victims' culture and community. In sexually abusing a woman, the perpetrator seeks to destroy what is culturally symbolizing the very heart of the family – the wife and mother.<sup>187</sup> Today, rape and sexual violence are not considered just another element of war but recognized as a war crime<sup>188</sup> and a crime against humanity under international humanitarian law.<sup>189</sup> Following the case law established in the International Criminal Tribunal of Rwanda, sexual violence has been acknowledged as means of committing

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<sup>183</sup> Beltz, p. 171.

<sup>184</sup> McGregor, p. 29.

<sup>185</sup> McGregor, p. 28.

<sup>186</sup> Bergenlöv et al., p. 213 and Riggins, p. 428-429.

<sup>187</sup> Kirk, p. 323.

<sup>188</sup> Zoglin, p. 327.

<sup>189</sup> Lakatos, p. 918.

genocide and/or to destroy women as a group. In 1998, the Rwanda tribunal rendered a judgment in the *Akayesu case*<sup>190</sup>, explicitly recognizing sexual violence as a form of genocide, provided that the criteria for the crime genocide in article II in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide are met.<sup>191</sup> This was the first time that an international criminal tribunal interpreted the elements of genocide.<sup>192</sup> The Rwanda tribunal convicted Akayesu, a former commune mayor, of genocide by the act of rape under the Genocide Convention's article II (b), "causing seriously bodily or mental harm to members of the group". In doing so, the tribunal also provided guidance to the way rape can be interpreted as an act of genocide described under the Genocide Convention's article II (d), "imposing measures intended to prevent births within the group".<sup>193</sup>

In 1998, the International Criminal Tribunal for the former Yugoslavia rendered a judgment in the *Furundzija case*<sup>194</sup>. In the case, the tribunal examined if rape could acquire the status of a crime distinct from torture under international criminal law.<sup>195</sup> The tribunal found it "indisputable that rape and other serious sexual assaults in armed conflict entail the criminal liability of the perpetrators."<sup>196</sup> As the tribunal pointed out, however, no international instrument at that time specifically prohibited rape, although rape under certain circumstances had been found to amount to torture.<sup>197</sup> International case law had recognized the use of rape in the course of interrogation as means of torture, for instance in the Akayesu case:

"Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or others person acting in an official capacity. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."<sup>198</sup>

The International Criminal Tribunal for the former Yugoslavia explained in its judgment that rape was included as a crime against humanity. The tribunal held that the accused was found guilty of violations of international criminal law "through outrages upon personal dignity including rape".<sup>199</sup>

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<sup>190</sup> Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T.

<sup>191</sup> Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, para. 731.

<sup>192</sup> de Brouwer, p. 44.

<sup>193</sup> de Brouwer, p. 45.

<sup>194</sup> Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T.

<sup>195</sup> Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, para. 163-164.

<sup>196</sup> Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, para. 169.

<sup>197</sup> Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, para. 170.

<sup>198</sup> Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, para. 597-598.

<sup>199</sup> Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, para. 275.

# 4 The Swedish Legislation

## 4.1 Introduction to the Chapter

This chapter examines how the victims' rights movement has developed in Sweden and describes some of the legislative acts the movement has resulted in. Additionally, the chapter analyses the Swedish Counsel for Injured Party Act, the purpose behind the Act's creation and the effects it has for the injured parties in criminal legal proceedings.

## 4.2 History of Victim's Rights

### 4.2.1 The Rise of the Victims' Rights Movement

Throughout the greater part of the last century, Sweden tended to focus more on the social welfare of offenders rather than on the social welfare of victims of crimes. This attitude changed in the 1970s, and the Swedish government has implemented several victim initiatives since then. The historical focus on the offenders does not mean that the Swedish government completely neglected policies relating to victims. For instance, Swedish law has for a long time enabled an injured party's claim for damages to be consolidated with the prosecution of the offence. Additionally, the injured parties have been able to be heard during the criminal proceeding.<sup>200</sup> However, the real starting point for the increased interest in crime victims' situations came with the work of the Swedish women's movement for women in exposed situations. The movement was inspired and influenced by the American women's movement, which will be discussed in the following chapter.<sup>201</sup> In the 1970s, the crime victims became a public concern through the so called rape debate (*våldtäktsdebatten*). In the debate, female debaters questioned why the rapist was able to get help from doctors as well as psychologists meanwhile the rape victim was not offered any help at all. During this period the public interest in the matter grew, but during the 1960s and 1970s the debate in the media was still focused on the perpetrator and the perpetrator's needs.<sup>202</sup> Still, in the early 1970s the first step was taken towards a more balanced judicial system in regards to a victims' social welfare. In 1971 legislation was enacted to award compensation for personal injuries or property damage committed by an offender who was a fugitive from a state institution. Under these rules, compensation was awarded to the injured person if the offender could not pay or if the insurance did not award payment for the damage.<sup>203</sup> In 1978 the Criminal Injuries Compensation Act

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<sup>200</sup> RPS rapport 2001:1, p. 7.

<sup>201</sup> Terrill, p. 335.

<sup>202</sup> Lindgren, p. 7.

<sup>203</sup> Terrill, p. 335-336.

(1978:413) (*Brottskadelagen*) was created. With this act, a general system for victim compensation by government funds was established (*brottskadeersättning*) as well as the Criminal Injuries Compensation Board (*Brottskadenämnden*), a governmental authority to try such cases. The board was composed by experts in law, in claims adjustment, and in criminal policy.<sup>204</sup>

During the 1980s, a variety of components of the judicial system reexamined the troubles of victims of crimes, and a number of changes were either recommended or implemented.<sup>205</sup> Additionally, the number of Women's Crisis Centers (*kvinnjourer*) and Victim Support Centers (*brottsofferjourer*) increased.<sup>206</sup> The prime catalyst for these developments was a growing recognition and concern for women that had been sexually assaulted and domestically abused. For instance, the prosecution was rather restricted in handling domestic violence cases in the beginning of the 1980s. Prosecution was not accommodating unless the victim reported the crime and supported the prosecution or the committed crime was an obvious grave crime that was in the public's interest to prosecute. The result of that attitude was that countless crimes were never prosecuted. Today, the prosecution's new guiding principle is caused by the somewhat newfound belief that it is actually in the public interest to prevent domestic violence. This approach enables the prosecution to initiate a case even if the victim does not support the prosecution. Another example is that the prosecution historically had been passive in pressing for damages in criminal proceedings. To amend this, the Code of Judicial Procedure was revised in 1988 to encourage the prosecutors to take better care in presenting damage claims of injured parties.<sup>207</sup> These and other changes affected and led to reforms in other branches of the justice system as well. For instance, the Swedish courts are nowadays expected to adhere closely to the private claims of injured parties. Additionally, the police are expected to consider the issue of damages throughout their criminal investigations. The police are also supposed to offer help and support to victims to a significantly higher degree than before. Through the Ministry of Justice (*Justitiedepartementet*) the government has produced a brochure for crime victims that explain the judicial procedure and the possibility of collecting damages. The brochure also contains information about the state compensation scheme and different help and support organizations.<sup>208</sup>

The 1990s were an eventful decade for Swedish crime victims and a decade where the Swedish government initiated several pieces of legislation that reinforced the victim's status and rights. It was especially eventful in respect to persons subjected to sexual assault and domestic violence. Two of the more recent developments involving crime victims offer rather innovative strategies for two old problems. The first creative strategy deals with

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<sup>204</sup> 2005/06:RFR1, p. 7.

<sup>205</sup> Terrill, p. 335-336.

<sup>206</sup> Lindgren, p. 7.

<sup>207</sup> Terrill, p. 335-336.

<sup>208</sup> Terrill, p. 336-337.

problem of domestic violence. Several voices have been raised about viewing domestic abuse as a women's health issue. Because of this debate, the Swedish Penal Code (1962:700) (*Brottsbalken*) was amended to include a new crime of gross violation of integrity in 1998. The crime resulted in that courts under certain circumstances now have the ability to sanction a domestic abuser for gross violation of the victim's integrity, besides the traditional offence, for instance assault. For the justice system to make use of the crime, the woman's abusive circumstances must become known to the court, which means that abused women must seek medical treatment. In the past, a problem has often been that abused women refuse to do so. What is innovating with the strategy is that the strategy is designed to have police, health care professionals, and social authorities work together to address the issue. To deal with the problem, the different authorities need to encourage the abused person to reveal the length and the severity of the abuse. The authorities also need to collect physical evidence and address the abused victim's perception of self-worth. In doing all this, the intent is to empower victims to seek the justice system's assistance so that the system can charge the abusive person with the offence. The second creative strategy emerged in 1999 with the adaptation of a new law on prostitution. The new law criminalized the buying of sexual services rather than the offering of sexual services. The law came into being after scholars pointed out that prostitution should be seen as a form of exploitation and, thus, that the prostitutes should be seen as victims of this exploitation.<sup>209</sup>

### 4.3 Some Victim-Oriented Sources of Law

The Swedish Code of Judicial Procedure contains numerous provisions dealing directly or indirectly with crime victims and injured parties. These provisions deal mostly with a injured party's active legal rights and obligations in court. For instance, an injured party has a legal duty to give a statement and legal right to support the prosecution or initiate a private prosecution. Another example is § 15 of chapter 20 of the Code of Judicial Procedure, which provides that a support person can be appointed to the injured party.<sup>210</sup> The provision was created since injured parties often feel very vulnerable and exposed in the criminal proceedings where the injured party is forced to meet the defendant and his counsel. It is especially stressful for those injured parties who have been victims of crimes that severely violate the personal integrity, for instance sexual assault.<sup>211</sup> The support person's role is to provide personal support throughout the proceedings, both as a fellowman that listens and offers sympathy and as a helping hand when the injured party deals with the authorities. The work as a support person is usually performed by volunteers, typically without any

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<sup>209</sup> Terrill, p. 336-337.

<sup>210</sup> Brien & Hoegen, p. 892.

<sup>211</sup> Prop 1983/84:105, p. 62-63.

legal training, and their role is important also after the legal proceedings, when the work for everyone else involved in the case usually is over.<sup>212</sup>

According to § 13a of the Ordinance on the Preliminary Investigation (1947:948) (*Förundersökningskungörelsen*), the victimized person should be informed of the authorities and organizations who can offer help and support. The National Swedish Council for Crime Prevention is a government organization who today concentrates primarily on crime prevention. They are responsible for an informative brochure informing victims about the judicial proceedings following a report of the crime and the rights provided to victims.<sup>213</sup> In police guidelines, it is understood that the information provided to victimized persons should be supplied both verbally and in writing. It is a general rule that the police, in addition to the verbal information during the preliminary investigation, should also hand out a copy of this informative leaflet.<sup>214</sup> In Sweden, the Swedish National Victim Support Organization (*Brottsofferjourernas Riksförbund*) has been working for better terms for victims of crimes since 1988. The non-profit organization is an umbrella organization of slightly over a hundred local branches of Victim Support Centers that annually give information, help, and support to approximately 50 000 victims, relatives to victims and witnesses. The organization provides the earlier mentioned support persons.<sup>215</sup> The organization's cooperation with the police is generally very good and well maintained, partly due to the fact that the creation of local victim support branches was largely a police initiative. The local branch usually has a contact person within the local police who works as the police's link to the organization in the work to help and support crime victims. These police officers normally sit on the board of the local Victim Support Center.<sup>216</sup>

An injured party is under certain conditions entitled to legal aid according to the Legal Aid Act (1996:1619) (*Rättshjälpslagen*). Legal aid can be granted in most legal matters with a few exceptions. To qualify for legal aid the injured party must meet certain conditions. § 2 and § 6 of the act state that legal aid in legal matters may be granted to a person whose yearly income does not exceed a financial threshold, currently set at 260 000 SEK, roughly approximately 36 000 USD. Additionally, § 2 and § 4 of the act provide that the injured party must have received at least an hour of legal advice before qualifying for legal aid. Furthermore, legal aid can only be granted if it is considered reasonable for the state to contribute to the costs, according to § 8 of the act. This assessment depends on the nature and significance of the case, the value of the disputed object, and the overall circumstances. The Legal Aid Act was revised in 1996 and prior to the revision, all Swedish citizens could enjoy and depend on publicly-funded legal aid. Today, citizens are obliged to take out a private legal expense insurance policy to be

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<sup>212</sup> Brienens & Hoegen, p. 892.

<sup>213</sup> Brienens & Hoegen, p. 886.

<sup>214</sup> Brienens & Hoegen, p. 893-894.

<sup>215</sup> <http://www.boj.se> (retrieved 2010-03-26).

<sup>216</sup> Brienens & Hoegen, p. 895.

entitled to legal aid. Remarkably enough, about 97 % of the Swedish population has a legal expense insurance policy. This phenomenon can be explained by the fact that legal expenses since the 1960s have been included in most insurance policies.<sup>217</sup> In addition to legal aid, injured parties are entitled publicly-funded legal representation through the Counsel for Injured Party Act (1988:609) (*Lagen om målsägandebiträde*). This Act will be discussed further under chapter 4.4. If such a counsel is appointed, the injured party loses the possibility to legal aid according to § 7 of the Legal Aid Act.

A victim of a crime may claim compensation from the offender based on the Tort Liability Act (1972:207) (*Skadeståndslagen*). State compensation is based on the Criminal Injuries Compensation Act. In 1994, the Swedish government established the Crime Victim Compensation and Support Authority (*Brottsoffermyndigheten*). This governmental agency took over the responsibility of dealing with state compensation claims. One of the agency's other tasks is to manage the Victim Fund (*Brottsofferfonden*), which is regulated by the Act on the Victim Fund (1994:426) (*Lagen om Brottsofferfond*).<sup>218</sup> Since 1994, offenders convicted of offences for which they may be imprisoned are liable to pay a lump sum of 500 SEK, roughly approximately 70 USD, to the Victim Fund. This constitutes a specific legal remedy, which is applied over and above other sanctions. The Victim Fund generates approximately 25 million SEK per year, roughly approximately 3.5 million USD. The money is channeled through the National Police Board (*Rikspolisstyrelsen*) to the Crime Victims Compensation and Support Authority where it is processed and distributed. In assessing state compensation to crime victims, the Crime Victim Compensation and Support Authority is not bound by court decisions on damages. Due to this, the authority's role has become important in setting examples for damages for different crimes since the Swedish Supreme Court adjudicates quite few cases concerning damages for crime victims. In addition to the compensatory role, the fund has become a major sponsor of different crime victim projects, and it has also contributed to establishing victimology as an academic research field in Sweden.<sup>219</sup>

## 4.4 The Victims' Right to Counsel

Since the late 1980s, victims of sexual offences have, as injured parties, had the right to be appointed a special legal counsel free of charge in the form of a counsel for injured party (*målsägandebiträde*). Counsel for injured party became a legal reality in 1989 when the Counsel for Injured Party Act was adapted. In the creation of the Act, the underlying idea was that women victimized by sexual offences were in need of extra support and assistance through the legal proceedings, especially during the preliminary

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<sup>217</sup> Barendrecht & van Zeeland, p. 2.

<sup>218</sup> Brienens & Hoegen, p. 886-888.

<sup>219</sup> <http://www.brottsoffermyndigheten.se/default.asp?id=1345> (retrieved 2010-03-26).

investigation and the trial. Several surveys had shown that precisely these victims were frequently put through persistent and sometimes hard questioning and that many women did not have the strength to follow through such a legal process. As a result, many sexual offences were left unreported as well as unprosecuted, and the conviction rate for sexual offences was fairly low compared to the number of committed offences. The Counsel for Injured Party Act intended to change the situation through entitling the injured parties assistance and support of legal counsels.<sup>220</sup>

Swedish authorities and agencies have translated the term “counsel for injured party” differently. Some examples are “the injured person assistant”, the quite literal translation; “the legal advisor for the injured party”, the translation used in the committee report SOU 1998:40; and “the counsel for the injured party” or “the injured party counsel”, the translations used in the committee report SOU 2007:6. Other translations one may come across are “the injured person advocate”, “the injured party advocate”, “the victim’s legal advisor”, “the victim’s lawyer”, and “the complainant’s counsel”.<sup>221</sup> This thesis will refer to the counsel as “the victim’s legal counsel” or “the counsel for injured party”.

## **4.4.1 The Introduction of Counsel for Injured Party in a Judicial Context**

### **4.4.1.1 The Commission on Sexual Offences**

In the early 1970s, a discussion about legal aid and assistance to victims of sexual offences arose in Sweden. This was a result of several reports presented by governmentally appointed committees and commissions, which had analysed and revised the Swedish legal framework surrounding sexual offences. These reports led to a public debate about the victims’ situation and their treatment within the legal system.<sup>222</sup> One of the principal reports was the report by the Commission on Sexual Offences (*Sexualbrottsutredningen*) in the 1970s, called *SOU 1976:9 Sexuella övergrepp*. The commission’s main task was to bring the sexual offences’ legal framework up to date. Before the 1970s and the revision, the legislation’s purpose was to protect the morality amongst the people. With the report, the commission recommended amending the provisions in question in the Penal Code, so that the purpose of the provisions first and foremost should be to punish various forms of sexual crimes.<sup>223</sup> The report was subjected to strong critique, both from the instances where it was circulated for consideration and from the public. In fact, very few reports have caused the same level of media attention as *SOU 1976:9 Sexuella övergrepp*. The main reason for the massive attention was that the report suggested a very far-reaching softening of the legal framework. For

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<sup>220</sup> BRÅ rapport 2009:4, p. 14.

<sup>221</sup> Brien & Hoegen, p. 891.

<sup>222</sup> BRÅ rapport 2009:4, p. 16.

<sup>223</sup> SOU 1976:9, p. 21.



instance, the report was accused for blaming the victim of a sexual offence, or at least suggesting that the victim was jointly responsible for the crime. Further, the report was criticized for having insufficient basic data and for that reason considered an invalid foundation for legislation, at least in regards to the part concerning the victim's right to counsel.<sup>224</sup>

#### 4.4.1.2 The Committee on Sexual Offences

Because of the strong critique of the Commission's report, the Swedish government appointed the Committee on Sexual Offences (*Sexualbrottskommittén*) in the early 1980s to revise and improve the findings of the report. The committee was instructed to focus on the victim's situation in connection to legal hearings in the proceedings, particularly the situation for rape victims. Additionally the committee was instructed to consider what measures the legislators could take to improve the victim's situation. The committee was faced with the question if it was possible to construct some practical and appropriate routines that would guarantee immediate and direct help to rape victims. Furthermore, the committee should examine if it was possible to make such help recurrent and not just an isolated phenomenon.<sup>225</sup> The committee set in motion a number of studies about victims' situation in the judicial system in relation to sexual offences, to meet the old critique of insufficient data and to create a more confidence-inspiring foundation for legislation. A study, presented in the committee's report *SOU 1982:64 Våldtäkt – En kriminologisk kartläggning av våldtäktsbrottet*, showed that the number of unrecorded rapes at that time was considerable. The study estimated the number of hidden rapes to be somewhere around 10 000 cases annually, in comparison to the reported 600 cases. The study also revealed that every fourth rape victim wanted to withdraw the charges as early as during the preliminary investigation. Furthermore, the study showed that no legal assistance of any sort was available for the rape victims and that approximately one of twenty victimized women had some form of curative support.<sup>226</sup> Another study emphasized the importance of active care for victims of sexual offences, in order for them to cope with the stress of the legal proceedings and the trial. The study concluded that there was a strong need within the Swedish judicial system for legal counsels to victims of sexual offences.<sup>227</sup> Based on their findings, the committee recommended that public authorities in charge of social welfare should appoint supportive contact persons to the victims. Moreover, the committee recommended that people who encountered victims in relation to the legal handling of the offence should go through certain training and information, in order to meet the victims in a correct manner. This included the police, the hospital staffs, the social workers and the prosecutors. The committee also recommended that the institutions first in line to meet the victims, for instance the police, should establish special routines for informing the victims about the assistance offered by the

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<sup>224</sup> SOU 1981:64, p. 6-9 and RPS rapport 2001:1, p. 7-8.

<sup>225</sup> SOU 1982:61, p. 29.

<sup>226</sup> SOU 1981:64, p. 249-252.

<sup>227</sup> SOU 1982:61 Bilaga 2, p.191-193.

authorities. The victims should for example be informed about how legal proceedings work and what rights they have in relation to the proceedings.<sup>228</sup> When the committee's work was circulated amongst a number of instances for consideration, one thing became very clear. Almost all instances strongly emphasized the need of a better and more effective way to take care of the victims of sexual offences, and thus supported the suggested measures. However, some instances found the measures insufficient. They suggested that victims of sexual offences should have the right to an own legal counsel free of cost. The Office of the Equal Opportunities Ombudsman (*Jämställdhetsombudsmannen*) argued that rather than support and assistance from the social welfare, victims were in need of legal support, best given by an own legal counsel.<sup>229</sup> Despite these arguments, the Swedish legislators followed the committee's recommendations when revising the Swedish Penal Code in 1984, not finding it necessary to give the victims of sexual offences the right to an own legal counsel.<sup>230</sup>

#### 4.4.1.3 The Legal Aid Committee

In the mid 1980s, the Swedish parliament declared the victims of sexual offences' situation as especially vulnerable, particularly during the preliminary investigation and the trial. Therefore, the Swedish government instructed the Legal Aid Committee (*Rättshjälpkommittén*) to examine how legal aid to victims should be designed and provided in the future.<sup>231</sup> In 1984, the committee was given additional instructions to investigate how the new legal framework for sexual offences was perceived in practice, from the victims' point of view; and to examine the different forms of broadened legal assistance to women victimized by sexual offences.<sup>232</sup> One of the reasons for the committee's supplementary instructions was the introduction in the early 1980s of provisions in Norway and Denmark affording special legal counsels to victims of sexual offences. The new legislation resulted in positive effects for both the neighboring countries.<sup>233</sup> The committee's final work resulted in the report *SOU 1986:49 Målsägandebiträden*.<sup>234</sup>

The committee pointed out that it was of great importance, for humanitarian reasons, that victims felt supported by the society particularly in such heinous crimes as sexual offences. The government was found to have a responsibility to provide for the victims' need of assistance and to protect the victims from any further unnecessary discomfort and pain. Additionally, the committee discussed certain legal political reasons for supporting victims of crime. They noted that a society founded on the rule by law depends on the victim's assistance to bring criminals to justice. If the

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<sup>228</sup> SOU 1982:61, p. 129.

<sup>229</sup> SOU 1986:49, p. 40-41.

<sup>230</sup> BRÅ Rapport 2009:4, p. 16.

<sup>231</sup> Ju 1982:01.

<sup>232</sup> Dir 1984:43.

<sup>233</sup> SOU 1986:49, p. 76.

<sup>234</sup> SOU 1986:49, p. 27.

victims did not feel supported by the society, the committee saw a significant risk that the victims would participate neither during the preliminary investigation nor during the trial. The committee concluded that victims in general were more likely to participate in all the steps of the legal proceedings, if the society offers its support.<sup>235</sup> Moreover, the committee concluded that particularly victims of sexual crimes were in need of special assistance in order to cope with the stress due to criminal proceedings. Furthermore, these victims need help to watch over their legal interests in connection to the case, such as claims for damages.<sup>236</sup>

In their report, the Legal Aid Committee found that the measures taken through legislation to improve the victims' situation had been insufficient and not resulting in an improvement. The committee's opinion was that the existing laws could not guarantee appropriate and accurate assistance to victims of sexual offences and that these victims needed more assistance.<sup>237</sup> Therefore, the committee recommended that these victims should be given the right to an own legal counsel, to assist them through the course of the legal proceedings.<sup>238</sup> The committee suggested that the legal counsel should be appointed to a victim by the court, on the victim's request or when the need of a counsel becomes known. The appointment should be possible as soon as the victim reported the crime to the police and should remain for the duration of the criminal investigation, which meant until the police had terminated their investigation through a decision or when a sentence had gained legal force.<sup>239</sup>

In 1988, a government bill was presented to the Swedish parliament. The bill was a result of *SOU 1986:49 Målsägandebiträden*, following the recommendations made in the report only in parts. Nevertheless, some adjustments were made. The government bill clarified the counsel's assignments and broadened it to some extent.<sup>240</sup> In the bill, the government suggested that it should be possible to appoint legal counsels for people victimized by other crimes than sexual offences. One of the examples mentioned was people victimized by robbery, who might be put through stressful questioning, thus, creating a special need for extra assistance and support.<sup>241</sup> Above all, the bill emphasized that one of the counsel's primary duties was to relieve the injured party from some of the stress caused in relation to the legal investigation of the crime.<sup>242</sup> The government bill was met with positive responses from the judicial system and resulted in a legislative act the same year, the Counsel for Injured Party Act.<sup>243</sup>

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<sup>235</sup> SOU 1986:49, p. 29-31.

<sup>236</sup> SOU 1986:49, p. 11.

<sup>237</sup> SOU 1986:49, p. 87.

<sup>238</sup> SOU 1986:49, p. 12 and p. 87.

<sup>239</sup> SOU 1986:49, p. 14.

<sup>240</sup> Prop. 1987/88:107, p. 22-23.

<sup>241</sup> Prop. 1987/88:107, p. 21-22.

<sup>242</sup> Prop. 1987/88:107, p. 23.

<sup>243</sup> SOU 2007:6, p. 113.

## 4.4.2 Today's Counsel for Injured Party

### 4.4.2.1 The Counsel for Injured Party Act (1988:609)

The Counsel for Injured Party Act (*Lagen om målsägandebiträde*) has been subject to a few changes and expansions since its creation in 1988.<sup>244</sup> The present version of the Act is the following.<sup>245</sup>

**1 §** When preliminary investigation has been initiated, a special counsel for injured party (counsel for injured party) shall be appointed in cases concerning

1. crimes according to chapter 6 of the Penal Code, if it is not apparent that the injured party lacks a need for such counsel,
2. crimes according to chapter 3 or 4 of the Penal Code, that may result in imprisonment, or according to chapter 8 § 5 or 6 of the Penal Code or attempt, preparation or conspiracy to such crime, if it in consideration of the injured party's personal relation to the suspect or other circumstances can be assumed that the injured party has a need for such counsel,
3. other crimes that may result in imprisonment, if it in consideration of the injured party's personal conditions and other circumstances can be assumed that the injured party has an especially strong need for such counsel.

A counsel for injured party may be appointed in higher court of justice, if the prosecutor or the defendant has appealed the verdict on the question of culpability. Act (2001:230).

**2 §** A counsel for injured party must not be appointed after the prosecutor has decided not to raise public prosecution or to withdraw such prosecution. Act (1994:59).

**3 §** The counsel for injured party shall look after the injured party's interests in the case and also provide support and assistance to the injured party.

The counsel for injured party shall assist the injured party in bringing private claim on account of the crime, if this is not done by the prosecutor. The assignment for the counsel for injured party remains even if the action has been detached according to chapter 22 § 5 of the Code of Judicial Procedure to be dealt with as a special case according to the rules of civil action, unless the case is dealt with according to chapter 1 § 3 d of the Code of Judicial Procedure. The assignment for the counsel for injured party also

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<sup>244</sup> Author's note: Further information about these changes, three in number, can be found in the government bills preceding the expansions of the Act, see prop. 1989/90:158, prop. 1993/94:26 and prop. 2000/01:79.

<sup>245</sup> Author's note: The author's own translation of the Act.

remains if the district court's judgment is appealed only in regards to private claim. Act (1994:59).

**4 §** The counsel for injured party is appointed at the request of the injured party or when there is otherwise reason for it. At the appointment the first passage of § 26 of the Legal Aid Act (1996:1619) applies.

In regards to changing counsel for injured party and right for such counsel to find a substitute the second and third passage of § 26 of the Legal Aid Act applies.

The counsel for injured party shall be dismissed, if it is necessary in regards to the conditions in the case or if there is otherwise cause for it.

As to other questions concerning counsel for injured party the Code of Judicial Procedure's rules about counsel applies. Act (1996:1644).

**5 §** The counsel for injured party has right to remuneration in accordance with what according to § 27 of the Legal Aid Act (1996:1619) applies for counsel in legal aid. In regards to the remuneration §§ 29, 43 and 47 also applies.

**6 §** If a counsel for injured party is appointed, the injured party is compensated for the afterwards arising costs of evidence and investigation owing to private claims to the same extent as if the injured party had been granted legal aid due to such a claim.

In cases where the counsel for injured party's assignment remains according to the second passage of § 3, the injured party has right to compensation by public funds for the travelling and living expenses in connection to the court appearance according to provisions that the government issues. Act (1996:1644).

**7 §** Decisions in matters referred to in this act is made by the court. However, in the cases referred to in § 6 it is the counsel for injured party that decides about the investigation to same extent that according to § 17 of the Legal Aid Act (1996:1619) applies for counsel in legal aid. Act (1996:1644).

**8 §** The provisions in chapter 31 of the Code of Judicial Procedure about obligation for the defendant or other to repay the government the costs for defense counsel that according to the court's decision have been paid with public funds also holds good in regards to costs for the counsel for injured party. In cases where the counsel for injured party's assignments remains according to the second passage of § 3, applies with reference to these costs the provisions

in chapter 18 of the Code of Judicial Procedure about responsibility for opposite party's legal expenses. Act (1996:1644).

#### **4.4.2.2 Who Is Entitled to a Counsel for Injured Party?**

Previously, before the expansion of the Counsel for Injured Party Act, only injured parties subjected to a sexual offence were entitled to a state-paid legal counsel. Since the amending of § 1 of the Act the group of crimes entitled to counsel for injured party, however, has grown. Today, the group contains crimes according to chapter 6 of the Penal Code, which includes sexual offences, for instance rape, gross rape, sexual coercion, sexual exploitation of in a position of dependency and procuring; crimes according to chapter 3 of the Penal Code, that is crimes against life and health, for instance murder, manslaughter, assault, gross negligence causing grievous bodily harm and creating danger to another; crimes according to chapter 4 of the Penal Code, that is crimes against liberty and peace, for instance kidnapping, unlawful coercion, gross violation of a woman's integrity and threatening with a weapon; and crimes according to § 5 or § 6 of chapter 8 of the Penal Code, robbery and gross robbery. In addition, injured parties subjected to crimes that may result in imprisonment for the offender, and who are considered to have an especially strong need for a legal counsel, might be appointed a counsel for injured party.

However, even if someone is victimized by one of the crimes included in the Act, the injured party might not be entitled to a counsel. This is the case when the prosecutor has decided not to bring a public prosecution or to discontinue such prosecution, according to § 2 of the Act. A counsel for injured party is also not appointed if it is "apparent that the injured party lacks a need for such counsel", according to § 1 (1) of the Act. This is, for example, the case if the injured party already is assisted by a counsel in the case, or if she opposes an appointment of a counsel for injured party. Although, in exceptional cases, the legislators find that it should be possible to appoint such a counsel without having the injured party requesting it. A situation where this might be discussed is, for instance, when the injured party is in a state of shock or severe trauma because of the sexual offence. In such situations, there exists a strong presumption for the appointment of a counsel for injured party.<sup>246</sup> § 1 (2) of the Act states that a counsel should be appointed "if it in consideration of the injured party's personal relation to the suspect or other circumstances can be assumed that the injured party has a need for such counsel". When assessing the need for counsel, the court should look at every aspect of the injured party's situation in relation to the crime the case concerns.<sup>247</sup> Through the case RH 2001:13 one can draw the conclusion that an injured party is not deemed in need of a counsel for injured party when the injured party is an attorney.<sup>248</sup>

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<sup>246</sup> Prop 1987/1988:107, p. 37-38 and SOU 1986:49, p. 103.

<sup>247</sup> Prop. 1989/90:158 s. 11.

<sup>248</sup> RH 2001:13.

Looking at case law, the conclusion could be drawn that the courts are fairly generous with appointing counsels for injured party at least in sexual offences where the injured party intends to help with the prosecution. In a case concerning sexual offence, NJA 2002 s. 439, a counsel for injured party was appointed when the preliminary investigation was reopened in connection to a possible petition for a new trial. The Swedish Supreme Court wrote in their verdict that a counsel for injured party should be appointed in sexual offences cases if it is not apparent that the injured party lacks the need for one. Hence, as the court argued, the reasons behind the Act strongly suggests that it also should be possible to appoint a counsel for injured party in connection to a reopening of a preliminary investigation that may result in a petition for a new trial.<sup>249</sup>

#### **4.4.2.3 Who Appoints the Counsel for Injured Party and Who Can Be Appointed?**

The injured party's legal counsel is appointed at the request of the injured party or when there is otherwise reason for it by the court, according to §§ 4 and 7 of the Counsel for Injured Party Act. Who may then be a legal counsel for an injured part? § 4 of the Act states that the first passage of § 26 of the Legal Aid Act applies for the appointment of counsels for injured party. This passage states that an attorney or an advocate, an assistant lawyer on a law firm or anyone else who is suitable for the job as a counsel for injured party may be appointed. If the injured party herself suggests someone suitable that person shall be appointed, if there are no particular reasons against it. The first passage of § 26 of the Legal Aid Act also offers the possibility to dismiss a counsel for injured party if there are reasons to do so. In regards to changing a counsel and the right for that counsel to find a substitute, § 4 of the Act states that the second and third passage of § 26 of the Legal Aid Act shall apply. These passages state that a change of counsel for injured party is possible after a special permission and only if there are specific reasons for the change. A counsel for injured party may substitute himself or herself with an attorney or an assistant lawyer on a law firm, if it does not cause a considerable increase of the costs. In practice, the court's appointment of counsel for injured party is done from a list of attorneys that the court find suitable.<sup>250</sup> In NJA 1994:596 the court acknowledged that an injured party can change counsel if the injured party lacks confidence in the counsel.<sup>251</sup>

#### **4.4.2.4 Which is the Counsel for Injured Party's Task?**

##### **4.4.2.4.1 The Legislators' Underlying Thoughts in Regards to the Assignments for the Counsel for Injured Party**

In creating the possibility to a government funded counsel for injured parties, the Swedish legislators wanted to help the victims of sexual

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<sup>249</sup> NJA 2002 s. 439, p. 440.

<sup>250</sup> Brienens & Hoegen, p. 891.

<sup>251</sup> NJA 1994:596.

offences since it is usually very trying to initiate a criminal investigation by reporting the crime to the authorities. Even if a report is made, and the injured party takes part of the preliminary investigation and legal proceedings, the stress put on the injured party sometimes is immense.<sup>252</sup> In the preparatory legislative material to the Act, it was made clear that the number of reports withdrawn was significant and that one of the reasons for this was that sexual offences by its very nature are a severe violation of the injured party's integrity. It might be too hard for the victimized person to later meet the defendant in open court. Additionally, the preparatory legislative material showed that the injured party often was subjected to personal and intimate questions, both during the preliminary investigation and during the trial.<sup>253</sup> Clearly, some of the questioning were, and still are, necessary in order to build a case against the perpetrator, to classify the offence and to assess the severity of it. However, studies showed that many injured parties perceived the questioning as a second violation to their integrity and that they felt pressured and degraded when they had to go into the details of the crime.<sup>254</sup> For the legislators, it was important that the injured parties were made to understand why these questions were being asked and that it was in their own interest to answer the questions as truthfully and as detailed as possible, so that they would be perceived trustworthy in an eventual trial. One government bill pointed out the fact that sexual offences cases often created situations where the injured party's word stood against the defendant's and that the prosecution often lacked other evidence besides the injured party's story.<sup>255</sup> In this, the legislators saw that the counsel for injured party could fill an important role. It should be the counsel for injured party's task to protect the injured party from unnecessary and offensive questioning, as well as to inform her about the reasons for these kinds of questions and prepare her for the legal proceedings.<sup>256</sup>

Furthermore, the preparatory legislative material discussed the circumstance that defendants in sexual offence cases often faced long terms of imprisonment. In addition, and in part as a result of long imprisonments, many defendants appealed their sentences. These circumstances put additional stress on the injured party, especially since she might have to go through the judicial process once more.<sup>257</sup> Through the creation of the counsel for injured party, the legislators wanted to make sure that someone made this process somewhat easier for the injured party. The counsel for injured party was to look after the injured party's interests, for instance by informing her about the possibility to be questioned without the defendant in the room and to hold the trial without the public present.<sup>258</sup>

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<sup>252</sup> Bring, p. 224.

<sup>253</sup> Prop. 1987/88:107, p. 17.

<sup>254</sup> Bring, p. 225-226.

<sup>255</sup> Prop. 1987/88:107, p. 18.

<sup>256</sup> SOU 1986:49, p. 84 and Bring, p. 226.

<sup>257</sup> Bring, p. 226.

<sup>258</sup> Prop. 1987/88:107, p. 18.



#### 4.4.2.4.2 Support and Assistance to the Injured Party

According to § 3 of the Counsel for Injured Party Act, the counsel for injured party shall look after the injured party's interests throughout the preliminary investigation of the offence and the following trial. The counsel shall also provide support and assistance to the injured party, both during the preliminary investigation and during the trial, for instance by being present when the injured party is being questioned by the police. Additionally, the counsel is to assist the injured party with a possible appeal, if such situation occurs.<sup>259</sup> According to § 15 of chapter 20 of the Code of Judicial Procedure, the counsel for injured party has a right to be summoned to the legal proceedings and other meetings where the injured party is to be questioned.<sup>260</sup>

During the preliminary investigation the police have no obligation to inform the injured party of how the investigation is coming along, although the injured party often is informed as a "side effect" of the investigation. The laws regarding secrecy also gives that an ongoing preliminary investigation shall be secret, with some exceptions, even to the injured party.<sup>261</sup> Since the Swedish inquisitorial legal proceedings and the prosecutor's role are governed by the principle of objectivity (*objektivitetsprincipen*), the prosecutor has no obligation to meet the injured party before the trial. Nor does the prosecutor have a responsibility to keep the injured party informed of the advancements and process of the case. The exception is if the injured party contacts the prosecutor and asks for a meeting and if the prosecutor does not find a meeting meaningless.<sup>262</sup> This means that the role of the counsel for injured party becomes even more important for the injured party, seeing as the counsel sometimes may be the only legal connection to the case she can rely on. To be able to give the injured party the proper support and assistance that she needs, the counsel for injured party should be present already during the preliminary investigation, especially during the questioning of the injured party. At this point, the injured party should have had the process explained to her as well as what is expected of her as an injured party. It has been said that the counsel for injured party's most important task is to explain for the injured party what information is relevant to the case and to the injured party's credibility.<sup>263</sup> During the preliminary investigation, besides the right to be present during the questioning, the counsel for injured party has a right to protect the injured party from pointless and unnecessary offensive questions. The counsel may also have a right to ask the injured party complementary questions. When the preliminary investigation is over, the counsel for injured party has the right to, on behalf of the injured party, get a copy of the preliminary investigation report free of charge.<sup>264</sup>

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<sup>259</sup> Brienens & Hoegen, p. 891.

<sup>260</sup> Renfors & Sverne, p. 188.

<sup>261</sup> Ds 1993:29, p. 38-39 and Bring, p. 187.

<sup>262</sup> SOU 1986:49, p. 56-57 and Ds 1993:29, p. 44.

<sup>263</sup> Bring, p. 233.

<sup>264</sup> Prop. 1987/88:107, p. 23.

If an action is brought, the counsel for injured party plays a very important role in connection to the trial. Before the main proceeding, the counsel for injured party should go through the proceedings with the injured party and explain what it includes, the purpose of it and what is expected of the injured party. If the injured party has any special requests in relation to the trial, the counsel for injured party may convey these to the court.<sup>265</sup> At the trial, the counsel for injured party should assist the injured party with general personal support. The counsel may for instance ask the court, on behalf of the injured party, to exclude the public from the trial or to arrange so that the defendant is not present during the questioning of the injured party. During the questioning at trial, just as during the preliminary investigation, the counsel should be able to guard so that none too intrusive questions are asked and to ask complementary questions to the injured party. Additionally, the counsel for injured party is entitled to ask questions to the defendant and, with the permission of the court, to witnesses. However, the counsel should not take the role as a second prosecutor, why the questions the counsel is allowed to ask only should be intended to clarify statements and evidence.<sup>266</sup> Furthermore, after the trial and after the court's verdict, the counsel for injured party shall assist the injured party with a possible appeal, if such a need exist.<sup>267</sup>

#### **4.4.2.4.3 The Injured Party's Private Claim**

As provided by § 3 of the Counsel for Injured Party Act, the assignment for the counsel for injured party includes assisting the injured party in preparing any eventual private claim for compensation. The exception is if the prosecutor assists the injured party with the claim. As earlier mentioned in this thesis, it is possible for the injured party to consolidate the private claim against the defendant with the prosecution of the offences, according to §§ 1 and 2 in chapter 22 of the Code of Judicial Procedure. It is very rare for a prosecutor to assist the injured party in a private claim for damages, if a counsel for injured party has been appointed. When counsels for injured party were first introduced, the general understanding was that there would not be a big need for counsels for injured party to assist in regards to private claims. However, put into practice, the task to assist in private claims has shown to be a large part of what the injured party needs assistance with, at least a larger part than the legislators could have foreseen.<sup>268</sup> A survey carried out by a government agency, the Courts Administration (*Domstolsverket*) in 1996, showed that in approximately 85 % of the cases examined, a private claim was brought. Amongst these cases, 95 % of the private claims were brought by a counsel for injured party.<sup>269</sup>

In the preparatory legislative material to the Counsel for Injured Party Act, it was considered to be several advantages with handling private claims on

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<sup>265</sup> Prop. 1987/88:107, p. 23 and SOU 1998:40, p. 126.

<sup>266</sup> SOU 1986:49, p. 99 and Ds 1993:29, p. 30.

<sup>267</sup> Brienens & Hoegen, p. 891.

<sup>268</sup> Renfors & Sverne, p. 188.

<sup>269</sup> DV rapport 1996:2, p. 30.

account of crimes, in the same legal proceedings as the prosecution of the crimes. One argument that was presented was that it was efficient from a procedure-economic viewpoint, since the evidence in both cases is mostly the same. It was stated that everyone involved in the proceedings benefited from a joint trial. For the injured party, a joint trial meant a quicker and simpler process and that she did not have to go through the same process twice. For the defendant this meant only one appearance in court and that the legal costs, which the defendant pays if convicted, was minimized. For the court, a joint trial meant saving time and money, as well as effort.<sup>270</sup>

### 4.4.3 Tomorrow's Counsel for Injured Party

Today counsels for injured party can be appointed in all crimes that may result in imprisonment for the defendant. Counsels are, however, only appointed after the injured party's need of a counsel has been assessed and the only cases excepted from this assessment are sexual offences. The Swedish government is presently processing the report *SOU 2007:6 Målsägandebiträdet – ett aktivt stöd i rättsprocessen* and the memorandum *JU 2004:1 Anmälan och utredning om sexualbrott*. The two reports contain recommendations on further expansions of the right to counsel for injured party.<sup>271</sup> The report *SOU 2007:6 Målsägandebiträdet – ett aktivt stöd i rättsprocessen*, argues that already ten years before the report, it was concluded that the counsels for injured party should have a more prominent role. This was especially the case during the preliminary investigations. The report shows that the counsels for injured party have not been appointed in gross sexual offences, to the extent intended by the legislator. Neither have the appointments been done at the time intended by the legislators. The report states that the time when the counsel for injured party is appointed affects the injured party's standing during the legal proceedings. Additionally, the time when a counsel is appointed has great importance for how the injured party experiences and reacts to the preliminary investigation of the case as well as to the following court hearing.<sup>272</sup>

To amend these problems and to create a better and more efficient system of appointing counsels for injured party, the report suggests some improvements, both to the Counsel for Injured Party Act and to other relevant legislation. For one, the information to the injured parties must be improved and all injured parties entitled to a counsel must be informed about the possibility to have one. It is only in exceptional cases where this information does not need to be provided. Furthermore, the duty to provide this information should include an obligation for both the police and the prosecutors to obtain information about the injured party's position in regards to having a counsel.<sup>273</sup> Since the prosecutor and the injured party are dependent of one another, the report suggests that prosecutors should be

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<sup>270</sup> SOU 1998:40, p. 109.

<sup>271</sup> BRÅ rapport 2009:4, p. 14.

<sup>272</sup> SOU 2007:6, p. 31.

<sup>273</sup> SOU 2007:6, p. 31.

legally responsible to offer a meeting to injured parties. This obligation should apply in all cases of injured parties subjected to serious offences. In addition, the report recommends that the prosecutors take part in the appointment of counsels for injured party. As earlier mentioned, the report's surveys show that the counsels are appointed too late in the legal proceedings. The report argues that the authority which has the best knowledge of the injured party's needs is also the one that is best fitted to take decisions about the appointment of counsels. Therefore, the report recommends that prosecutors should appoint the counsels, and that they should do so during the preliminary investigation. If a request for a counsel were to be rejected by a prosecutor, the injured party should be able to appeal the decision to the district court.<sup>274</sup> Another suggestion made in the report is that injured parties victimized by sexual offences should have a mandatory right to counsel for all categories of offences in chapter 6 of the Penal Code, except for sexual molestation. The recommendation means that it would not be necessary to assess whether the injured party does not have a need for a counsel.<sup>275</sup>

In May 2008, the Swedish government commissioned the National Council for Crime Prevention to study how the Counsel for Injured Party Act was used and for which offences counsels for injured party were appointed. This was done as a part of the legislative preparations, to further examine how the concept of counsels for injured party could be improved. The Council presented their findings in a report in 2009.<sup>276</sup> When a counsel for injured party is appointed in a case, this is registered at the Swedish Prosecution Authority (*Åklagarmyndigheten*). During a time period of one year, between July 1<sup>st</sup> 2007 and June 31<sup>st</sup> 2008, a total amount of 10 779 appointments of counsel for injured party were registered. In 9 700 of these cases, approximately 90 % of the registered cases, the Prosecution Authority has connected the appointment to an injured party and an offence.<sup>277</sup> In the National Council for Crime Prevention's report they conclude that rape was the second most common offence amongst the offences where counsels for injured party were appointed. The intention from the legislators was that all injured parties in rape cases should have a counsel for injured party appointed to them. However, the report shows that this has not been the case. The survey shows that counsels for injured party only has been appointed in around 40 % of the cases of rape and attempted rape where a preliminary investigation has been initiated. When the Council examined other cases of sexual offences, they found that the number of appointed counsels for injured party was significantly lower than that, around 17 %. But, when the Council examined the number of cases with counsels for injured party that gone to trial, compared to the number of cases in total that gone to trial, the numbers were utterly different. The emerging picture through the report is that most injured parties in cases of sexual offences

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<sup>274</sup> SOU 2007:6, p. 32-33.

<sup>275</sup> SOU 2007:6, p. 34-35.

<sup>276</sup> BRÅ rapport 2009:4, p. 5.

<sup>277</sup> BRÅ rapport 2009:4, p. 22.

that have gone to trial have had a counsel for injured party supporting and assisting them.<sup>278</sup>

An interesting but difficult question that the report examines, is how many cases involving counsels for injured party that have gone to trial. To examine this, the Council was required to do some rough assessments. In their report, they estimated that approximately 78 % of all cases in question result in legal actions.<sup>279</sup> The survey carried out in 1996 by the Courts Administration, showed that amongst the cases examined there were only a few where the injured party's request for a counsel was declined, approximately 4 %. The National Council for Crime Prevention has not been able to get information about today's decline-rate. Even though the provisions of the Counsel for Injured Party Act have expanded since the Courts Administration's survey, the Council's opinion is that very little suggests an increase in the numbers of refusals.<sup>280</sup>

The Swedish government is still processing the report *SOU 2007:6 Målsägandebiträdet – ett aktivt stöd i rättsprocessen*. Involved in the process is Catharina Sitte-Durling, adviser in the criminal policy unit at the Swedish Ministry of Justice. She states that the report, which evaluates the counsel for injured party and suggests improvements, has circulated for consideration by the parties concerned. The majority of the parties consulted have been positive to the report's recommendations. According to Sitte-Durling, the report is presently being processed within the administrative frameworks of the Ministry of Justice.<sup>281</sup>

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<sup>278</sup> BRÅ rapport 2009:4, p. 22-23.

<sup>279</sup> BRÅ rapport 2009:4, p. 24.

<sup>280</sup> BRÅ rapport 2009:4, p. 7.

<sup>281</sup> Author's note: According to a phone call with Catharina Sitte-Durling 2010-05-04.

# 5 The American Legislation

## 5.1 Introduction to the Chapter

This chapter examines how the victims' rights movement has developed in the United States and some of the actions taken by the federal government to improve the legal conditions for sexually assaulted victims. Furthermore, the chapter looks at some of the rights provided to victims of sexual assault at a state level, exemplified by the state of Arizona and the state of Massachusetts.

## 5.2 History of Victims' Rights

### 5.2.1 The Rise of the Victims' Rights Movement

The modern crime victims' rights movement began almost forty years ago and has been one of the most successful civil liberties movements of recent time.<sup>282</sup> The political force of this movement began to escalate during the 1970s and quite a few commentators trace the origin of the movement to grass-roots programs, such as self-help support groups and outreach groups with a common desire to turn their victimization into something constructive.<sup>283</sup> The victims' rights movement has been traced back to several other movements pre-dating the victims' movement. Some of the movements said to have strategically opened the way for victims' rights are the civil rights movement, the anti-war movement, and the women's movement.<sup>284</sup> The women's movement, including an anti-rape movement and a movement against domestic violence, has been pointed out as the most important precursor to the victims' rights movement.<sup>285</sup> Starting in the early 1960s, the American crime rate was steadily increasing and the effects on American life became evident by the early 1970s. In reply, the movement for crime victims' rights began on several fronts.<sup>286</sup> During the 1970s, the federal government and state legislators enacted statutes aimed at providing rights for crime victims, in the form of monetary restitution and improved opportunities to participate in the prosecution as well as within sentencing and parole of criminal defendants.<sup>287</sup> The movement against domestic violence established their first battered women's shelter in 1974, with the major focus to provide support to victims with the use of self-help groups. The goal rapidly expanded and the movement against domestic violence started to also focus on the unfair and insensitive treatment of victims by the

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<sup>282</sup> Gillis & Beloof, p. 689-690.

<sup>283</sup> Stearman, p. 44.

<sup>284</sup> <http://aabss.org/journal2000/f04Walker.jmm.html> (retrieved 2010-04-28).

<sup>285</sup> Karmen, p. 30.

<sup>286</sup> <http://aabss.org/journal2000/f04Walker.jmm.html> (retrieved 2010-04-28).

<sup>287</sup> Stearman, p. 44.

American criminal justice system.<sup>288</sup> Since the origin of the victims' rights movement, and increasingly over the years, the movement and the movement against domestic violence have been following one another closely.<sup>289</sup>

One of the motives for the victims' rights movement, as well as a starting point for a debate concerning victims' participation in the judicial proceedings, was the decision made in 1973 by the Supreme Court in *Linda R.S. v. Richard D.*<sup>290</sup> In that case, the Supreme Court considered whether an unmarried mother could seek to enjoin the district attorney's office from a discriminatory application of a statute criminalizing the non-payment of child support. According to the state judicial construction the statute applied only to married parents and the prosecutor's office refused to prosecute fathers of children born to unmarried women.<sup>291</sup> The court took a somewhat narrow holding, stating that the victim could not display a connection between the district attorney's discriminatory enforcement of the statute and the woman's failure to secure child support payments from the child's father. Hence, the court found that the victim did not have standing to seek the requested relief.<sup>292</sup> In doing so, the Supreme Court acknowledged the view prevailing at that time, that a victim of a crime cannot oblige a criminal prosecution since "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."<sup>293</sup> With this, the court rejected the plaintiff's attempt to be afforded legal standing in the judicial proceeding. Nevertheless, the Supreme Court provided a basis for remedying the situation in *Linda R.S. v. Richard D.* in stating that Congress could "enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."<sup>294</sup>

## 5.2.2 The Presidential Task Force

One of the most important milestones for the crime victims' rights movement took place in the beginning of the 1980s with the establishment of President Ronald Reagan's Task Force on Victims of Crime. The Presidential Task Force was established to investigate the treatment of crime victims by the American criminal justice system. The final report issued in December 1982 made some shocking observations about the treatment of victims. The report firstly pointed out that a criminal justice system is absolutely dependent on the cooperation of victims. It would be impossible in a free society to hold criminals accountable without the cooperation of victims and witnesses in reporting crimes and testifying about them. The report showed that when victims came forward to report and testify, thus

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<sup>288</sup> <http://aabss.org/journal2000/f04Walker.jmm.html> (retrieved 2010-04-28).

<sup>289</sup> Karmen, p. 30.

<sup>290</sup> *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

<sup>291</sup> <http://supreme.justia.com/us/410/614/case.html> (retrieved 2010-03-18).

<sup>292</sup> <http://www.ncvli.org/vrhistory.html> (retrieved 2010-02-02).

<sup>293</sup> <http://supreme.justia.com/us/410/614/case.html> (retrieved 2010-03-18).

<sup>294</sup> <http://www.ncvli.org/vrhistory.html> (retrieved 2010-02-02).

performing a “vital service” to the criminal justice system, they found little protection. The report revealed a system that to a large extent was out of balance and that treated victims of crime with institutionalized disinterest and as attachments of the judicial system. In response to the Task Force’s observations, sixty-seven recommendations for action were formulated. The recommendations included a modification to the Sixth Amendment of the Constitution to include a victims’ rights provision. By these recommendations, the federal government expressed its support for victims’ rights.<sup>295</sup> The larger part of the recommendations was recommendations to people within disciplines that encountered victims of crimes, on how to meet and how to respond the victims.<sup>296</sup> The final report’s discoveries have generally been considered a catalyst to the modern victims’ rights movement. For example, in 1985 victims’ rights spokesmen began to focus on amending state constitutions with the intent to secure rights significant to crime victims. The fact that the majority of the American states today have enacted victims’ rights amendments is by many people seen as evidence of the success of these efforts.<sup>297</sup>

Since the findings and suggestions of improvement by the Task Force in 1982, the modern crime victims’ rights movement has been lobbying for the creation of an independent participatory role in the criminal proceedings for crime victims. The movement has been trying to achieve this in a number of ways – both through the Congress and through the state legislatures. The last two decades, thousands of federal and state statutes governing the crime victims’ rights and interests have been enacted. In addition, a majority of the states have amended their constitutions to guarantee basic rights for victims of crimes. Amongst these provisions we find the right to be informed of judicial hearings, trial dates and the status of the case in question; the right to be present at the proceedings; the right to be heard through victim impact statements at sentencing hearings and parole hearings; and the right to receive restitution from the convicted offenders.<sup>298</sup>

Besides these legislative developments, the judiciary system has showed some movement concerning the victim’s status in the criminal proceedings. In 1991, in the case *Payne v. Tennessee*<sup>299</sup>, the Supreme Court recognized that the crime victims play an actual role in the justice system and that they are not just “faceless non-players”.<sup>300</sup> In *Payne* the court addressed the use of victim-impact statements in capital sentencing. They held that the Eighth Amendment to the United States Constitution, prohibiting cruel and unusual punishment, does not bar the admission of victim-impact evidence in the sentencing phase of a trial. *Payne* eliminated a constitutional bar to victim-impact statements in death-penalty cases and has as a consequence allowed state courts to uphold victim-impact statement language in state

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<sup>295</sup> Stearman, p. 44-45.

<sup>296</sup> <http://www.ncvli.org/vrhistory.html> (retrieved 2010-02-02).

<sup>297</sup> Stearman, p. 44-45.

<sup>298</sup> Gillis & Beloof, p. 690.

<sup>299</sup> *Payne v. Tennessee*, 501 U.S. 808 (1991).

<sup>300</sup> <http://www.ncvli.org/vrhistory.html> (retrieved 2010-02-02).



constitutions and statutes. In view of the Supreme Court's holding in *Payne*, state appellate courts have consistently rejected defendant claims of due process, equal protection, right to confrontation, and cruel and unusual punishment violations in capital-sentencing cases where victims were permitted to introduce victim-impact evidence. Arizona courts have held that a judge's decision to impose the death penalty is not affected by victim-impact evidence. In *State v. Mann*<sup>301</sup>, victim-impact evidence was allowed to rebut a capital-murder defendant's mitigation evidence. In upholding the decision in *Mann*, the Arizona Supreme Court sanctioned the use of victim-impact evidence in capital sentencing.<sup>302</sup>

### 5.2.3 The Creation of Rape Shield Laws

Another important milestone for the crime victims' rights movement was the establishment of rape shield laws. Traditionally, the rape laws have held that the sexual history of alleged rape victims was relevant for the truth of the victim's allegation. In the past, a defendant at trial for rape was able to submit evidence about the victim's previous sexual conduct, in order to discredit the victim's testimony. Professor Michelle J. Anderson has called this the "chastity requirement" in the rape laws, conditioning a rape victim's vindication on her sexual virtue. This chastity requirement had the effect that a chaste woman was considered more likely to have resisted the defendant's sexual advances and, hence, had more legitimacy in her allegations.<sup>303</sup> American feminists argued that the rape laws did not protect women, but instead served to enhance male opportunities for sexual access by the laws expectations of the proper behavior of women. What a woman did or wore, for instance "she went to the man's apartment", "she drank alcohol" or "she wore a tight sweater", implicitly led the police and the prosecutors to assume that the woman had consented or simply got what she deserved because of her behavior and appearance.<sup>304</sup>

In the late 1970s and early 1980s the great majority of American states passed rape shield laws. The state of Michigan was first with adopting a rape shield law in 1974, after the public became aware of the high frequency of rape and the rarity of prosecution and conviction of the offences.<sup>305</sup> Today, all states have adopted some form of rape shield laws<sup>306</sup> and a federal rape shield law was adopted in 1978.<sup>307</sup> When passed, the rape shield laws were quite controversial and the opponents were mainly arguing that the laws could violate the defendant's constitutional rights.<sup>308</sup> The intent behind the creation of rape shield laws was to protect victims of rape

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<sup>301</sup> *State v. Mann*, 934 P.2d 784 (1997).

<sup>302</sup> Stearman, p. 55-56.

<sup>303</sup> Anderson, p. 51-52.

<sup>304</sup> McGregor, p. 35.

<sup>305</sup> Carmody Tilley, p. 46.

<sup>306</sup> Gruber, p. 646.

<sup>307</sup> Carmody Tilley, p. 70.

<sup>308</sup> Carmody Tilley, p. 52-53.

from the public disclosure at trial of their private sexual lives. The laws were designed to curtail the defendant's ability to use a victim's sexual history as evidence. For instance, the laws circumscribed the defendant's ability to cross-examine alleged rape victims about their sexual histories, as well as to submit evidence on the same matter. The debates leading up to the rape shields were mostly focused on the rape victim's trauma of having to discuss their private sexual lives in public. In adopting the rape shield laws, the legislators concluded that there was no ground for assuming that the victim had consented to a sexual act with the defendant just on the victim's previous consent to sexual intercourse with other persons. They also found that the assumption that victims were more likely to lie under oath if the victim previously had consented to sexual acts with other persons, was illogical and unfounded.<sup>309</sup>

### 5.2.3.1 Critique to the Rape Shield Laws

Reformers have commended the broad adoption of rape shield laws, although complaining that the laws contain too many exceptions. The asserted critique has stated that if the exceptions of the shields were eliminated, the rape trials would win in legitimacy amongst the victims. This would in its turn lead to an increasing inclination within the victim group to report crimes, thus increasing the convictions.<sup>310</sup> Professor Michelle J. Anderson is one of the scholars who have criticized the rape shield laws, arguing that the laws too often function more "as sieves" than the shields they were intended to be. In an article, she states that there are many situations where courts still admit evidence of the victim's previous sexual conduct, particularly if the victim and the defendant have been intimate before the alleged rape. Faced with the defendant's claim that he held a reasonable but mistaken belief as to the victim's consent, most courts admit evidence of sexual history despite the presence of rape shield laws. Another situation where the sexual past of the victim still comes into play is when there is a previous pattern of sexual conduct, such as prostitution or other promiscuity.<sup>311</sup> In her article, Anderson points out that although many of the rape shield laws are formulated in a way that they seem to prohibit the admission of rape victim's previous sexual history there are exceptions to the rape shields. The exceptions are limited and are only permitted to be used under carefully defined circumstances. Nonetheless, Anderson's opinion of the exceptions, or at least of some of them, is that they undermine and degenerate the protection of the rape shields on the whole.<sup>312</sup>

An example of exceptions in a state's rape shield law is the exceptions in the Massachusetts statute. In Massachusetts, like in many other states, the trial judge has the discretion to allow impeachment of a sexual assault complainant by prior conviction of a sexual offence, for instance prostitution. The Massachusetts statute do not allow the victim's sexual

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<sup>309</sup> Anderson, p. 54-55.

<sup>310</sup> Gruber, p. 646.

<sup>311</sup> Anderson, p. 51.

<sup>312</sup> Anderson, p. 55-56.

history to become a subject for questions unless the victim's sexual conduct is with the defendant or if there is evidence of recent behavior of the victim allegedly causing a physical feature or condition of the victim. In these situations, the trial judge should hold a hearing on the motion to hear the defendant's offer of proof. The purpose of the hearing is to determine whether the impeachment value of the defendant's evidence outweighs any prejudicial effect to the victim. Additionally, the judge should determine whether the evidence is relevant to the victim's bias or motive to fabricate.<sup>313</sup> An example when this has been done is the case *Ivey v. State*<sup>314</sup>, where the court held that "[f]rom these facts, the jury could certainly draw a reasonable inference, based on reason and common sense, that Ivey might have believed that the sexual acts were consensual."<sup>315</sup> Though, as one critic of the rape shield exceptions argues, this reasonable belief standard will always be problematic since the underlying idea is based on what a "reasonable man" put in the defendant's situation would have believed.<sup>316</sup> In a case in Massachusetts the court, however, went in another direction. In *Commonwealth v. Sa*<sup>317</sup> the defendant was charged with aggravated rape. The defense of the defendant was that the victim was a prostitute who had falsely accused him of rape after he was unable to pay her the agreed upon price for the consensual intercourse. The rape victim had a prior conviction of prostitution and the Commonwealth filed a motion based on the rape shield statute, seeking to exclude the victim's sexual history including her prior conviction. The defense argued that notwithstanding the rape shield's prohibition against admitting evidence of a sexual assault victim's sexual conduct, a judge should have the discretion to admit evidence of the victim's prior conviction for impeachment purposes. The court ruled that the judge must consider the policies to be promoted by the rape shield statute and that a judge thus may exclude the convictions due to those policy concerns.

In her article, Anderson emphasizes one example of undermining rape shield exceptions, *Rule 412: Sex Offence Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition*, of the Federal Rules of Evidence, 28 U.S.C.A. According to this rule, evidence to prove a rape victim's "other sexual behavior" or "sexual predisposition" is inadmissible. The exceptions are when the evidence is presented "to prove that a person other than the accused was the source of semen, injury or other physical evidence"; when it is presented to provide evidence of consent and it consists of "specific instances of sexual behavior by the alleged victim with respect to the person accused"; or when the barring of the evidence "would violate the constitutional rights of the defendant".<sup>318</sup> Anderson supports the first exception to the federal shield, which she and many other scholars find narrow enough. This exception is of great importance since

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<sup>313</sup> Alexandre, p. 67-68.

<sup>314</sup> *Ivey v. State*, 590 S.E.2d 781 (Ga. Ct. App. 2003).

<sup>315</sup> *Ivey v. State*, 590 S.E.2d 781 (Ga. Ct. App. 2003), p. 783.

<sup>316</sup> Alexandre, p. 68.

<sup>317</sup> *Commonwealth v. Sa*, 58 Mass. App. Ct. 402 (2003).

<sup>318</sup> Anderson, p. 55-56.

misidentification of perpetrators is a frequent evidentiary issue in rapes committed by strangers. However, Anderson finds that the second and third exceptions to the federal shield, as well as to analogous state shields, make the rape shield's intended protection deficient. She argues that the second exception weakens and impairs the federal and state rape shields, since the percentage of rapes committed by men with whom the victim has been previously intimate with amounts to 26 % of all rapes in the United States. As for the third exception, Anderson argues that it frequently destroys the victim's remaining rape shield protection. According to Anderson, the courts tend to repeatedly misinterpret and overstate the extent of the defendant's constitutional rights to inquire into the sexual history of the victim, especially if the rape victim is deemed promiscuous with the defendant or others.<sup>319</sup>

### 5.3 A Federal Victims' Rights Amendment

“They explained the defendant's constitutional rights to the nth degree. They couldn't do this and they couldn't do that because of his constitutional rights. And I wondered what mine were. And they told me, I haven't got any. — A victim”<sup>320</sup>

There are provisions in the federal constitution specifically protecting the rights of the criminally accused, but there are no constitutionally guaranteed rights allocated to crime victims. This has led to strong critique, especially since the Presidential Task Force's report actually recommended an adoption of a victims' rights amendment to the federal constitution. Numerous inquiries and studies have pointed out that victims of crime feel highly neglected and ignored in the American criminal justice system.<sup>321</sup> In recommending a federal amendment, the Task Force proposed the following language as an addition to the Sixth Amendment of the constitution: “Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings.”<sup>322</sup> The Task Force expressed very clearly that they did not make the recommendation of a federal victims' rights amendment lightly. Nonetheless, they found that the experiences and lessons learned from their investigations clearly showed that a fundamental change needed to be undertaken.<sup>323</sup> The Task Force stated that “the fundamental rights of innocent citizens cannot adequately be preserved by any less decisive action.”<sup>324</sup> Among the members of the Task Force, the general consensus was that a constitutional amendment was crucial “to give teeth” to the other recommendations made in the final report. A concrete federal constitutional

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<sup>319</sup> Anderson, p. 56.

<sup>320</sup> Stearman, p. 43.

<sup>321</sup> Stearman, p. 43.

<sup>322</sup> Stearman, p. 45.

<sup>323</sup> Romley, p. 18.

<sup>324</sup> [http://ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/constit\\_amend.pdf](http://ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/constit_amend.pdf) (retrieved 2010-04-05).

amendment concerning victims' rights was first introduced to Congress in 1991. Since then the amendment has been reintroduced a number of times and the amendment's original language has changed several times, sometimes expanding and sometimes contracting it in length.<sup>325</sup> In 1996, the Congress for example took action towards a federal victims' rights amendment by introducing the Victims' Bill of Rights Constitutional Amendment in both the United States Senate and House of Representatives. The introduction coincided with the 1996 presidential election and the bill was endorsed by both candidates. Hearings on the proposed federal amendment were held and the bill was considered each congressional session, surprisingly enough enjoying a bipartisan support. However, many years thereafter nothing judicially or politically concrete has happened in respect to a federal victims' rights amendment. The fact that no federal amendment has been adopted does not mean that no efforts have been made to create a more balanced judicial system in regards to the victims' situation. The Task Force's final report and the movement for constitutional victims' rights contributed to a majority of states passing own constitutional victims' rights amendments.<sup>326</sup> Nonetheless, even though several states have taken upon themselves to amend their constitutions, the idea of a federal victims' rights amendment is still very much alive and present in the victims' rights movement. Richard M. Romley, County Attorney in Maricopa County in Arizona, was one of the people responsible for drafting and passing a victims' rights amendment to the Arizona constitution. He wrote the following article, as a response to an article expressing concerns about an introduction of a federal victims' rights amendment. "Across the country, many citizens have lost faith in the criminal justice system. For years, victims have been treated as mere after-thoughts, expected to be there to testify when needed, but otherwise not informed, not consulted, and not made whole. Indeed, it seems that for many years the only right that a victim had was to be present at the scene of the crime. It is for these very reasons that constitutional rights for victims are essential."<sup>327</sup>

It is evident that not everyone supports the movement for a federal victims' rights amendment. Some legal scholars see the states' constitutional victims' rights amendments as merely "symbolic" victories and that the amendments do not provide any real developments of the crime victims' rights. Scholars and legislators have also debated what impact an amendment might have on the federal constitutional rights of the defendant.<sup>328</sup> In Richard M. Romley's article he rebuts some of the arguments raised against an adoption of federal victims' rights. Romley writes that some prosecutors have expressed concerns that victims' rights might result in the creation of a criminal three party system: the state, the defendant and the victim. Romley finds this fear unfounded, stressing that victims have felt left out of the criminal justice process for many years without the ability to have input into key decisions. He notes that even

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<sup>325</sup> <http://www.ovc.gov/ncvrvw/2005/pg4d.html> (retrieved 2010-04-05).

<sup>326</sup> Stearman, p. 43-46.

<sup>327</sup> Romley, p. 18.

<sup>328</sup> Stearman, p. 44.

though Arizona's constitutional amendment afforded victims the right to be consulted during the course of prosecution it did not give victims the right to veto the prosecutors' or judges' decisions. Romley rebuts the concern and concludes that by amending the federal constitution the right for a victim to have a voice in the process will become formalized without risking the system as a whole. Romley also confronts the argument that a federal victims' rights amendment is uncalled for since all the rights included in the amendment already have been established at a state level. Noting that not all states have enacted constitutional rights for victims and pointing out that the enacted rights are not uniform, Romley finds this argument groundless. If a person from Arizona travels to a state without constitutional victims' rights and is victimized in that state, the victim does not enjoy the constitutional rights granted to her in Arizona. Romley concludes that the only way to achieve a fair and balanced judicial system is to make victims' rights the law of the land.<sup>329</sup>

Today, several of the Presidential Task Force's members remain actively engaged in the movement towards a more equal and balanced criminal justice system. The challenges to the passing of a federal victims' rights amendment continues to be strong to this day. According to some, the reason for this is that there has not been made an adequately unified effort to bring the general public's attention to the proposal and the underlying reasons for it. If this is done properly the public would be able to put pressure on the Congress, thus creating the much needed political climate for such an amendment. As one of the former members of the Task Force puts it "it's never going to happen unless there is a strong group lobbying it on a full-time basis at least through one Congress and with one Administration." According to him, federal victim's rights can only become a reality with the help of the general public, no matter how much effort and work the victim assistance organizations puts in. As another former member explains it, the system only changes if the victims' voices are heard and the issue is personalized, thus demonstrating what a difference a federal amendment would make in the lives of crime victims.<sup>330</sup>

## 5.4 The Federal Crime Victim's Rights Act

In 2004, Congress passed a Crime Victims' Rights Act, 18 USC Sec. 3771, which amended the federal criminal code. According to § 3771(e), a "crime victim" is defined as a person directly and proximately harmed as a result of the commission of a federal offence. The act provided the following rights to crime victims: *the right* to be reasonably protected from the accused; *the right* to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused; *the right* not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing

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<sup>329</sup> Romley, p. 18-19.

<sup>330</sup> <http://www.ovc.gov/ncvrv/2005/pg4d.html> (retrieved 2010-04-05).

evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; *the right* to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; *the reasonable right* to confer with the attorney for the government in the case; *the right* to full and timely restitution as provided in law; *the right* to proceedings free from unreasonable delay; *the right* to be treated with fairness and with respect for the victim's dignity and privacy.<sup>331</sup>

The court shall in any court proceeding involving a crime victim ensure that the victim is afforded these rights and that the officers and employees of the government engaged in the detection, investigation and prosecution of crimes make their best efforts to see to that crime victims are notified and accorded these rights.<sup>332</sup> According to the act, crime victims and attorneys for the government may assert the rights in question and a victim may make a motion to re-open a plea or sentence if the victim, amongst other things, has asserted the right to be heard before or during the proceeding at issue and such right was denied.<sup>333</sup> Two years after the act was passed, the United States Court of Appeals for the Ninth Circuit ruled that the act's right to be "reasonably heard" at sentencing means the right to speak in open court. The ruling came in a California case, *Kenna v. United States Dist. Court*<sup>334</sup> involving father-and-son defendants, after a judge refused to let a victim who spoke at the son's sentencing, speak at the father's sentencing. The Ninth Circuit wrote "The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children – seen but not heard". According to the court, the Crime Victims' Rights Act gives victims an indefeasible right to speak, a right similar to the one of the defendant, and also gives victims the right to confront each defendant who has wronged them.<sup>335</sup>

When it comes to the victim's right to confer with the prosecution, as provided in 18 U.S.C. § 3771(A) (5), this is also often a state constitutional and/or a state statutory right. The right to confer generally allows a victim to speak with the prosecution about the status of the case, the government's direction and possible disposition of the matter.<sup>336</sup> It also provides victims with the opportunity to form and express opinions about the case to the government and the court. The right is intended to be expansive and requires that the communication between prosecutor and victim is meaningful.<sup>337</sup> It is, however, important to point out that the right to confer with the prosecutor does not grant the victim status as a party. The prosecutor retains all discretion regarding the charging decision and recommendations regarding the disposition of the criminal proceedings. A victim's right to

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<sup>331</sup> 18 U.S.C. §§ 3771(A)(1)-(A)(8).

<sup>332</sup> 18 U.S.C. §§ 3771(B) and (C).

<sup>333</sup> 18 U.S.C. §§ 3771(D)(1) and (D)(5).

<sup>334</sup> *Kenna v. United States Dist. Court*, 435 F3d 1011 (9th Cir 2006).

<sup>335</sup> <http://www.ncvli.org/objects/osbdoug.pdf> (retrieved 2010-03-29).

<sup>336</sup> See for example *State v. Stauffer*, 58 P.3d 33 (Ariz. Ct. App. 2002) and *Reed v. Becka*, 511 S.E.2d 396 (S.C. Ct. App. 1999).

<sup>337</sup> *United States v. Heaton*, 458 F. Supp. 2d 1271 (D. Utah 2006).

confer “is not an infringement [...] on the government’s independent prosecutorial discretion [...]; instead, it is only a requirement that the government confer in some reasonable way with the victims before ultimately exercising its broad discretion.”<sup>338</sup>

A question that recently got attention is whether and how victims can assert their right to confer with the prosecution while a court issued gag order is in place. The main purpose of a gag order is to avoid out-of-court publicity from interfering with the integrity and fairness of the criminal proceedings, in particular the trial.<sup>339</sup> Gag orders is issued by the courts to control pretrial or trial publicity by preventing trial parties as well as participants from discussing aspects of the case with the public. Because a victim is not a party to a criminal prosecution, it is possible for victims to be viewed as outside the scope of the gag order, neither bound by its terms nor allowed to communicate with those who are. A gag order generally arises out of the criminal defendant’s right to a fair trial and an impartial jury and the United States Supreme Court has often recognized control of publicity as essential to that right. Additionally, a court may issue gag orders to protect crime victims’ interest in the non-disclosure of certain information to the public. Courts have found that a victim’s interest in privacy and emotional well-being may require an order to be issued, barring trial participants from discussing the case with the media. Importantly, however, is that since victims of crimes have specific rights in the criminal justice process the gag orders cannot properly be construed to terminate these legal rights, including the right to confer with the prosecution. If a victim is prohibited from receiving information and expressing their opinion through a gag order, the victim’s statutory and/or constitutional right to confer is violated.<sup>340</sup> In *United States v. W.R. Grace*<sup>341</sup>, the federal court found that the prosecution was allowed to speak with victims as required by a victim’s rights statutes even where a gag order was in place. The court found there was no violation of the issued gag order when a Victim Witness Specialist from the United States Attorney’s Office met with prosecutors and made a public statement requesting more victims to come forward. Instead, the court held the government’s statements were necessary to comport with the victims’ right to be notified of all proceedings under the Crime Victims’ Rights Act.<sup>342</sup>

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<sup>338</sup> In re Dean, 527 F.3d 391 (5th Cir. 2008), p. 395.

<sup>339</sup> *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000).

<sup>340</sup> Asai-Mackewich, p 11-14.

<sup>341</sup> *United States v. W.R. Grace*, 401 F. Supp. 2d 1057 (D. Mont. 2005).

<sup>342</sup> *United States v. W.R. Grace*, 401 F. Supp. 2d 1057 (D. Mont. 2005), p. 1064.



## 5.5 The Victims' Role in the Proceedings

“Why didn't anyone consult me? I was the one who was kidnapped, not the State of Virginia.”<sup>343</sup>

### 5.5.1 Is a Victim Also an Injured Party?

The American victims are currently and in general denied any form of formal role-party status in the criminal judicial proceedings. Even though it may be the victim's complaint that gave rise to the prosecution of the offence and the victim's testimony that may be essential to sustain it, the victim has no formal relation to the criminal case. The victim has no right to present any evidence or to argue the issue, instead it is the prosecutor alone that represents the public interests. In this role, the prosecutor has been given a broad discretion by the courts in matters of charging, dismissal and restitution, a discretion that is almost unreviewable. In reality, the prosecutors in the American judicial system have a monopoly of criminal prosecution.<sup>344</sup> Many attempts have been made to explain how the victim's passive role and the prosecutor's monopoly to prosecute have developed. Professor of law Gail Heriot has explained the fact that victims lack a formal role-party status with the fundamental purpose behind the structure of criminal law. The historical intention with criminal law, which has lasted until our days, is punishment. In civil law, the purpose is compensation and this compensational purpose requires an identifiable person who claims injury and is the potential recipient of the compensation. This is not the case in criminal law. No such person or recipient is necessary in order to carry out the criminal law's punishing purpose. In fact, modern criminal cases repeatedly involve activities considered essentially victimless, such as gambling, or cases considered victimless on the facts of the particular case, such as attempt. In addition, the purpose of punishment in criminal law requires an identifiable person to punish, which is not the case in civil law.<sup>345</sup> Why then, did the state become the primary initiator of criminal prosecution? For one thing, victims can only be relied upon to initiate criminal actions when crimes contain a victim. For criminal actions without a specific victim, someone else must step in to initiate the legal proceedings and the state is the obvious party. This does not, however, fully explain why the state developed to be the exclusive initiator of criminal proceedings. Another more practical explanation can be found in social changes. When the American society became more urbanized the likelihood that people involved in crimes would be strangers increased considerably. As a consequence, it became more difficult to investigate a crime than it had been before. Thus, the fear was that victims would be less and less inclined to prosecute and that they in the end would refrain from prosecuting criminal

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<sup>343</sup> <http://www.ovc.gov/ncvrvw/2005/pg4d.html> (retrieved 2010-04-05).

<sup>344</sup> Beloof, p. 13-14.

<sup>345</sup> Heriot, p. 49-50.

actions. To prevent this from happening, the state nowadays brings action against defendants whose actions may or may not have caused actual harm to someone. If a defendant is found guilty of the offence the state punishes the action. The victims of crimes, if there are any, are relegated to a supporting role. It may of course be possible for victims to bring civil actions but the state does not give victims power to control criminal proceedings through formal role-party status.<sup>346</sup>

## 5.5.2 The Victims and the Prosecutors

As earlier mentioned, it is the core roles of the prosecutors to represent the public interests in criminal prosecutions. They represent both the interests of the American government and the interests of the American citizens. The prosecutor has broad discretion in matters of charging, dismissal and restitution and the victims are often seen as mere witnesses to the defendants' crimes.<sup>347</sup> As professor of law Jeffrey J. Pokorak describes it in an article "[...] the specific victim of a crime is relevant to the prosecutor only as a witness and a symbol of the threat a defendant poses to society."<sup>348</sup>

So, what is the relationship between the victim and the prosecutor? Does it, in fact, take the form of a client/attorney relationship? Crime victims and particularly rape victims have traditionally seen the judges as indifferent to their concerns. They have also seen the American judicial system as too unbalanced, providing defendants with several strong rights that they as victims are not entitled to. Since the prosecutors, through their monopoly on criminal prosecution, lead the prosecution of the offences, rape victims often perceive the prosecutors as their personal attorneys. This impression of a direct representation is supported and strengthened by duties imposed on the prosecutors through legislation that intends to protect victims' rights. Additionally, it does not help that politically elected prosecutors run for office by talking about how he or she wants to vindicate the harms victims have been put through.<sup>349</sup>

However, the very powers granted to prosecutors to represent the public interests, give rise to conflicts with individual victims and their interests. If the victim's legal interests does not coincide with the prosecutor's, the victim is often treated as a mere witness instead of as a complaining witness. If the victim is consulted when deciding a plea to offer the defendant, the victim's opinion is regularly only secondary to the independent case assessment made by the prosecutor. If the victim provides the prosecutor with exculpatory evidence relevant for the case the prosecutor is legally bound to disclose this material to the defendant. If the victim for some reason needs to be present at a hearing it is usually the prosecutor that issues a subpoena to guarantee the victim's presence at the

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<sup>346</sup> Beloof, p. 16.

<sup>347</sup> Beloof, p. 13-14.

<sup>348</sup> Pokorak, p. 697.

<sup>349</sup> Pokorak, p. 697-698.

hearing. If a case falls apart and is dismissed it falls upon the prosecutor to handle the victim.<sup>350</sup> The prosecutors' duty is to seek justice and their responsibility is to their client "the people". Their client, however, includes both the government and all the citizens, thus including both the victim and the defendant.<sup>351</sup> As the comments to the ABA Standards for Criminal Justice describes it: "A prosecutor's client is the people who live in the prosecutor's jurisdiction. Since all lawyers have a fiduciary duty to their clients, the professional judgment of the prosecutor must be exercised within the bounds of the law solely for the benefit of the client – the people [...]."<sup>352</sup> Even if the rape victims might be seen as having the most pressing interests in the prosecution of an offence, a victim has no real influence over a prosecutor's action. This becomes especially apparent if the victim's interests deviates from the prosecutor's.<sup>353</sup> It is the prosecutor who decides when and how often the rape victim must come to court to witness; when a case ought to be concluded, by a plea offer or by a dismissal; and how much influence a victim should have on these decisions. In reality, the effect of the prosecutors' high volume of cases and the prosecutors' responsibility to their client, the people, is that prosecutors have very little contact with rape victims, as well as victims in general.<sup>354</sup>

The rape victims have in many ways a unique position in regards to the prosecutors. As described, the crime rape is one of the most intrusive assault crimes there are and the physical and mental trauma associated with the crime is horrendous. The rape victim's primary interest is not to seek criminal or civil actions against the perpetrator. Instead her primary need is the need for privacy. This primary interest has been described as indispensable by some practitioners and scholars.<sup>355</sup> "For most sexual assault victims, privacy is like oxygen; it is a pervasive, consistent need at every step of recovery."<sup>356</sup> The victim needs to protect herself from intrusive questions and innuendos, whether they come from well-intended members of her community or from the defense counsel. To help the victim with her need for privacy, rape victims enjoys many legally recognized privileges associated with the offence, for instance the privacy of certain documents within the healthcare system. However, once the rape is reported, the victim's privacy staggers and the defense will seek and gather medical records and statements.<sup>357</sup> The effect from the loss of privacy for the rape victim may be devastating, both at a personal level and in relations to the situation at the workplace or at school. As a result, the rape victims are in need of legal representation on several fronts at once.<sup>358</sup> As stated by Pokorak, "[v]ictims of rape – as a class – are among the people most in need

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<sup>350</sup> Pokorak, p. 698-699.

<sup>351</sup> Pokorak, p. 705.

<sup>352</sup> ABA, p. 9.

<sup>353</sup> Pokorak, p. 706.

<sup>354</sup> Pokorak, p. 710-711.

<sup>355</sup> Pokorak, p. 712-713.

<sup>356</sup> Seidman & Vickers, p. 473.

<sup>357</sup> Pokorak, p. 714-715.

<sup>358</sup> Pokorak, p. 718.

of general and comprehensive legal services.”<sup>359</sup> Recent research has pointed out that rape victims who were legally assisted by attorneys were significantly more likely to report the offences. The victims who had such legal assistance also stated that they experienced less distress and discomfort after their contact with the judicial system.<sup>360</sup> The rape victim is actually presented with a lawyer in the criminal law context. However, this lawyer – the prosecutor - may appear to get involved in the case to provide the victim with legal support, but is neither the victim’s attorney nor acting in the victim’s own interests. This is the problem in the relationship between victims and prosecutors. The role of the prosecutors gives the victims the impression that they have a client/attorney relationship, but the prosecutors are legally as well as ethically prohibited from representing any individual victims.<sup>361</sup>

## **5.6 Two Modern Examples of State Rights Provided to Victims**

### **5.6.1 Arizona**

#### **5.6.1.1 Constitutional Rights**

Arizona is a state that enjoys a reputation of being one of the states on the front edge of victims’ rights. About two decades ago, a majority of Arizona’s voters voted for the approval of a proposed amendment to the Arizona state constitution, which intended to provide Arizona’s crime victims with specific procedural and substantive rights. By this, Arizona became one of only six American states that by 1990 had amended their state constitutions to provide crime victims with such rights. In the ensuing years, the Victims’ Bill of Rights, or the Victims’ Rights Amendment, gave Arizona’s crime victims a participatory role in the criminal justice process. However, some say that the state’s upper-level courts - the Supreme Court and the Court of Appeals - have not always let the Bill achieve all its designers intended. In several respects the upper-level courts have interpreted and applied the amendment consistent with the intent behind it, thus achieving important results for crime victims. But in other respects, the interpretation and appliance of the Victims’ Rights Amendment have created a heated debate among the amendment’s supporters. Concerns have been expressed that several results the Bill was intended to achieve, have not yet been fully attained and that the courts even have taken steps to void the Amendment’s ability to achieve these results.<sup>362</sup>

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<sup>359</sup> Pokorak, p. 719.

<sup>360</sup> <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32369#1> (retrieved 2010-04-15).

<sup>361</sup> Pokorak, p. 722.

<sup>362</sup> Harrison, p. 531-532.

At its core, the Victims' Bill of Rights acknowledges that crimes are committed not only to the state, but also to specific individual victims. The recognition that victims have an interest in the criminal prosecution of the offences was introduced recently in Arizona's jurisprudence. Before the amendment of the Bill, victims were largely viewed by the criminal justice system as little more than unfortunate by-products of criminal activity. When a crime was committed, the victim's role in the criminal prosecution was solely the one of a witness for the prosecution. Aside from this role, the victims had no right of access to the criminal justice system. The Bill came to in order to change that and to make the criminal justice process inclusive for victims and receptive to the victims' need to see justice done. The Victims' Rights Amendment empowers victims through the right to due process in criminal prosecutions.<sup>363</sup>

Who is then a victim under the Victims' Bill of Rights? A "victim" is defined as the person against whom the criminal offence was committed, or if that person is killed or incapacitated, the person's spouse, parent, child or other lawful representative except if the person is in custody for an offence or is the accused.<sup>364</sup> In *State v. County of Maricopa*<sup>365</sup>, the Arizona Supreme Court held that the definition of "crime victim" in the Victims' Rights Amendment does not require a victim to suffer personal injury. The court found that also an owner of a car damaged by an intoxicated driver qualifies as a victim. Additionally, the court has also held that a "victim" under the Bill cannot be the "accused", but must be a victim of the alleged criminal offence with which the defendant is charged. In *Knapp v. Martone*<sup>366</sup>, the court stated that a mother of two murdered children was a "victim" and in *Stapleford v. Houghton*<sup>367</sup> the court stated that a person is not a "victim" if that person is in custody or is the accused.

The Victims' Bill of Rights consists of rights which can be divided into the four following groups. (1) Rights for victim to receive restitution from the person or persons who committed the crime.<sup>368</sup> (2) Rights which allow victim to participate in, contribute information to, and draw information from a criminal prosecution.<sup>369</sup> (3) Rights that protect the victim from harassment and abuse throughout the criminal justice process.<sup>370</sup> (4) Rights which permit the legislature to act on behalf of crime victims so that the rights secured by the Victims' Rights Bill may be preserved.<sup>371</sup> For example, to "preserve and protect victims' rights to justice and due process, a victim of crime has a right to have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect

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<sup>363</sup> Harrison, p. 533-534.

<sup>364</sup> Art. 2, § 2.1(C) of the Arizona Constitution.

<sup>365</sup> *State v. County of Maricopa*, 909 P.2d 476 (Ariz. 1996).

<sup>366</sup> *Knapp v. Martone*, 823 P.2d 685 (Ariz. 1992).

<sup>367</sup> *Stapleford v. Houghton*, 917 P.2d 703 (Ariz. 1996).

<sup>368</sup> Art. 2, § 2.1(A)(8) of the Arizona Constitution.

<sup>369</sup> Art. 2, §§ 2.1(A)(2), (A)(3), (A)(4), (A)(6), (A)(7), (A)(9) and (A)(12) of the Arizona Constitution.

<sup>370</sup> Art. 2, § 2.1(A)(1) of the Arizona Constitution.

<sup>371</sup> Art. 2, §§ 2.1(A)(1), (A)(5), (A)(10), (A)(11) and (D) of the Arizona Constitution.

victims' rights and to have these rules be subject to amendment repeal by the legislature to ensure the protection of these rights."<sup>372</sup> Another example of these rights is the rule that "the legislature, or the people by initiative or referendum, have the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section, including the authority to extend any of these rights to juvenile proceedings."<sup>373</sup> The second group of Bill of Right's rights allow victim to participate in and contribute information to a criminal prosecution. This, however, do not give the victims standing as aggrieved parties in the prosecution. The Arizona Supreme Court has in *State v. Lamberton*<sup>374</sup>, rejected the notion that the victims' right to be heard regarding sentencing under the Victims' Bill of Rights should give victims standing as "aggrieved parties" in the prosecution. This means that the Bill of Rights does not provide the victims the right to petition for relief from or review of courts' sentencing decisions. In *Lamberton*, the court held that the Victims' Rights Amendment did not provide crime victims the right to file petitions for review in criminal cases.

One concern about the Victims' Bill of Rights is that the victims' rights potentially could infringe upon the defendants' constitutional rights. In *State v. Bible*<sup>375</sup>, the Arizona Supreme Court held that crime victims and their families have certain rights provided by the Victims' Rights Amendment. However, as the court wrote, those rights do not and must not conflict with the defendant's right to a fair trial. In the case, the prosecutor suggested that it was the jurors' duty to protect the rights of both the defendant and the victim and that the goal of the trial was to do justice, not necessarily to give the defendant a fair trial. The court held that these comments were improper. In *Romley v. Superior Court in and for County of Maricopa*<sup>376</sup>, the Arizona Supreme Court found a direct conflict between the Victim's Bill of Rights and the defendant's constitutional right to due process. The court held that the due process clause of the Constitution takes precedence over the provisions of a state constitution. In the case of *Romley*, the defendant required access to medical records for the purpose of cross-examination and impeachment of the victim. The right for a victim to refuse a defendant's discovery request for medical records was recognized by the court, but it also held that when the information is exculpatory and crucial to the defendant's defense, the right of the victim must be rejected. This is also the case if the information is necessary for an impeachment of the victim.

### 5.6.1.2 Statutory rights

The rights in the constitutional Victims' Bill of Rights have been supplemented by statutes, *Title 13, Criminal Code; Chapter 40, Crime*

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<sup>372</sup> Art. 2, § 2.1(A)(11) of the Arizona Constitution.

<sup>373</sup> Art. 2, § 2.1(D) of the Arizona Constitution.

<sup>374</sup> *State v. Lamberton*, 899 P.2d 939 (Ariz. 1995).

<sup>375</sup> *State v. Bible*, 858 P.2d 1152 (Ariz. 1993).

<sup>376</sup> *Romley v. Superior Court in and for County of Maricopa*, 836 P.2d 445 (Ariz. Ct. App. 1992).

*Victims' Rights* of the Arizona Revised Statutes, enacted in 1991 as a part of the Crime Victims' Rights Implementation Act.<sup>377</sup> According to § 13-4401, the statute defines "victim" as a person against whom a criminal offence has been committed.<sup>378</sup> The victims' rights provided by chapter 40 arise on the arrest or formal charging of the person who are alleged to be responsible for a criminal offence against a victim. The rights continue to be enforceable until the final disposition of the charges, including acquittal or dismissal of the charges, and may be exercised by a lawful representative if a victim is physically or emotionally unable to exercise any right. This representative shall accompany the vulnerable victim through all proceedings, including delinquency, criminal, dependency and civil proceedings.<sup>379</sup> The law enforcement agency responsible for investigating the criminal offence shall as soon as possible after the detection of a criminal offence provide the victim with information about the victim's right under the Victims' Bill of Rights' article 2 § 2.1.<sup>380</sup> On a request by the victim, the prosecuting attorney shall confer with the victim about the disposition of the criminal offence. Also, if the victim so requests, the prosecuting attorney shall confer with the victim before the commencement of the trial. However, the right of victims to confer with the prosecuting attorney does not include the authority to direct the prosecution of the case.<sup>381</sup> A victim has the right to be present throughout all criminal proceedings in which the defendant has the right to be present, as well as to be heard at any proceeding where a negotiated plea for the person accused of committing the criminal offence will be presented to the court.<sup>382</sup> The victim has standing to seek an order or to bring a special action mandating that the victim be afforded any right or to challenge an order denying any right guaranteed to victims under the Victims' Bill of Rights' article 2 § 2.1. In asserting any right, the victim has the right to be represented by a personal counsel at the victim's own expense.<sup>383</sup>

## 5.6.2 Massachusetts

### 5.6.2.1 Statutory rights

Compensation for victims of crime was one of the earliest forms of giving assistance to victims and the state of Massachusetts was amongst the first states to establish some form of compensation program. The state also stands out, on the account that its statutorily mandated time restrictions is one of two American states that allows victims to file a claim for compensation up to three years after the crime. Additionally, the state's compensation program employs advocates to assist the victims through the

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<sup>377</sup> Harrison, p. 534.

<sup>378</sup> § 4401(19) of title 13 of the Arizona statute.

<sup>379</sup> § 4402(A) and §§ 4403(A) and (E) of title 13 of the Arizona statute.

<sup>380</sup> § 4405(A)(3)(a) of title 13 of the Arizona statute.

<sup>381</sup> §§ 4419(A), (B) and (C) of title 13 of the Arizona statute.

<sup>382</sup> § 4420 and § 4423(A) of title 13 of the Arizona statute.

<sup>383</sup> § 4437(A) of title 13 of the Arizona statute.

entire compensation claims process.<sup>384</sup> The state of Massachusetts does not have a victims' rights amendment to its constitution. Instead, the victims' rights laws are found in a statute, *Part III, Courts Judicial Officers and Proceedings in Civil Cases; Title IV, Certain Writs and Proceedings in Special Cases; Chapter 258B, Rights of Victims and Witnesses of Crime*. The following is a selection of rights provided to victims by the so-called Victim Bill of Rights, enacted through chapter 258B in the mentioned statute.

According to § 1, the definition of "victim" used in the chapter is "any natural person who suffers direct or threatened physical, emotional, or financial harm as the result of the commission or attempted commission of a crime or delinquency offence, as demonstrated by the issuance of a complaint or indictment [...]". § 2 prescribes that the prosecutors shall not be prohibited from providing services under the chapter to any natural person who suffers direct physical harm as the result of the commission of a crime. According to § 3 victims shall be afforded the following fundamental rights in order to be able to play a meaningful role in the criminal justice system: the victim shall be informed by the prosecutor about a victim's rights in a criminal process; how a case progresses through the criminal justice system; what the victim's role is in the process and the expectations on the victim; and if the victim requests it, the prosecutor shall periodically apprise the victim of significant developments in the case.<sup>385</sup> The victim shall have the right to be present at all court proceedings related to the offence committed against the victim, with some exceptions.<sup>386</sup> The victim shall also have the right to confer with the prosecutor before the trial begins as well as before an act by the commonwealth terminating the prosecution. However, the victim's right to confer does not include the authority to direct the prosecution of the case.<sup>387</sup> In addition, § 3 gives the victims the right to be heard through an oral and written victim impact statement about the effects of the crime on the victim. The victim has the right to be heard at sentencing or the disposition of the case against the defendant and at any other time deemed appropriate by the court.<sup>388</sup> Finally, a victim has the right to receive protection from the local law enforcement agencies, from harm arising out of the criminal proceedings.<sup>389</sup> The rights and duties established in the statute are enforceable until the final disposition of the charges. This includes acquittal or dismissal of charges, all appellate proceedings and the discharge of all criminal proceedings relating to restitution. If a case for some reason is returned to the trial court for further proceedings, the victim shall have the same rights that applied to the criminal proceedings leading to the appeal.<sup>390</sup>

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<sup>384</sup> <http://legacy.lclark.edu/org/ncvli/objects/Compensation.pdf> (retrieved 2010-05-01).

<sup>385</sup> § 3(a) of chapter 258B of the Massachusetts statute.

<sup>386</sup> § 3(b) of chapter 258B of the Massachusetts statute.

<sup>387</sup> § 3(g) of chapter 258B of the Massachusetts statute.

<sup>388</sup> § 3(p) of chapter 258B of the Massachusetts statute.

<sup>389</sup> § 3(d) of chapter 258B of the Massachusetts statute.

<sup>390</sup> § 11 of chapter 258B of the Massachusetts statute.



It has been clearly stated that even though victims are afforded rights under § 3 in order to play a meaningful role in the criminal justice system, the Victim Bill of Rights does not create standing for a victim in a criminal case. In the case *Commonwealth v. Hagen*<sup>391</sup> the court stated that the Bill of Rights does not create standing for a victim to challenge the denial of the statutory right to a prompt disposition. In the case, the defendant was convicted of rape and indecent assault and battery in 1987. The following year, the defendant was sentenced to ten years in state prison. He filed an appeal and a motion to stop the execution of the sentence pending his appeal. The motion was granted and due to various problems, the execution of the sentence was stopped for thirteen years. In 2001, the crime victim engaged a private counsel to file a motion requesting that the sentence would be carried through. The trial judge would not permit the victims' counsel to file an appearance for the victim, ruling that the victim was not a party to the criminal proceeding. Although the statute intended to allow victims to actively participate in the criminal justice process, the Victim Bill of Rights does not create a private right for victims to file motions in criminal cases or to be heard as a party to the case.

When it comes to victims' rights, state courts have generally upheld the absolute sexual assault victim-counselor privilege, faced with a defendant's claim of constitutional entitlement.<sup>392</sup> Interesting enough, the Massachusetts courts are amongst those who have limited the absolute privilege established by statute, for instance in *Commonwealth v. Bishop*<sup>393</sup>. The courts in Massachusetts have been particularly influential in shaping the range of the state's counselor privilege. Subsequent to the legislature passing a law with the purpose to establish an absolute privilege, the Supreme Judicial Court in Massachusetts determined in the case of *Bishop* that a defendant, under certain circumstances, must have access to privileged materials. Otherwise, it would not be a fair trial for the defendant. The judges were to follow a five-step procedure when weighing a sexual assault victim's statutorily protected privacy interest, against the constitutional rights for the defendant.<sup>394</sup> Later on, for instance in *Commonwealth v. Fuller*<sup>395</sup>, this procedure was modified and the standard of need that the defendant must satisfy before being granted access to a victim's privileged counseling records was increased.<sup>396</sup> In 1997 in the case *Commonwealth v. Tripolone*<sup>397</sup>, the Massachusetts Supreme Judicial Court recognized for the first time that victims may have a constitutional right to protect the confidentiality of their counseling records. From the victims' standpoint, this recognition opened the door for a broadened scope of privilege.

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<sup>391</sup> *Commonwealth v. Hagen*, 437 Mass. 374 (2002).

<sup>392</sup> Author's note: see for example *People v. District Court of Denver*, 719 P.2d 722 (Pa. 1986) and *People v. Foggy*, 521 N.E.2d 86 (Ill. 1988).

<sup>393</sup> *Commonwealth v. Bishop*, 617 N.E.2d 990 (Mass. 1993).

<sup>394</sup> *Commonwealth v. Bishop*, 617 N.E.2d 990 (Mass. 1993), p. 997-998.

<sup>395</sup> *Commonwealth v. Fuller*, 667 N.E.2d 847 (Mass. Sup. Ct. 1996).

<sup>396</sup> *Commonwealth v. Fuller*, 667 N.E.2d 847 (Mass. Sup. Ct. 1996).

<sup>397</sup> *Commonwealth v. Tripolone*, 681 N.E.2d 1216 (Mass. Sup. Ct. 1997).

# 6 Comparative Victims' Rights

## 6.1 Introduction to the Chapter

This chapter will briefly describe some of the legal rights that injured parties and crime victims have within the legal systems of Sweden, Arizona and Massachusetts. The following rights are a selection of the rights provided to victims' in the respective judicial systems and might in some aspects be a repetition of rights already mentioned in previous chapters. The motive for choosing these rights is to illustrate how the victims' legal support pre-trial, during trial and post-trial differs between the systems. When reading the following chapter, the reader should have in mind the previous exposition of the Swedish Counsel for Injured Party Act. The reason for this is that not all of the rights provided by the Act, or the intent behind them, will be repeated owing to the fairly exhaustive explanation of these provisions and their importance given earlier.

## 6.2 The Pre-Trial Rights

### 6.2.1 Sweden

#### 6.2.1.1 The Right to Information

The Swedish authorities have spent a lot of effort on developing effective victim information processes, to improve the victims' participation rate in the criminal proceedings. In a circular from the Attorney General (*Riksåklagaren*) in 1994, it was recognized that a considerable part of the authorities' assistance to injured parties consisted of the information that the police and prosecutors must supply.<sup>398</sup> If the investigation authority, during the preliminary investigation, finds that a private claim may be raised on account of the offence, they should give sufficient notice to the victim prior to instituting the prosecution.<sup>399</sup> § 13a of the Ordinance on the Preliminary Investigation provides that the injured party should be informed of whether the prosecutor can present her private claim and of her possibility to claim compensation under the Criminal Injuries Compensation Act. In this context, information should also be given in a suitable manner about the rules that apply to such a claim. Furthermore, § 13a provides that if conditions for appointing a legal counsel for injured party or the granting of a protection order are met, the injured party should be informed of the rules that apply for this as soon as possible. Finally, § 13a of the ordinance provides that the injured party should, to a suitable extent, be given information about the rules in § 15 of chapter 20 and § 10 of chapter 23 of the Code of Judicial Procedure, concerning support persons. Additionally,

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<sup>398</sup> Brienens & Hoegen, p. 892-893.

<sup>399</sup> § 2 of chapter 22 of the Code of Judicial Procedure.

information should be given about the possibility to general legal aid and advice as well as authorities, organizations and others who can offer support and help.<sup>400</sup>

However, the Ordinance on the Preliminary Investigation does not determine who is responsible for giving the injured party all the mentioned information. But, since both the police and the prosecutor are involved in the preliminary investigation, when the information should be given, they are responsible for providing the information. Seeing as the police are the first point of contact for crime victim and the victims should be informed as soon as possible, the police have the primary responsibility for informing the victims. According to § 6 of chapter 1 of the Police Statute (1998:1558) (*Polisförordningen*), it lays within the police's assignment to "strive to provide the public with advice and support. In particular, the police should provide crime victims with the information they need as a result of the crime they have been subjected to". Still, since the prosecutors also are involved in the preliminary investigation, they are responsible to act as an informatory safety net.<sup>401</sup>

According to § 13b of the Ordinance on Preliminary Investigations, the crime victim should be asked if she would like to be informed about the different decisions made in the case. This information includes a more concrete and comprehensible information about the subsequent handling of the case. In addition, the victim has the possibility to request information about whether a preliminary investigation is discontinued or not initiated and if it is decided that no prosecution shall take place. Furthermore, the victim may request information about the date for the case's main hearing as well as the court's final decision, although she will receive this information automatically, whether she requests it or not. § 15 of chapter 45 of the Code of Judicial Procedure provides that the victim shall be given notice to appear at the main hearing if she supports or joins the prosecution, or if she is to be examined as a part of the prosecutor's case.

There is no general provision obligating the police to continuously give the victim information about important occurrences in the criminal investigation, such as when the suspect is taken into custody. However, according to § 13c of the ordinance, the injured party should be informed if a seized, arrested or detained suspect absconds and according to § 13d of the ordinance, the injured party should be informed as soon as it has been decided to prosecute the suspect.<sup>402</sup> According to § 14 of the ordinance, a victim of crime who has reported the crime, submitted a claim for damages or made a request to be kept informed about the investigation, should be notified of a decision by the prosecution not to initiate a preliminary investigation; to close an investigation; or to waive prosecution. The

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<sup>400</sup> Brienens & Hoegen, p. 893.

<sup>401</sup> Brienens & Hoegen, p. 893.

<sup>402</sup> Lindgren & Qvarnström, p. 7-8.

government has recommended that the information is given to the victims verbally as well as in writing.<sup>403</sup>

### **6.2.1.2 The Right to Assistance**

The injured party is, under the provisions of the Counsel for Injured Party Act, entitled a legal counsel to assist her and the counsel should be appointed already during the preliminary investigation. The counsel for injured party has a right to be present at all hearings and questionings where the injured party is being questioned, according to § 10 chapter 23 of the Code of Judicial Procedure. Once the preliminary investigation has been closed, the injured party has a right, upon request, to receive a copy of the protocol of the preliminary investigation. The request has to be made on the victim's own initiative, since the police usually do not ask whether the victim want to receive a copy. If a counsel for injured party has been appointed, this person can get a copy on behalf of the injured party. The legal counsel for injured party should guard the interests of the injured party to ensure that all the victim's rights are exercised.<sup>404</sup>

### **6.2.1.3 The Right to Ask for a Review**

A crime victim has the right to ask for a review of a decision not to prosecute an offence, in a case concerning an offence committed to the victim. In Sweden, most crimes fall within the domain of the public prosecution, even if it only falls within the domain upon complaint by a victim. If a prosecutor decides not to prosecute, the victim has the possibility to ask for a review, simply by writing to the prosecuting authorities with a request that they should reconsider the case. The review of the case is a competent authority – a higher-ranking prosecutor of the same authority as the prosecutor who took the initial decision not to prosecute the case. This right for the victim to review the decision in a case is not regulated in any legislation.<sup>405</sup>

### **6.2.1.4 The Right to Institute Private Proceedings**

If the public prosecutor decides not to prosecute a case, the victim has a subsidiary right to institute a private prosecution. The right to initiate such proceedings for an offence falling within the domain of public prosecution comes into play only under two premises, according to § 8 of chapter 20 of the Code of Judicial Procedure. One is that the victim must have reported the offence to a competent authority and two is that the prosecutor must have decided not to prosecute the offence. § 5 of chapter 20 of the Code of Judicial Procedure states that a competent authority is defined as the office of any prosecutor or the police. In addition to this right, if the prosecutor decides to drop a prosecution the victim may take over where the prosecutor left off, according to § 9 of chapter 20 of the Code of Judicial Procedure.

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<sup>403</sup> Lindgren & Qvarnström, p. 8.

<sup>404</sup> Brienens & Hoegen, p. 896.

<sup>405</sup> Brienens & Hoegen, p. 900.

The normal procedure is that the victim asks for a review of the decision not to prosecute the offence, before instituting private proceedings, even though this is not a formal pre-requisite. Private prosecutions are rare and not without a risk for the victim. The victim must bear all the costs of the trial if the case is lost and may even risk being sentenced for initiating an unfounded prosecution, if the judge decides that there was no probable reason to prosecute. Even so, occasionally private prosecutions do take place, although rarely successfully.<sup>406</sup>

## **6.2.2 The United States**

### **6.2.2.1 Arizona**

#### **6.2.2.1.1 The Right to Information and the Right to Confer**

To preserve and protect victims' rights to justice and due process, a crime victim has a constitutional right to be informed of the rights of victims.<sup>407</sup> Additionally, a victim has a right to be informed of all criminal proceedings where the defendant has a right to be present.<sup>408</sup> The crime victim also has a constitutional right to confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.<sup>409</sup> According to the statutes, the victim should be provided with a form by the responsible law enforcement agencies, as soon after the crime as the victim may be contacted without interfering with an investigation or arrest. The form should allow for the victim to request or waive the rights to which the victim is entitled; provide the victim a method to designate a lawful representative; and provide notice to the victim of all of the following information: The constitutional right to be treated with fairness, respect and dignity and to be free of intimidation, harassment or abuse throughout the criminal justice process; The possibility to crisis services and medical services and, where applicable, the information that medical expenses arising out of the need to secure evidence may be reimbursed pursuant; The information of public and private victim assistance programs, including the county victim compensation program and programs providing counseling, treatment and other support services. The form also contains information about the possibility to be at the earliest opportunity after the arrest of a suspect. If the suspected offender is cited and released, the victim has a statutory right to be informed of the court date and how to obtain additional information about the subsequent criminal proceedings.<sup>410</sup>

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<sup>406</sup> Brienens & Hoegen, p. 891 and p. 900.

<sup>407</sup> Art. 2, § 2.1(A)(12) of the Arizona Constitution.

<sup>408</sup> Art. 2, § 2.1(A)(3) of the Arizona Constitution.

<sup>409</sup> Art. 2, § 2.1(A)(6) of the Arizona Constitution.

<sup>410</sup> § 4405 of title 13 of the Arizona statute.

### 6.2.2.1.2 The Right to Refuse a Discovery Request

According to the Arizona constitution, a victim has a constitutional right to refuse an interview, deposition, or other discovery request by the defense.<sup>411</sup> Arizona is one of few states that provide crime victims the right to refuse an interview, deposition, or other discovery request by the defense.<sup>412</sup> When the Victims' Bill of Rights was first proposed to the Arizona voters, one of the most controversial aspects of the bill was that it would limit a criminal defendant's pretrial discovery rights. Prior to the implementation of the Victims' Bill of Rights, Arizona courts provided defendants with very extensive pretrial discovery rights, actually some of the most extensive rights available to criminal defendants anywhere in the United States. These rights included an ability for defendants to compel victims to submit to pretrial interviews and produce evidence to help the defense establishing the defendant's case. The legislators behind the Victims' Bill of Rights recognized that victims were repeatedly mistreated through these pretrial discovery rules and consequently created the right for crime victim's to be free from harassment, provided in art. 2, § 2.1(A)(5). This generated much apprehension and critics decried the limitations on discovery were in derogation of the defendant's right to a fair trial under the federal constitution. The critique became intensified and even more pronounced after the Arizona Supreme Court's decision in *State v. Warner*<sup>413</sup>. In their decision, the court held that the crime victim's right to refuse a pretrial interview, a deposition request and another discovery request from the defendant is absolute.<sup>414</sup>

The Arizona courts have, when defining the substance and scope of the constitutional due process rights of crime victims, to a large extent preserved the right to refuse a pretrial interview or other discovery requests made by the defendant. However, the courts have also ensured that the crime victims' due process rights do not nullify or suspend the defendants' rights to effective cross-examination, confrontation, and other fair trial rights. The courts have tried hard to achieve a balance between the conflicting interests of victims and criminal defendants, clearly shown by the decisions in *State v. Riggs*, *State v. Superior Court* and *S.A. v. Superior Court*<sup>415</sup>. In *Riggs*, the court held that trial courts have discretion to deny cross-examination of victims regarding the victim's refusal to participate in pretrial interviews. The purpose behind the victim's right to refuse is to minimize the amount of contact between the victim and the defendant. It would go against the purpose of the rule, if the defendant were given the possibility to cross-examine the victim on the reasons for the refusal. The court wrote that the simple fact that the victim refused does not indicate hostility or bias bearing on victim's credibility. Instead, it is the defendant who has the burden of establishing facts indicating otherwise.<sup>416</sup> In *State v.*

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<sup>411</sup> Art. 2, § 2.1(A)(5) of the Arizona Constitution.

<sup>412</sup> Stearman, p. 49 and art. 2 § 2.1(A)(5) of the Arizona Constitution.

<sup>413</sup> *State v. Warner*, 812 P.2d 1079 (Ariz. Ct. App. 1990).

<sup>414</sup> Harrison, p. 539-540.

<sup>415</sup> *State v. Riggs*, 942 P.2d 1159 (Ariz. 1997).

<sup>416</sup> Harrison, p. 541-542.

*Superior Court*<sup>417</sup>, the court held that the Victims' Bill of Rights does not prevent a trial court from requiring the parents of a sexual assault victim to submit to an interview by the defendant's counsel. In *S.A. v. Superior Court*<sup>418</sup>, the Arizona Court of Appeals had to decide whether the scope of art. 2 § 2.1(A)(5) was broad enough to include the right of a victim to refuse a court's order to testify against the defendant at trial. The court held that the Victims' Bill of Rights does not give victims the right to refuse to testify, since society's interest in justice would be jeopardized if the court concluded that victims have a right to refuse to obey a court order to testify. It would also compromise the society's possibility to prosecute offenders and defeat the defendants' constitutional right to confront their accusers.

## **6.2.2.2 Massachusetts**

### **6.2.2.2.1 The Right to Information and the Right to Confer**

A victim has the right to be informed by the prosecutor about the victims' rights in the criminal process. At the beginning of the criminal justice process, the prosecutor shall provide an explanation to the victim of how the case progresses through the criminal justice system, what the victim's role is in the process, and what the system may expect from the victim and why the system requires this.<sup>419</sup> The victims should also be provided with information of the level of protection available and receive protection from the local law enforcement agencies from harm and threats of harm arising out of their cooperation with law enforcement and prosecution efforts.<sup>420</sup> Additionally, information should be given to the victims about financial assistance and other social services available to victims, including information relative to applying for such assistance or services.<sup>421</sup> Victims have a right to be notified by the prosecutor, in a timely manner, when a court proceeding to which they have been summoned will not go on as scheduled, provided that such changes are known in advance.<sup>422</sup> They also have a right to be informed of the possible right to pursue a civil action for damages relating to the crime, regardless of whether the court has ordered the defendant to make restitution to the victim.<sup>423</sup>

Before the commencement of the trial, the victims have a right to confer with the prosecutor. Victims also have the same right before any hearing on motions by the defense to obtain psychiatric or other confidential records; before the filing of any act by the commonwealth terminating the prosecution; and before the submission of the commonwealth's proposed sentence recommendation to the court. The prosecutor shall inform the court of the victim's position, if known, regarding the prosecutor's sentence

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<sup>417</sup> *State v. Superior Court*, 922 P.2d 927 (Ariz. Ct. App. 1996).

<sup>418</sup> *S.A. v. Superior Court*, 831 P.2d 1297 (Ariz. Ct. App. 1992).

<sup>419</sup> § 3(a) of chapter 258B of the Massachusetts statute.

<sup>420</sup> § 3(d) of chapter 258B of the Massachusetts statute.

<sup>421</sup> § 3(e) of chapter 258B of the Massachusetts statute.

<sup>422</sup> § 3(c) of chapter 258B of the Massachusetts statute.

<sup>423</sup> § 3(u) of chapter 258B of the Massachusetts statute.

recommendation. However, the right of the victim to confer with the prosecutor does not include the authority to direct the prosecution of the case.<sup>424</sup>

#### **6.2.2.2 The Right to Refuse a Discovery Request**

Victims have a statutory right to be informed of the right to submit to, or decline an interview by defense counsel or anyone acting on the defendant's behalf, except when responding to lawful process, and, if the victim decides to submit to an interview, the right to impose reasonable conditions on the conduct of the interview.<sup>425</sup> It is possible to limit the defense discovery rights under certain conditions. In *Commonwealth v. Santana*<sup>426</sup>, a judge abused his discretion by ordering a prosecutor to disclose the address of a victim. The case involved assault and battery, annoying phone calls and threats and the defendant insisted that she needed the address so that she would be able to interview the victim to obtain information to impeach the victim. A judge in the Supreme Judicial Court vacated the order, emphasizing that the Commonwealth is not required to produce evidence that is not in their possession or control. In addition, the judge strongly underscored the judge's responsibility to limit discovery in cases such as this when safety is an issue. In another case, *Commonwealth v. Liang*<sup>427</sup>, it is established that the notes of a Victim/Witness Advocate<sup>428</sup> are protected from discovery by the defense. The court argued that the Victim/Witness Advocates are part of the Commonwealth's prosecution team. Because of this, their notes regarding contact and conversations with the victim in a case shall be treated in the same way as the notes a prosecutor keeps in a case. However, notes containing relevant statements must be disclosed to the defense.

In relation to the discovery process pre-trial, the defendant may seek pretrial inspection of statutorily privileged records of a third party. In *Commonwealth v. Dwyer*<sup>429</sup>, the defendant was convicted of rape of a child by force and indecent assault and battery on a child under the age of fourteen. Among several challenges to his convictions, the defendant claimed that the denial of his repeated requests to review the victim's therapy records was an abuse of discretion. The courts ruled in favor of the defendant, thus establishing that the defense counsel is allowed to inspect privileged information produced by a third party, if certain requirements are met.

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<sup>424</sup> § 3(g) of chapter 258B of the Massachusetts statute.

<sup>425</sup> § 3(m) of chapter 258B of the Massachusetts statute.

<sup>426</sup> *Commonwealth v. Santana*, Suffolk County, September 24, 2001.

<sup>427</sup> *Commonwealth v. Liang*, 434 Mass. App. Ct. 131 (2001).

<sup>428</sup> Author's note: The Victim/Witness Advocates are employed at the larger prosecution offices and manages witness and victim interactions for the lawyers. The Advocate is responsible for the prosecution office's victim contact throughout the legal proceedings.

<sup>429</sup> *Commonwealth v. Dwyer*, 448 Mass. 122 (2006).



## 6.3 The Rights During the Trial

### 6.3.1 Sweden

#### 6.3.1.1 The Right to be Present

An injured party has always a right to be present during the whole legal proceedings. Support persons, provided to victims by the local branch of the National Victim Support Organization, are regularly involved in the court proceedings as support for the injured party. If a support person is present, the injured party has the right to have the support person sitting next to her. This applies even if a counsel for injured party also is present during the trial.<sup>430</sup> If a counsel for injured party has been appointed, the counsel has a right to assist the injured party in court, with the private claim as well as with support. According to § 15 of chapter 20 of the Code of Judicial Procedure, the counsel has a right to be summoned to all legal proceedings where the injured party is summoned.<sup>431</sup> If the injured party feels uncomfortable in the presence of the defendant, she or her legal counsel can ask to have the defendant removed when she makes her statement.<sup>432</sup> It is also possible for the injured person to follow the rest of the proceedings via an intercom in another room.<sup>433</sup> The counsel for injured party should also, if this is the injured party's wish, ask the court if it is possible to exclude the general public from the proceedings.<sup>434</sup>

#### 6.3.1.2 The Rights During Questioning

During the questioning of the injured party, the injured party has a right to receive a certain degree of anonymity, if there exists some legal reasons for it, according to § 10 of chapter 36 of the Code of Judicial Procedure. When the injured party is being questioned, she has the support of her appointed counsel for injured party. The counsel, present in the court room and sitting next to the injured party during the whole proceedings, should protect her from offensive questions that lack relevance for the case. The counsel should make the court aware of such questions, if the court does not notice it itself.<sup>435</sup> The counsel should also have prepared the injured party before the trial and the questioning, so she feels as comfortable as she can faced with the court's and the defense counsel's questions. She should have been informed by her counsel of what the court expects of her and why it is necessary for her to participate in the questioning.<sup>436</sup> According to § 17 chapter 36 of the Code of Judicial Procedure, the injured party has a right to ask questions to the defendant and the witnesses. When a counsel has been appointed, the counsel for injured party, with the court's permission, can

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<sup>430</sup> SOU 1986:49, p. 15 and Brienens & Hoegen, p. 892.

<sup>431</sup> Renfors & Sverne, p. 188.

<sup>432</sup> § 18 of chapter 36 of the Code of Judicial Procedure.

<sup>433</sup> Brienens & Hoegen, p. 905.

<sup>434</sup> Prop. 1987/88:107, p. 18.

<sup>435</sup> § 17 of chapter 36 of the Code of Judicial Procedure and SOU 1986:49, p. 84.

<sup>436</sup> SOU 1986:49, p. 84 and Bring, p. 226.

question the same persons. Additionally, the counsel for injured party also has a right to ask the injured party complementary questions, in order to clarify made statements and evidence or to complete the picture in regards to something that is essential for the party injured.<sup>437</sup>

### **6.3.1.3 The Private Claim**

The injured party has a right, under certain conditions, to consolidate the private claim against the defendant with the prosecution of the offence.<sup>438</sup> When the injured party has had a counsel for injured party appointed to her, the counsel should assist her with the claim.<sup>439</sup> The assistance of the counsel is intended to make the whole proceedings simpler for the injured party and it is the counsel's duty to safeguard the injured party's legal interests. The counsel for injured party is responsible to build up a case for the injured party's private claim for compensation.<sup>440</sup>

## **6.3.2 The United States**

### **6.3.2.1 Arizona**

#### **6.3.2.1.1 The Right to be Present**

A victim of crime has both a constitutional and a statutory right to be present at all criminal proceedings where the defendant has the right to be present.<sup>441</sup> In *State v. Gonzales*<sup>442</sup>, the Arizona Supreme Court addressed the issue of whether a victim's presence in the courtroom, during jury selection and possibly even after testifying in the case, violated a defendant's due process rights. When the defendant's case came to trial, the victim of aggravated assault and armed robbery was present in the courtroom for jury selection and, after giving testimony, the victim quietly observed at least a part of the remaining trial proceedings. The defense argued that the victim's presence in the courtroom prejudiced the defendant and denied him the defendant's constitutional right to a fair trial. The court held that the presence of the victim in the courtroom during jury selection did not prejudice or deny the defendant's right to a fair trial. The court recognized that the victim had a right under the Arizona constitution to attend all the criminal proceedings that the defendant had a right to attend. It also noted that there was no evidence that potential jurors noticed the victim or knew who the person was during jury selection.

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<sup>437</sup> Prop. 1987/88:107, p. 23 and SOU 1986:49, p. 14-15.

<sup>438</sup> § 1 and § 2 of chapter 22 of the Code of Judicial Procedure.

<sup>439</sup> § 3 of the Counsel for Injured Party Act.

<sup>440</sup> SOU 1998:40, p. 109.

<sup>441</sup> Art. 2, § 2.1(A)(3) of the Arizona Constitution and § 4420 of title 13 of the Arizona statute.

<sup>442</sup> *State v. Gonzales*, 892 P.2d 838 (Ariz. 1995).

### 6.3.2.1.2 The Right to be Informed of the Constitutional Rights

The courts holding in *Gonzales* may be looked upon with added importance with respect to victims' procedural and substantive due process rights, when *Gonzales* is considered with another case decided three years earlier, *State ex. rel. Hance v. Arizona Board of Pardons & Paroles*<sup>443</sup>. The Arizona Victims' Bill of Rights provides crime victims the earlier mentioned right to be informed of their constitutional rights.<sup>444</sup> In *Hance*, the Arizona Court of Appeals considered whether the state's failure to inform a victim of her constitutional rights to attend and be heard at post-conviction relief proceedings, rendered those proceedings constitutionally deficient. A rape victim brought a petition before the court requesting that the court vacate an order by the Arizona Board of Pardon and Paroles releasing a prisoner, on the grounds that she did not receive prior notice of either the parole hearing or her constitutional rights. The Board had sent notice of the first parole hearing, but the notice was sent to the victim's last known address and was returned as undeliverable and no additional efforts were made to contact the victim. Pursuant to the Arizona Constitution providing both these rights, the Arizona Court of Appeals acknowledged that the state has an affirmative obligation to inform victims of their state constitutional rights. The court unanimously held that the Board had failed to make "reasonable efforts" to locate the rape victim and as a result, the victim's right to be informed of her state constitutional rights was violated. The Arizona Constitution protects a victim's due process rights, but due process requires only that efforts to provide notice must be "reasonably calculated" to notify the individual. The court in *Hance* held that the appropriate remedy for the violation of the victim's right to notice of her constitutional rights was to set aside the result of the release hearings and have a new hearing ordered.<sup>445</sup> Thus the significations of both *Gonzales* and *Hance* regarding a victim's right to participate in a criminal prosecution are strong. In accordance with *Hance*, if the victim's constitutional due process rights are violated during a criminal prosecution, the victim will be entitled to have that part of the proceedings vacated and repeated, to vindicate these rights. Furthermore, *Gonzales* gives that a defendant cannot successfully claim that he has been denied a fair trial in the case where a victim only has exercised a constitutional right.<sup>446</sup>

### 6.3.2.1.3 The Right to Impact Statements

To preserve and protect victims' rights to justice and due process, a victim of crime has a right to be heard at any proceeding involving a negotiated plea and sentencing.<sup>447</sup> Since the passage of the Victims' Bill of Rights, countless victims have appeared at sentencing to inform the court of the

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<sup>443</sup> *State ex. rel. Hance v. Arizona Board of Pardons & Paroles*, 875 P.2d 824 (Ariz. Ct. App. 1993).

<sup>444</sup> Harrison, p. 536 and art. 2, § 2.1(A)(12) of the Arizona Constitution.

<sup>445</sup> Harrison, p. 536.

<sup>446</sup> Harrison, p. 538-539.

<sup>447</sup> Art. 2, § 2.1(A)(4) of the Arizona Constitution and § 4423 of title 13 of the Arizona statute.

impact of the crime. As a result, the defendant is forced to listen to the aftermath of the crime, and judges are forced to consider the effects of the crime on the victim and the community. According to a County Attorney in Arizona, this has had a significant impact on sentencing decisions. The wide spread view in the Arizona judicial system is that defendants who would have received probation are being sentenced to prison as a result of the victim's allocution. Other consequences are that restitution is ordered and that conditions of probation are tailored to protect the victim of the criminal offence.<sup>448</sup>

In *State v. Mann*<sup>449</sup>, the court delivered a decision which defended and gave substance to the right for crime victims to offer victim impact evidence under the Victims' Bill of Rights. The defendant was convicted of first degree murder and sentenced to death, for the killing of two persons during a drug deal. During the defendant's trial, the victims' families sent numerous letters to the trial judge, requesting the death penalty for the crimes. The defendant argued that the victim impact evidence from the victims' families had an unjustifiable influence on the trial judge at sentencing. Therefore, the defendant's sentence should be reversed. The court acknowledged that the issue of victim impact evidence was not without controversy. However, as the court explained, "the United States Supreme Court has held that a 'State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant ... as to whether or not the death penalty should be imposed.'"<sup>450</sup> The court concluded that the victim impact evidence produced in *Mann* was admissible under the Arizona Constitution and that it should be used "to rebut the defendant's mitigation evidence."<sup>451</sup> It is this final conclusion in the *Mann* opinion that makes it an important victim's rights decision. The courts holding do not only protect a victim's right to submit victim impact evidence to the court, but also suggests that the evidence should be used by the court to counter a defendant's mitigation evidence.<sup>452</sup> In addition to the victim impact statement, the victim also has a right to present evidence, information and opinions that concern the criminal offence, the defendant, the sentence or the need for restitution.<sup>453</sup>

## 6.3.2.2 Massachusetts

### 6.3.2.2.1 The Right to be Present

In the Massachusetts legal proceedings all victims, and their family members, have a right to be present at all court proceedings related to the offence committed against the victim. The exception is if the victim is to testify and the court finds that the person's testimony would be materially

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<sup>448</sup> Romley, p. 18.

<sup>449</sup> *State v. Mann*, 934 P.2d 784 (Ariz. 1997).

<sup>450</sup> *State v. Mann*, 934 P.2d 784 (Ariz. 1997), p. 792.

<sup>451</sup> *State v. Mann*, 934 P.2d 784 (Ariz. 1997), p. 792.

<sup>452</sup> Harrison, p. 546.

<sup>453</sup> § 4426 of title 13 of the Arizona statute.

affected by hearing other testimonies at trial and orders the person to be excluded from the courtroom during certain testimonies.<sup>454</sup> The victim should be provided, by the prosecutor, with a secure waiting area or room which is separate from the waiting area of the defendant and his relatives, friends, attorneys or witnesses, during court proceedings. It is the court's duty to designate a waiting area at each courthouse and to develop any reasonable safeguards in order to minimize contact between victims and the defendant, the defendant's family etc.<sup>455</sup> Victims should be informed of the right to request confidentiality in the criminal justice system. If the court would approve such a request, no law enforcement agency, prosecutor, defense counsel, or parole, probation or corrections official may disclose or state in open court the residential address, telephone number, or place of employment or school of the victim. The same goes for the victim's family member and witnesses, except as otherwise ordered by the court. The court may enter such other orders or conditions to maintain limited disclosure of the information as it deems appropriate to protect the privacy and safety of victims, victims' family members and witnesses.<sup>456</sup>

#### **6.3.2.2 The Restitution**

The victim has the right to request that restitution should be an element of the final disposition of the case. In this right lies the right to obtain assistance from the prosecutor in the documentation of the victim's losses. If restitution is ordered as part of a case disposition, the victim has the right to receive a copy of the schedule of restitution payments and the name and telephone number of the probation officer or other official who is responsible for supervising the defendant's payments. If the offender seeks to modify the restitution order, the offender's supervising probation officer shall provide notice to the victim and the victim shall have the right to be heard at any hearing relative to the proposed modification.<sup>457</sup>

#### **6.3.2.3 The Right to Impact Statements**

All victims in Massachusetts have a right to be heard through an oral and written victim impact statement at sentencing. The same right exists at the disposition of the case against the defendant about the effects of the crime on the victim. The victims also have a right to recommend a sentence under certain conditions and to be heard at any other time deemed appropriate by the court. Additionally, the victims have a right to submit a victim impact statement to the parole board so that the statement can be included in the board's records regarding the perpetrator of the crime.<sup>458</sup>

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<sup>454</sup> § 3(b) of chapter 258B of the Massachusetts statute.

<sup>455</sup> § 3(i) of chapter 258B of the Massachusetts statute.

<sup>456</sup> § 3(h) of chapter 258B of the Massachusetts statute.

<sup>457</sup> § 3(o) of chapter 258B of the Massachusetts statute.

<sup>458</sup> § 3(p) of chapter 258B of the Massachusetts statute.

## 6.4 The Post-Trial Rights

### 6.4.1 Sweden

#### 6.4.1.1 The Right to Verdict Information

After the trial proceedings has been completed and after the court's verdict in the case, the injured party and her counsel has a right to get a copy of the verdict sent by mail.<sup>459</sup> If the injured party succeeded in a private claim, she has a right to get the verdict, when it has acquired legal force, sent to the Swedish Enforcement Authority (*Kronofogdemyndigheten*) by the court, according to § 25 of the Ordinance (1990:893) of Information of Verdict in Criminal Cases etc.<sup>460</sup> (*Förordning (1990:893) om underrättelse om dom i vissa brottmål, m.m.*). In that connection, the injured party shall also get information sent to her by mail about procedure.<sup>461</sup>

#### 6.4.1.2 The Right to Appeal and the Right to Compensation

After the court's verdict in the case, the injured party has a right to appeal the case in the liability part, if this is not done by the prosecutor.<sup>462</sup> The counsel for injured party shall assist the injured party in the way stated in the Counsel for Injured Party Act, with such an appeal.<sup>463</sup> The counsel should also assist the injured party in her eventual appeal of the private claim.<sup>464</sup> Under certain conditions, the injured party may also be entitled to compensation from the Crime Victim Compensation and Support Authority.<sup>465</sup>

### 6.4.2 The United States

#### 6.4.2.1 Arizona

##### 6.4.2.1.1 The Right to Restitution and the Right to be Heard

In Arizona, a crime victim has a right to a prompt and final conclusion of the case after the conviction and sentence. The victim has also a right to receive prompt restitution from the person or persons convicted of the criminal offence that resulted in the victim's loss or injury.<sup>466</sup> To preserve and protect victims' rights to justice and due process, a victim of crime has a

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<sup>459</sup> § 7 of chapter 30 of the Code of Judicial Procedure.

<sup>460</sup> Author's note: The author's own translation of the Act.

<sup>461</sup> Fredriksson & Malm, p. 133.

<sup>462</sup> § 8 of chapter 20 of the Code of Judicial Procedure.

<sup>463</sup> Brienens & Hoegen, p. 891.

<sup>464</sup> § 3 of the Counsel for Injured Party Act.

<sup>465</sup> Fredriksson & Malm, p. 133.

<sup>466</sup> Art. 2, § 2.1(A)(8) and § 2.1(A)(10) of the Arizona Constitution.

constitutional as well as statutory right to be heard at any proceeding when any post-conviction release from confinement is being considered.<sup>467</sup>

#### **6.4.2.1.2 The Right to Information About the Convicted**

The victim has the right be notified by the prosecutor's office of the right of the victim, any member of the victim's family or any member of the victim's household, to request not to receive mail from the inmate who was convicted of committing a criminal offence against the victim. If such a request is made by the victim, the state department of corrections shall notify the inmate of the request and that sending such mails will result in appropriate sanctions.<sup>468</sup> If the crime victim so requests, she has a constitutional right to be informed when the convicted person is released from custody or has escaped.<sup>469</sup> Additionally, the victim has a statutory right to be immediately notified by the custodial agency of an escape by, and again upon the subsequent re-arrest of, an incarcerated person who is accused or convicted of committing a criminal offence against the victim. The custodial agency shall give notice by any reasonable means.<sup>470</sup> The victim also has the right to receive mail informing her about the convicted prisoner in the custody of the department of corrections, concerning the earliest release date of the prisoner if his sentence exceeds six months, of the release of the prisoner and of the death of the prisoner.<sup>471</sup>

#### **6.4.2.1.3 The Right to Certain Notice**

The victim can request that the prosecutor's office shall, after the conviction or acquittal or dismissal of the charges against the defendant, give the victim notice of the criminal offence for which the defendant was convicted or acquitted or the dismissal of the charges against the defendant. If the defendant is convicted and the victim has requested notice, the victim shall be notified, amongst other things, of the right to make a victim impact statement, the right to be present and the right to be heard at any presentence or sentencing proceeding. The victim shall also be informed that the victim's impact statement may include the following: an explanation of the nature and extent of any physical, psychological or emotional harm or trauma suffered by the victim; an explanation of the extent of any economic loss or property damage suffered by the victim; an opinion of the need for and extent of restitution; and whether the victim has applied for or received any compensation for the loss or damage. However, this information does not remove the probation department's responsibility to initiate the contact between the victim and the probation department, concerning the victim's economic, physical, psychological or emotional harm. At the time of the probation department's contact, they shall advise the victim of the date, time

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<sup>467</sup> Art. 2, § 2.1(A)(9) of the Arizona Constitution and § 4414 of title 13 of the Arizona statute.

<sup>468</sup> § 4411.01 of title 13 of the Arizona statute.

<sup>469</sup> Art. 2, § 2.1(A)(2) of the Arizona Constitution.

<sup>470</sup> § 4412 of title 13 of the Arizona statute.

<sup>471</sup> § 4413 of title 13 of the Arizona statute.

and place of sentencing and of the victim's right to be present and be heard at that proceeding.<sup>472</sup>

According to the Arizona statute, the prosecutor's office shall, on request, within fifteen days after sentencing notify the victim of the sentence imposed on the defendant. The prosecutor's office shall provide the victim with a form that allows the victim to request post-conviction notice of all post-conviction review and appellate proceedings; all post-conviction release proceedings; all probation modification proceedings that impact the victim; all probation revocation or termination proceedings; any decisions that arise out of these proceedings; and all releases and all escapes.<sup>473</sup>

## **6.4.2.2 Massachusetts**

### **6.4.2.2.1 The Right to Information**

According to the Massachusetts statute, victims have the right to be informed, by the prosecutor, of the final disposition of the case. This includes an explanation of the type of sentence imposed by the court as well as a copy of the court order setting forth the conditions of probation or other supervised or unsupervised release, with the name and telephone number of the probation officer assigned to the defendant.<sup>474</sup>

### **6.4.2.2.2 The Right to Information About the Convicted**

A victim in Massachusetts has the right to be informed by the parole board of information regarding the defendant's parole eligibility and status in the criminal justice system.<sup>475</sup> In addition, the victim also has a right to be informed in advance by the appropriate custodial authority whenever the defendant receives a temporary, provisional or final release from custody. The same applies whenever a defendant is moved from a secure facility to a less secure facility and whenever the defendant escapes from custody.<sup>476</sup>

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<sup>472</sup> § 4410 of title 13 of the Arizona statute.

<sup>473</sup> § 4411 of title 13 of the Arizona statute.

<sup>474</sup> § 3(q) of chapter 258B of the Massachusetts statute.

<sup>475</sup> § 3(s) of chapter 258B of the Massachusetts statute.

<sup>476</sup> § 3(t) of chapter 258B of the Massachusetts statute.



# 7 Analysis

## 7.1 Initial Remarks

Crime victims have developed great symbolic value in the judicial systems as well as in the criminal and social policy debate. Their value has transformed and grown since the 1970s, but it is especially the last ten to twenty years that there have been some real developments in both Sweden and the United States. These developments, however, do not necessarily mean that the circumstances and conditions for the victims have improved. A reason for this might be that the question of victims' rights is still often viewed as a "soft" question, a matter for idealistic organizations and kind-hearted attorneys, social workers and legal scholars. Amongst many of those in authority positions, the question of victims' rights is still not regarded as the pure legal issue that it in reality is. When promoting the question of providing crime victims with legal rights and the protection and support they need, it should not be regarded as being "nice" to the victims. In the end, the question of legal rights for crime victims is a question of fundamental human rights. It is also a question of the right to freedom and integrity, together with the right to psychological and social assistance. These are all rights that a democratic society ought to guarantee its citizens.

## 7.2 The Findings of This Thesis

### 7.2.1 The Swedish Judicial System and the American Judicial System

*How are the criminal judicial system and the criminal legal proceedings constructed in Sweden compared to in the United States in general and which are the differences and the similarities?*

When looking at the judicial system in Sweden and the overall judicial system in the United States, it becomes apparent that there are more differences than similarities. It is difficult to do a complete comparison of the systems, seeing as one of the major differences between the countries is their form of government. It is possible to talk about *the* Swedish judicial system since Sweden has a uniformed form of government and the arising conflicts are adjudicated in one single legal system. Of course, Sweden does have two parallel types of main courts. The general courts handle criminal and civil cases and the general administrative courts handle cases related to the public administration. However, all these courts exist within the same solitary judicial system. In the United States on the other hand, there is no such thing as *the* American judicial system. The United States is a federalist country containing fifty states and one can almost look at it as fifty "countries" collected under one label – the United States – since each of

these states have their own state governments. With this follows that the United States judicial landscape contains both a federal judicial system and fifty state judicial systems, where the federal and state systems function alongside one another. During this thesis' examination of the two countries' judicial systems it therefore becomes evident that the systems differ in great many aspects. Firstly, the systems have developed from different legal traditions. The judicial system in Sweden rests on a civil law tradition developed from Roman law and the American judicial systems generally rest on the British common law tradition developed by customs. As a result, the two countries' judicial systems and legal proceedings are quite different from one another. In Sweden, the judicial system is built and depends on codified laws and statutes and legislation is perceived as the primary source of law. People within the Swedish judicial system interpret the laws using preparatory legislative materials in a way that is unparalleled in the United States. In the American judicial systems, the primary source of law is case law and people working within the state and federal judicial systems interpret the law mainly through precedent. The use of precedent is done to a much greater extent than in Sweden. To put this difference in a generalized perspective, you can think of it this way. If you were to ask Swedish law students how they spend most of their studying hours, the majority would probably answer that they study law. If you were to ask American law students the same question, the majority would probably answer that they study case law.

Secondly, one of the other major differences between the two countries is that they apply different judicial processes when resolving legal matters. In Sweden, the court system use an inquisitorial process when adjudicating disputes and prosecuting criminals. The judge takes on an active role and steers the parties and the case in the direction that the judge finds best to find the hidden material truth of the case. This might include asking complementary questions to parties and witnesses, if the judge thinks that the right questions have not been asked and the right information has not been brought forward. In the United States, however, the federal and state courts generally use an adversarial process in their legal proceedings. Here, the judge acts as a passive referee and it is the parties who direct the case and battle it out in court. In the American systems, it is the idea of the procedural truth that prevails. Whichever party presents the best and most logical version of the facts, or has the best arguments for their case, wins the legal proceedings and the case.

Thirdly, the victims are treated differently within the two countries' legal proceedings. The victim of a criminal offence is in Sweden considered an injured party and as an injured party the victim has a formal role-party status. In that role, the injured party has a right to bring a private claim for damages within the frames for the criminal prosecution of the offence. She also has the right to actively take part of the legal proceedings. Furthermore, something that also illustrates the injured party's special position within the Swedish judicial system is the fact that the injured party is seen as a natural opponent to the defendant. In a Swedish criminal case, the defendant stands

on one side of the case and the prosecutor representing the state stands together with the injured party on the other. As a natural opponent to the defendant, the injured party does not have to take an oath before giving her statement since her interest and her bias in the case is formally recognized. In the United States, however, the crime victim is only referred to as a victim and she has no formal role-party status in the legal proceedings of the offence committed to her. A crime is formally seen as a criminal offence just directed against the American government. As a result, it is the federal government or a state government that prosecutes the defendant in a criminal case and no other claims can be brought against the defendant within the frames for the criminal prosecution. The victim is merely seen as a witness to the offence and is not viewed as a natural opponent to the defendant. In the procedural role as a witness, the victim takes an oath before taking the stands to give her statement. The background to this is that without a recognized formal role-party status in the criminal prosecution of the defendant, the victim can objectively not be bias since she formally has no interest in the prosecution of the crime committed to her.

Even though the judicial systems in Sweden and the United States show more differences than similarities, this does not mean that similarities between the systems cannot be found. For one thing, both judicial systems show forms of involvement of the public in the legal proceedings, through the participation of lay men. Both systems use public involvement for the same principle purpose – to assure civilian participation in the administration of justice. By doing so, the goals of the systems are to guarantee that the rulings of the criminal courts are in line with the public's general values of justice. The lay men participation intends to provide transparency within the judicial systems as well as to maintain the general public's confidence in the adjudicating power and role of the courts, which is important in states governed by law. In Sweden, the system of lay judges is looked upon as a matter of democracy, especially in view of the fact that the composition of people working as lay judges should reflect the general population living in Sweden. The lay judges have a strong standing in the legal proceedings since their role is governed by the Swedish court systems sovereignty in relation to the influence of governing powers. In the United States, the lay men participation in the legal proceedings takes the form of juries, which is a key feature of the American common law inheritance. Just as in Sweden, the American jury system is viewed as the means whereby the general public is involved in the adjudicating power. The lay men participation in the two countries differs in one primary aspect and that is how the lay men are chosen. In Sweden, the lay judges are politically elected for four years and the number of lay judges from a political party working in a district court corresponds with that political party's representation in the municipality council. In the United States on the other hand, the jury members are selected through a process of questioning conducted by the parties of the case. In contrast to the Swedish system of lay judges, the American system gives the parties the possibility to choose which members of the public they wish to judge in their case. The people

selected are then only serving in that jury until the case they were chosen for is adjudicated.

Another similarity between the Swedish judicial system and the judicial systems in the United States are the cross-examination of parties and witnesses. The inquisitorial system in Sweden has developed to also include an adversarial element – the cross-examination. Traditionally it was the judge that examined all the facts and statements in the legal proceedings, but today the proceedings also involve a questioning phase that is mainly handled by the parties. In this phase, the inquisitorial system only appears if the judge finds that a certain question has not been asked and therefore takes action to examine it. In the legal proceedings in the United States, the questioning phase is a part of the country's adversarial system and therefore it has a longstanding tradition. As a result, it becomes apparent in the comparison of the different legal proceedings that the cross-examination phase is more developed and elaborated in the American proceedings. Additionally, the Swedish version of cross-examination is a milder form of questioning compared to the American cross-examination. This becomes evident for anyone who has ever been in contact with a criminal legal proceeding in both countries.

## **7.2.2 The Rights Provided to Swedish Victims of Sexual assault**

*What rights are provided to sexual assault victims in the Swedish judicial system? What is the Swedish Counsel for Injured Party Act, why does it exist and what does it mean for victims of sexual assault?*

Since the 1970s, the Swedish government has paid more and more attention to the crime victims' situation in relation to the preliminary investigation and the legal proceedings. This has resulted in a number of legislative acts aimed to improve the conditions for victims of sexual assault and the victims have slowly but surely been provided with more and more legal rights. Today, an injured party subjected to a sexual assault is provided with the possibility to have a support person. The support person should be able to provide support and comfort to the injured party before and during the trial as well as after the trial. Additionally, an injured party may also be entitled to government supported legal aid. In terms of compensation and damages, the injured party can claim compensation from the offender through the Swedish Tort and Liability Act. She can also claim state compensation through the Criminal Injuries Act and get crime victim compensation provided to her through the Victim Fund.

The most significant development on the victims' rights front, however, has been the introduction of legal counsel for injured party through the Counsel for Injured Party Act. The Act was inspired by provisions in Norway and Denmark that entitled victims of sexual offences the assistance of special legal counsels. Swedish studies conducted prior to the creation of the Act

showed that many of the rapes committed in Sweden were never reported to the authorities. The studies also showed that 25 % of the rape victims who did report the crimes, wanted to withdraw the charges already during the stage of the preliminary investigation. The Legal Aid Committee, which finally suggested the introduction of legal counsel for injured party, pointed out that it for humanitarian reasons was very important that victims of sexual assault felt supported by the society. They also pointed out that a society governed by law was dependent of the victims' help in prosecuting criminals, why it was in the government's best interest to provide the victims with correct and effective forms of assistance. The Legal Aid Committee drew attention to the fact that a government has a responsibility to provide for the crime victims' needs and to protect them from any further discomfort and pain.

The Counsel for Injured Party Act entitles the injured party the right to a legal counsel, which should be appointed to the injured party when the preliminary investigation is initiated. The assignment for the counsel is to look after the injured party's interests throughout the preliminary investigation of the offence and the following trial. Additionally, the counsel shall provide support and assistance to the injured party throughout the legal proceedings. This may, for instance, be done by being present when the injured party is questioned by the police. The counsel's role is very important for an injured party victimized by a sexual assault, since the counsel may be her only legal connection to the judicial system and the prosecution of the offence that victimized her. It is up to the counsel to explain the legal proceedings for the injured party so that she knows what is expected of her. For a more efficient proceeding with less stress for the injured party, the injured party should learn about what information that is relevant to present in court and how her credibility can affect the outcome of the case.

The counsel for injured party also plays a significant role for the injured party in connection to the trial. If the injured party has any special requests in relation to the trial, the counsel for injured party should convey these to the court. An example of such a request can be that the injured party would like to exclude the public from the court proceedings. In Sweden, it is possible for an injured party to consolidate her private claim for compensation against the defendant with the prosecution of the offences. If a counsel for injured party has been appointed, the counsel should assist the party in her claim. The possibility to a joint trial benefits the injured party in the way that she does not have to go through the stress and hardship caused by legal proceedings twice. Besides having the counsel's assistance with presenting and proving the private claim, the counsel for injured party plays an important role when the injured party is being questioned by the defense. At this step of the legal proceedings, the counsel should protect the injured party from too intrusive questions. Additionally, the counsel has the possibility to ask complementary questions to the injured party to prove the injured party's private claim and to clarify statements and evidence. The

counsel for injured party may also play an important role for the injured party after the trial, if she wishes to appeal the court's verdict in the case.

### **7.2.3 The Rights Provided to American Victims of Sexual assault**

*What rights are provided to sexual assault victims in the United States at a federal level and at a state level in the state of Arizona and in the state of Massachusetts?*

There are great similarities between the developments of the victims' rights movements in Sweden and the United States. The developments and actions taken in the United States actually triggered the development of victims' rights movements in many other countries, amongst them Sweden. In the 1970s the attention was raised of the harmful effects the insensitive treatment by police, prosecutors and judges had on the American crime victims. Through the grassroots activism among the people victimized by domestic violence and rape a new form of societal responsibility developed, which resulted in the civil rights movement and the women's rights movement. The women's rights movement, including both an anti-rape movement and a movement against domestic violence, has been pointed out to be the most important precursor to the victims' rights movement. The movement for victims' rights took a big leap forward and gained greater national prominence with President Reagan's establishment of the President's task Force on Victims of Crime. In their final report the Task Force made some shocking observations about how crime victims were treated by the American criminal judicial systems. The report was very clear with pointing out that a judicial system is absolutely dependent on the cooperation of victims and that they by reporting and testifying are performing a vital service to the system. The final report presented some recommendations, which included a recommendation to amend the Constitution with rights for victims. Today, the majority of American states have enacted some form of victims' rights amendments to their state constitutions but there are still no rights provided to victims by the Constitution.

Another big leap for the victims' rights movement was taken by the establishment of rape shield laws, which today have been passed both federally and in all American states. The intent behind the rape shield laws was to protect victims of rape from the public disclosure at trial of their private sexual lives. This has improved the conditions for sexual assault victims remarkably. However, as some critics have pointed out, the rape shield laws do not provide bulletproofed shields for the victims. The shield laws usually contain exceptions and critics have called attention to that these exceptions might undermine the rape shield laws.

Even though victims are not provided with federal victims' rights through the Constitution, they are provided with victims' rights through the federal

criminal code. Amongst other things, victims have a right to be treated with fairness and with respect for the victim's dignity and privacy. Victims are also provided with the right to get notice of any public court proceeding or parole proceeding involving the crime and with the right to not be excluded, under certain conditions, from any such public court proceeding. Furthermore, victims have a federal right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing or any parole proceeding, and to confer with the attorney for the government concerning the case.

The federal rights provided to sexual assault victims is similar to the ones provided by the states. The state of Arizona provides victims with both constitutional rights and statutory rights. Some of the constitutional rights are rights which allow victims to participate in and contribute information to the criminal prosecution. Other rights are rights that protect the victim from harassment and abuse throughout the criminal justice process and rights which permit the legislature to act on behalf of crime victims so that their constitutional rights may be preserved. According to the statutory rights provided to victims, the victim has a right to confer with the prosecution about the disposition of the case and to be present throughout all criminal proceedings in which the defendant has a right to be present. The victim also has a right to be heard at any proceedings where a negotiated plea for the defendant will be presented to the court. The state of Massachusetts provides victims with statutory rights so that the victims will be able to play a meaningful role in the criminal judicial system. The victim has a right to be informed by the prosecution about how the case progresses and what expectations there is on the victim. Furthermore, the victim has a right to be present at all court proceedings related to the offence, with some exceptions, and to confer with the prosecutor before the trial begins and before the prosecution is terminated. Just as the victims in Arizona, the victims in Massachusetts have a right to be heard through a victim impact statement and at the sentencing or disposition of the case.

#### **7.2.4 The Rights for Victims Pre-Trial, at Trial and Post-Trial**

*What rights do sexual assault victims have pre-trial, at trial and post-trial in the judicial systems in Sweden, Arizona and Massachusetts? Do the state constitution and/or statutes in Arizona and Massachusetts provide sexual assault victims with a counterpart to the Swedish legal system's counsel for injured party?*

The judicial systems in Sweden, Arizona and Massachusetts provide their victims with a great deal of different rights, as has been showed in this study. However, since the judicial systems are so different per se, the wording of these rights is quite different and one has to look at the intent with these rights. One of the rights that can be found in all three judicial systems pre-trial is the right to information. In the Swedish provisions the

right to information is very well developed and thoroughly explained. In the two state judicial systems this right to information is fairly far-reaching and covers quite a few aspects of the legal proceedings. Another legal right, which is found in the two state judicial systems, is the legal right for the sexual assault victim to confer with the prosecutor. Additionally, under both the Arizona constitution and the Massachusetts statute crime victims have a right to refuse a discovery request under certain conditions. When looking at the rights provided to sexual assault victims at trial, all judicial systems provide a fundamental right for the victim to be present during the legal proceedings. In the American systems this right is either formulated as the right to be present at all criminal proceedings where the defendant has the right to be present, or as a right to be present at all court proceedings related to the offence committed against the victim. Furthermore, in Arizona as well as in Massachusetts, a victim of sexual assault has a right to be heard in court and to give an impact statement. Finally, victims in all systems are provided with post-trial rights. One of these rights is the right to claim some form of compensation or restitution for the offence and another is the right to verdict information or related information.

Something that has become very clear in the work with this study is that no counterpart to the Swedish counsel for injured party is to be found in the examined American systems. The legal right for sexual assault victims to be provided with a government funded counsel exists neither in the Arizona constitution or the Arizona statute, nor in the Massachusetts statute. The Swedish Counsel for Injured party Act is in this context completely unique.

## **7.3 Conclusion**

### **7.3.1 General Remarks**

The symbolic value of crime victims and the attention the victims' rights movements have gained in Sweden and in the United States the last few years, have every prospect to generate improvements for crime victims. As showed in this thesis, the victims' legal situation has developed in both countries. It should be pointed out, however, that all the attention might not be completely unproblematic. On the contrary, the public debate following closely in the victims' rights movements' path has the possibility to create a quite opposite reality. When victimized persons become aware of the gaps between the rhetorical values and the harsh reality of the criminal justice system, their situation may generate frustration and despair within the victim community. If or when this happens, the judicial systems risk losing one of its most important cornerstones in a community founded on the rule of law – trust. If victims lose their trust for the judicial system and perceive the system as unfair or indifferent for their hardships or even as a system working against the victims instead of for them, why would they report the crimes? If the victims come to regard the judicial system as almost as trying



as the actual criminal offences, where is the incitement to take part of the legal proceedings?

When victims do not report crimes committed to them or follow through with the legal proceedings of the offence the crimes will go unpunished. If too many crimes go unpunished, particularly such revolting and degrading crimes as sexual assaults that will in turn deteriorate the victims' trust for the judicial system and its legal proceedings even more, thus, creating a vicious circle. Furthermore, the general public's trust for the judicial system in general might decline when crime victims' experiences of the system becomes known to them. When the gap between theory and practice and the problems caused by it are publicly debated the blame is often put on at least one of two things, the system's poor resources and/or the number of police officers patrolling the streets. These arguments may sometimes be repeated almost like some form of protective mantra. In reality, it does not matter how valid these arguments may be since they are just contributing causes to the judicial systems shortcomings and not the core problem. These arguments, as well as others, may actually create an alibi for the legislators to hide behind, when they instead ought to analyse the judicial system's failings and take actions against them.

### **7.3.2 Sweden**

In Sweden, the judicial system has acknowledged the crime victims as injured parties. The system has realized the importance of victim participation and as a result introduced a government funded legal counsel for the injured parties. With the legal right to such a counsel, the injured party is provided with legal assistance as well as support in relation to the legal proceedings. As a result, the majority of the cases where a counsel for injured party has been appointed go to trial and the legal proceedings are followed through by the injured parties. Thus, the intent behind the creation of the Counsel for Injured Party Act has to a high degree been fulfilled. However, as has been pointed out by in the report *SOU 2007:6 Målsägandebiträdet – ett aktivt stöd i rättsprocessen*, the counsels have not been appointed in sexual offences to the extent that the legislator wished. Additionally, the appointments have not been done at the time intended by the legislators. This affects the injured party's standing during the legal proceedings and also affects how the injured party perceives and responds to the preliminary investigation and the court hearing. The National Council for Crime Prevention has presented information that indicates that counsels for injured party are still not quite filling the role the legislators intended. The Council's survey showed that the counsels were only appointed in approximately 40 % of the cases of rape and attempted rape where a preliminary investigation had been initiated, and only in approximately 17 % of other cases of sexual offences.

Seeing as the crimes of sexual assault are commonly accepted to be crimes with horrible consequences for the victimized persons, injured parties

victimized by sexual offences need to be provided with counsels to a higher degree than today. By providing support to more injured parties at the right time, the Swedish judicial system would gain further legitimacy. Additionally, if the victim community was to be provided with counsels more frequently they would trust the system more. This might create a bigger awareness amongst the victims, as well as the people working within the judicial system, of the possibility to have a legal counsel during the legal proceedings, which could affect the use of counsels in a positive direction.

### **7.3.3 The United States**

Victim participation is an important element of the American criminal judicial systems. The systems rely on victims to report the crime, testify, and facilitate the prosecution. Therefore, I find it reasonable that victims expect certain rights in the judicial process. The criminal justice systems have obviously begun recognizing the necessity of treating crime victims with fairness and respect. As I find it, the case law developed under the Arizona Victims' Rights Amendment indicates only limited problems caused by the enactment of state constitutional victims' rights. Based on this limited reasoning and not taking into account that amending the Constitution is a very long and trying process, I find that it should not be unreasonable that the Constitution is amended with victims' rights provisions. I become even more convinced of this since the rights now provided by the Constitution can be perceived as unbalanced, in view of the fact that defendants are provided with fundamental rights by the Constitution.

As I see it, it is important for the legitimacy of the American judicial systems to give the victims of sexual assault a formal role-party status. Today, the victims are viewed as witnesses to the offences whereas the state is viewed as the injured party or victim of the offence. This creates a deficiency in the American judicial systems for a number of reasons. Firstly, victimization frequently involves psychological and physical trauma, particularly in relation to a sexual assault, and the trauma may cause disruption of relationships and economic security. From my point of view it is obvious that it is individuals that are harmed by sexual assault and not the state. Because of this, I find that excluding the victims from the criminal legal process is unjust and somewhat irrational. The purpose with prosecuting a criminal offence is twofold; the first is to punish the offenders to show that their actions are not acceptable in a state governed by law and the second is to rectify the injustice committed to the victims and to stand by them. A modern and just judicial system needs to stand by its victims. The most evident way of doing this, according to me, is to recognize the victims as injured parties and to give them a formal role-party status in the legal proceedings. In creating such a role-party status for the victims, the judicial systems would also reduce the risk for secondary victimization of the victims, by giving the victims the opportunity to a meaningful

contribution and participation in the prosecution of the offence committed to them.

The state judicial systems in Arizona and Massachusetts provide their victims with fundamental rights within the criminal justice system. The intent behind many of these rights is to create a meaningful role for the victims in relation to the criminal proceedings. This shows that the state legislators realize the importance of victim participation in the legal proceedings. Crime victims are provided with rights such as the right to confer with the prosecutor, the right to information and the right to give impact statements in relation to the legal proceedings. Those rights show an understanding for the victims' situation in the judicial system. Additionally, for me it shows that even though the victims are not given any formal role-party statutes, the victims are perceived as the real victims of the offences instead of the state. When looking at the state judicial systems, I have found that no counterpart to the Swedish government funded counsel for injured party exists within these systems. Interesting enough, the Arizona statutes provide the possibility for a lawful representative to exercise the rights provided to the victim, if the victim is physically or emotionally unable to exercise her rights. This lawful representative can accompany the victim through all legal proceedings, including delinquency, criminal, dependency and civil proceedings. Under the same statute, the victim has the right to be represented by a personal counsel at the victim's own expense, in asserting some of her rights. This leads me to conclude that the idea of some form of legal counsel for injured party is not so far-fetched in the Arizona system, if one looks past the fact that victims are not seen as injured parties and that the government funding might cause some problems. By continuing to not entitle the American victims to an injured party role, to a right to an own legal counsel or to any control over the prosecution, the judicial systems might be sacrificing the overall victim participation. When the judicial systems do not provide victims of sexual assault with a meaningful role in the criminal proceedings and the support that they so desperately need, the systems alienate the victims from the American justice systems. When this happens everyone loses, not just the victims of sexual assault, but also the modern society as a whole.

### **7.3.4 Concluding Statements**

I will leave the reader with the following concluding statements.

- Without having victim participation in the judicial system and its legal proceedings a state governed by law is deficient.
- Without making the victims feel like they have a saying and that they are believed and supported, a judicial system fails in its purpose.
- Without providing victims with some form of legal assistance to cope with the stress and hardships of legal proceedings, a judicial system is incomplete and unbalanced.

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