EVIDENCE, PROBABILITY, AND TACTICS IN PROCEEDINGS

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The law of evidence embraces a number of different topics. In the first place, it includes various *technical* matters such as what evidence may be submitted to the court, the practical steps in presenting evidence, and the limits of the duty of individuals to give evidence in judicial proceedings. Besides these technical issues the law of evidence also takes up a position on a number of issues of *principle* regarding the relation between the community and the individual, the relations between individuals, and the position of the courts in such relations. It is these latter aspects of the law of evidence that will be dealt with in what follows.

This study is concerned with the law of evidence in the Nordic countries. Although the jury system exists there, it is not of the same importance as in the Anglo-American countries. This means that the distinction between law and fact, which is relevant for the function of the jury, does not have the same bearing on Scandinavian law.

Thus, in Scandinavia rules on admissibility of evidence exist only with regard to exclusion of evidence which is not relevant. The special problems concerning the inadmissibility of relevant evidence do not arise under Nordic law.

By way of introduction I shall first outline certain general problems and then proceed to a detailed examination of the relation between the autonomy of the parties and the possibility that a court has of acquiring a correct conception of the reality.

1. THE LAW OF EVIDENCE AND EPISTEMOLOGY

In order to reach a decision it is necessary for the courts—as well as other authorities—to acquire an insight into the facts of the case. The judge must acquire a knowledge of the relevant reality. One may call this *judicial epistemology*. In philosophy epistemology means the study of the conditions for (valid) human cognition.

An historical study of the criteria of cognition applied by the courts may profit from adopting a sociological approach to epistemology. This means taking an interest in the connection between the conditions for cognition

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condition of liability is supplemented by a strict liability in the field of technology, among other things because the risk must be tolerated as a legitimate one. Guilt is no longer a relevant element in situations where marriages are dissolved or where parental authority has to be allocated. Guilt-based sanctions in connection with social welfare benefits are disappearing.

The starting point of judicial proceedings is the autonomy of the parties, which is associated with the liberal conception of society, as is also the principle of guilt. But in various ways it may be adapted to the emergence of research results which may be applied as a contribution to judicial cognition. Scientific findings in court proceedings may appear as evidence submitted by the parties. Traditional rules regarding the burden of proof indicate which of the parties should submit such evidence.

Another possibility is that of introducing a principle whereby the court provides information on its own initiative. This has been done only to a limited extent, e.g. in paternity cases. In such situations the scientific findings will be contributed by the court itself.

Consequently a theoretical question of major practical importance is the extent to which a method of scientific research may support the court's evaluation of evidential material produced by the autonomous parties.

This issue is related to the conception of the burden of proof and the evaluation of evidence. *What is the relation between the rules regulating the activity of the parties regarding the production of procedural material and the rules regarding judicial decisions?* The principle of the autonomy of the parties dominates the law of procedure. The principle involves, among other things, the independence of the parties regarding the delimitation of the facts in issue and the production of relevant evidential data. The principle is modified to some extent, particularly by rules requiring a certain degree of objectivity on the part of one of the parties. This applies to the prosecuting authority in criminal cases, as well as to other public authorities which are parties to civil proceedings, and it also follows from the advocate's duty to be loyal to the court. However, the autonomous contribution by the parties is to be the basis for a judicial assessment of the facts of the case. This involves the crucial issue of the relation between the unilateral activity of the parties and the neutral evaluation by the court of the facts of the case.

The autonomy of the parties is a protection against force and infringements. However, it is also the basis for demanding activity by the parties during the proceedings. The demands in this respect may be compared to the demands of substantive law regarding the behaviour of the parties in general.

2. JUDICIAL ASSESSMENT OF THE EVIDENTIAL ACTIVITY OF THE PARTIES

It goes without saying that the problems outlined in the preceding section cannot be elucidated exhaustively within the framework of this paper. In what follows I shall concentrate on the significance which the activity of the parties in relation to evidence may have for the court's position regarding the facts. This may help to elucidate the relation between the unilateral activity of a party and the neutral and objective cognition of a court.

The judicial cognition of the facts which are relevant in terms of substantive law is a cognition of facts of an "extraprocedural" nature. The cognition is achieved through "intraprocedural" events or the evidential data of the case, consisting above all of oral and documentary evidence. The evidential data of the case are experienced and evaluated by the court on the basis of judicial "preknowledge", i.e. the fund of general experience and knowledge of indisputable facts available to the court and not necessarily confirmed during the proceedings of an individual case.

The law of evidence connects the activities taking place in court with a conception of the reality which is relevant on the basis of the substantive rule.

The court's conception of the substantive facts is determined by activities in court. In essentially the same way the chemist's conception of the chemical qualities of a fluid is governed by the chemical reactions observable during an analysis of a sample in the laboratory. From the results of this analysis a conclusion is drawn regarding the qualities of the fluid from which the sample has been taken. This process is based upon chemical laws on the qualities of the matter and on statistical computations regarding the significance of the result of the analysis. The corresponding process in court takes place in the light of the experiences—the general and concrete cognition of the world at large—in which the judge is engaged.

The relation between proceedings in court and the relevant substantive facts is of a more complex nature. This stems from the fact that the object of a chemical analysis is based upon certain "static" laws of nature, and that the analytical result reached in the laboratory is a reflection of the functioning of these laws in the concrete situation at hand.

The object of the judicial evaluation is of a different nature. Admittedly, certain "static" laws regulating human behaviour may be established. But the object of the analysis in court—the evidential data of the case—has not been procured through the scientific processing of a sample of a substance whose qualities are to be determined. The object consists instead of active individuals who appear during the court proceedings, among other things,

as a consequence of certain obligations connected with procedural activity. Furthermore, the parties will subject themselves to the guidelines applied by the judge in his evaluation of the parties' behaviour. In other words, there is an *interaction* which, to a certain extent, is regulated by the law of evidence. It is this interaction that will be examined in what follows.

The present section deals with the *legal* points of view on which the courts base themselves and to which the parties consequently adapt themselves. Section 3 below reviews the *tactical* considerations which guide the parties and their advocates in adapting themselves to the evaluations of the courts.

Certain norms regulate the way in which the parties, under certain given conditions, are to frame their arrangements or their behaviour in general; and these norms have the purpose of securing that by means of the activity of the parties relevant facts may be procured. These norms are concerned with the behaviour of the parties prior to proceedings as well as to their behaviour during proceedings in court and outside the court. The existence of these norms does not appear primarily from the fact that violating them is met by independent sanctions; their validity and effectiveness appear rather from the fact that under certain conditions the parties adhering to, or violating, these rules *decide which fact is to form the basis of the judicial decision.* Whether the court accepts or rejects a fact depends upon whether the norms have been adhered to.

According to these rules regarding the fact, the court has to examine whether the party in question may be criticized for deficient activity regarding evidence or whether, on the contrary, the activity exercised by the party has been satisfactory. This evaluation refers to—or at least may refer to—both parties, depending upon the substance of the rule of behaviour. The rule of behaviour may therefore be said to result in a comparative analysis of the negligence of the parties in relation to their activity regarding evidence.

The review of this normative assessment of behaviour will be elaborated in what follows. The main thesis will be divided into a number of subtheses which, taken as a whole, constitute the general evaluational structure which is applied where the assessment of evidence is based upon a normative assessment of behaviour. Essentially the review will be at a fairly abstract level, supplemented by examples illustrating the abstract points of view. It should, however, be stressed that the exemplification is merely illustrative; a more deeply-probing analysis of specific legal fields would necessitate an elaboration beyond the scope of this paper.

The elements of normative assessment of behaviour may be systematized as follows:

I. Behavioural requirements (objective requirements)
   1. Preparing evidence
   2. Securing evidence
   3. Preserving and storing evidence
   4. Producing evidence

II. General conditions
   1. The possibility of evidence
   2. Negligence
   3. Relevance

III. The behaviour of the parties—the behaviour of others

I. The *requirements concerning behaviour* relate to the behaviour of the parties prior to and during the proceedings. As far as their substance is concerned they are, from the point of view of principle, not different from requirements following from other rules, such as, e.g., the rules on damages and punishment. As for behaviour prior to proceedings the rules are concerned with whether the parties have acted in such a way that their conception of the facts of the case may be supported through evidence —in other words whether each party has acted in such a way that situations prior to the proceedings which are relevant under substantive law can be reproduced during the proceedings. One may distinguish various stages where this preparation becomes relevant in relation to judicial assessment.

I.1. *Preparing evidence.* Occasionally it is required that a party should make preparations in advance to secure evidence, in case a need of such evidence should arise. Prior to the situations which are relevant under substantive law, steps must be taken which will make it possible to fix the situation at hand with a view to subsequent judicial evidence.

Requirements of this nature are fairly extensive: It cannot be taken for granted that evidence will become necessary, since there is no saying whether the situation will lead to a conflict. Whether such demands are made and what their precise scope will be must depend partly on the likelihood of a legally relevant divergence and partly on the practical difficulties involved in taking such steps in advance as will make possible an evidential fixing of the situation with a view to subsequent production of evidence before a court. Requirements of this nature are rare in criminal cases.

I.2. *Securing evidence.* The transaction, action, or situation which constitutes the relevant fact may, in itself, be established in a form which constitutes an evidential datum—e.g. a written document—or it may be

combined with such evidential steps that a reproduction is possible during the production of evidence, for example by the depositions of witnesses who were present when an oral agreement was entered into, or by such an agreement subsequently being confirmed in writing. This includes the typical forms of "securing evidence" which are set out in the legal textbooks.

The securing of evidence becomes of particular importance where the situation or state of affairs which is relevant to the legal position is changed or processed by the person who may thereby become involved in a legal relation.

I.3. *Preserving and storing evidence.* Needless to say, once an evidential datum has been secured it must be kept on file as long as the situation in which it would be relevant may conceivably materialize. The obligation to preserve evidence may be subject to limits, depending upon the degree of probability that a legal problem will arise and the amount of economic and practical inconvenience entailed. As previously mentioned, there is also a limit inherent in the fact that the problem in question may become irrelevant, among other things because of the statute of limitations.

> In illustrating the interrelation between substantive law and the law of evidence and in justifying the statute of limitations, it is often stressed that the latter means, among other things, that uncertain assessments of the question whether old debts have been fulfilled become irrelevant. On the other hand, one may also justify the statute of limitations on the ground that it sets a time limit for the necessity of preserving such evidence as may prove the settlement of a debt.

I.4. *Production of evidence.* I use the term production of evidence as covering the procuring of evidential data which is directly orientated towards court proceedings, i.e. procuring statements by the parties and witnesses, submitting written evidence, procuring statements by expert witnesses ("manifest evidential data"). The production of evidence in court is supplemented by the immediately preceding *collection of evidence* during which any existing, but scattered, evidential data have to be submitted to the court.

The demands upon the parties are by no means limited to the production of evidence in court. They also include a series of other sequences of events and behaviours which may be subsumed under the concept production of evidence, because they are *experienced* by the judge through the evidential data which are presented in court and because the production of evidence in court is *conditioned by* a prior securing of evidence, etc. This perspective is also relevant in relation to the concept of the burden of proof, in so far as this is defined in connection with the production of

evidence—in other words related to one of the parties having a "burden of producing evidence".

II. *General conditions.* In conjunction with the behavioural requirements specified under the headings above one may establish a number of general conditions under which failure to adhere to the requirements in question influences the judicial assessment of the facts. Since the requirements concerning behaviour have not been fixed by statute as well-defined obligations incumbent upon the parties, it is, to a considerable extent, a judicial task to formulate such rules of behaviour. As far as Danish law is concerned, the problem of legal sources may be compared to the rule of negligence within the law of torts developed through judicial practice. Consequently, reviewing general conditions under which the behaviour of a party becomes relevant to the judicial assessment becomes at the same time a review of the criteria on the basis of which judicial practice regarding the behaviour of the parties should be developed.

II.1. *Possibility of evidence.* The requirements concerning a particular behaviour by the parties in regard to procuring evidence should not exceed what it is practically possible to live up to. Normally it is meaningless to make demands concerning evidence which it is not possible to comply with. There is hardly any conception in the theory of evidence which does not, in one way or another, refer to the possibility of procuring evidence as a crucial element in the regulation of the law of evidence.

Although this is generally correct as a starting point, it should be noted that in special situations deviations are made. This is connected with the background of the condition of possibility. This condition depends upon the substantive rule, in conjunction with an evidential activity during the proceedings, making possible a dichotomization in accordance with the substantive rule. Some cases fall on one side of the limit defined in substantive terms, and some fall on the other side; and, owing to the fact that this dichotomization is applied, it turns out that the rule applies as the one regulating the judicial conception of the legal relation in question. Should it not be possible to fulfil the evidential conditions for a given fact being assumed, it is not possible to carry out such a dichotomization in a practical way before the court, and the rule in question simply disappears from the list of rules finding practical application. In other words, the requirements concerning evidence may become so burdensome that the substantive rule in question is void of practical significance. When the condition of the possibility of procuring evidence as a general attitude of legal policy is disregarded in this way, the reason *may* be that from the point of view of legal policy it is not desired that the rule in question shall be applied. If that

is so, it is sensible to give up the condition of the possibility of procuring evidence. Consequently, it is not possible to maintain this condition without reserve.

The practical possibilities of procuring evidence change whenever the substantive subject is changed. Should it be established that it is impossible to procure evidence in relation to a given subject, and should there none the less be a wish to practice the dichotomization in question, the solution may therefore be to redefine the substantive subject.[1]

The theory of evidence has inherited such principles as that "it is impossible to prove anything negative", or that "it is not possible to prove that something has *not* happened within a particular period". Although such principles are hardly tenable when couched in such general terms, they are nevertheless based upon the reality that the party in question has been precluded from taking such action as would enable him to contribute to the quality of the basis of decision in question, or that it could have been improved only by means of a comparatively substantial infringement upon the freedom of action of the party.[2]

The concept of impossibility of securing evidence is not a fixed and unequivocal one. The same applies to the concept of impossibility used in the law of contracts in which the concept is construed in relation to the specific circumstances and the legal field in question. Consequently, any attempt to define more exactly the condition of impossibility in a general way is bound to be rather indistinct. Considerations regarding the possibility of evidence therefore merge with broader considerations of the issue how the production of evidential data may be prepared in the most practical way.

The condition of the possibility of procuring evidence is thus transformed into a general requirement of legal policy that a *rational distribution of tasks shall be achieved in the relation between the parties as far as the production of evidential data is concerned.* One of the purposes of the rules on the burden of proof and of the regulation of evidence as a whole is to provide such a rational distribution of tasks.

II.2. *Negligence.* In describing the various stages of behavioural requirements (see I above) as well as in describing the condition of possibility

[1] As an example of considerations of this nature one may refer to the statement by the Criminal Law Board regarding economic criminal offences, Copenhagen 1974. It is difficult to procure evidence regarding punishable financial transactions. This gives rise to considerations whether one should introduce penalties contingent upon situations which do not present the same evidential difficulties but where a penalty is justifiable on practical grounds, *inter alia* the fact that the criminal sanction will cover criminality which cannot be proven under current rules.

[2] See in this connection P. O. Ekelöf, *Rättegång IV*, Stockholm 1977, p. 93.

(see II.1 above) I have first and foremost focused upon the objective aspect of behavioural requirements. This means that the demands have been framed without direct regard to the individual person to whom the requirement is specifically directed. The objective behavioural requirements make specific demands upon the external behaviour of the persons involved. In a general systematization there must be included a heading under which to place subjective and individual elements of the assessment of behaviour. At any rate in certain situations the behaviour of the parties is assessed with due regard to the qualities of the individual persons or the specific group to which the individual parties belong, so that they are assessed in a special way, be it leniently or strictly.

A distinction between the subjective and objective aspects of a train of events is more readily accomplished under a regulation of behaviour in which the subjective demands are transcribed into specific psychological situations, namely intent, than in cases where the subjective requirements do not amount to a specific psychological fact of knowledge or intent but merely involve the inclusion, referred to here, of individualizing elements.

That such individualizing elements may have an objective nature can be exemplified by the fact that, where special evidential usages have developed between two parties, it is customary to attach importance thereto in assessing what requirements may be made concerning the evidentially orientated behaviour of the parties in question. Conversely, as an illustration of a more strict assessment, one may refer to the fact that a special structure of authority may involve special possibilities of evidence, to which importance must be attached in framing the overall requirements which can be made. In other words, an extension of the possibilities of securing evidence may involve additional evidential requirements. A crucial example of this is the structure of the public prosecuting authority. Upon the establishing of a branch of public administration which was given the task of producing evidential material in criminal cases, the very existence of this organization obviously became an element in the tenet that the public prosecutor carries the burden of proof. The tasks which this burden of proof imposes on the prosecuting authority as a party to proceedings must be specifically defined in the light of the organizational and enforcement apparatus available to the party (the public prosecutor). In such a situation "individual" conditions enter into the picture as individual justifications of stricter—objective—demands and, consequently, one glides into "the rational division of tasks" to which I referred above in connection with the possibility of evidence.

In other situations the subjective aspect is centred around such issues as normally are seen as questions of subjective guilt. There emerges a prob-

lem whether the party in question has in subjective terms acted negligently in relation to the objective demands made by the rule in question. This problem may frequently be irrelevant to a concrete case: it is not decisive whether a person claiming to have paid does not have a receipt owing to a fire or because his records are in disorder.

II.3. *Relevance.* In connection with the interweaving of the behaviour of the party and the assumption of certain facts, a question arises regarding the relevance of the behaviour of the party in question to the judicial assumption: What demands may be made upon an interrelation between the criticizable behaviour and the facts of the case?

As a starting point this question may be answered by referring to the demands framed under I.1–4: Where a party has adhered to the normative demand, the possibility exists of submitting to the court evidential data supporting the party's conception of the facts.

It is, however, possible to find examples of normative assessments regarding behavioural problems which cannot be considered relevant to the evidential question for which they nevertheless became decisive. The fact that a person has committed a "criticizable act" in a certain context is generally not relevant in assessing whether the person in question may be subject to judicial denunciation in some other context. Nevertheless, the fact that a party has acted "negligently" may have a bearing upon the evidential demands made in a case even though the party's adherence to, or violation of, the norm in question has had no influence upon the evidential basis upon which the judicial decision is founded. However provable and certain the negligence of the party may be, it is in other words not relevant to the assumption to be made in the case at hand. Importance may nevertheless be attached to it after such an *extended* normative assessment.

In general, the principle of free assessment of evidence is entirely meaningful in that it eliminates the legal restrictions of an assessment of sufficiency, even though a normative assessment of behaviour asserts itself: the assessment of what evidential data are to be considered sufficient is not established by statute but is determined judicially. However, the fact that the assessment of evidential data is decided judicially rather than by statute does not mean that certain points of view regulating the assessment are not evolved in judicial practice. The assessment of evidence is free in the sense that it is not bound by statutory regulations, but it is not free in the sense that it is judicially arbitrary.

III. *The party's behaviour—the behaviour of others.* The behaviour of the *party to proceedings* is the one to be related to the evidentially orientated behavioural demands, while the behaviour of other persons is generally not

included in such an assessment. It is for the debtor who settles a debt established in writing by paying the debt to secure a receipt. It is for the craftsman who has been given the task of working on a certain object, but who finds that the latter is not in a suitable condition for such work and that the defects in the object may lead to a claim against him at a later stage, to secure evidence by bringing in a third party.

This is the starting point. But the group of persons who may be subjected to a normative assessment is extended in that a number of other persons are identified with the party himself. Or rather: negligence of other persons with regard to compliance with normative demands addressed to these persons will have a detrimental effect upon the evidential position of the party.

It makes no difference whether it is the debtor himself who pays and forgets to secure a receipt, or whether the responsibility for this negligence lies with the debtor's agent. Just as the fact that special possibilities of securing evidence have been established (as is the case, for instance, with the public prosecutor's possibility of securing evidence, referred to above) leads to an extension of the evidential demands which may be made against the party in question, so negligence on the part of persons working in the party's enterprise must likewise be determinative in assessing the evidential position of the party.

In producing evidence during court proceedings the assessment of the court is, among other things, dependent upon the behaviour of the party's advocate. Should the court find some evidence to be missing, it is irrelevant whether the party has failed to mention (or possibly deliver) it to the advocate or whether the advocate has forgotten to produce it.

A full understanding of the significance to be attached to the fact that persons other than the party himself have "substituted" for him, with the consequence that their behaviour has the same relevance as the behaviour of the party himself, is not obtained until the significance of the behaviour of the party has been compared with assessments relating to persons other than the parties.

As far as *non-parties* are concerned, their actual obligations are limited to those which become relevant during proceedings: a witness is obliged to appear in court, to refresh his memory regarding the facts of the case (see the Administration of Justice Act, sec. 180, together with sec. 184, para. 3). As far as activity prior to proceedings is concerned, it may be useful to take a concrete example as a starting point:

Let us imagine that the decisive point of a case is whether a person has given a particular amount of money to another person at a certain time and place—a fact which constitutes the settlement of a debt. The train of

events has been explained in two different ways. For the sake of simplification I assume that the judge must take up a position on the issue of payment on the basis of the two explanations assessed in the light of general considerations of witness psychology: Were the witnesses involved present at the time of the event? Were they close by or were they at a distance? Did they have an interest in the issue of payment? Has a considerable period of time elapsed between the event in question and the proceedings? Have the witnesses had an understanding of the relation between the party who possibly paid and the party who received payment, etc.? An assessment such as the one described here cannot be made without cognition of the legal context of which the issue of payment is a part.

The assessment is changed if we add that one of the two parties submitting an explanation is a *party* to the case, in that he is the debtor who claims to have paid on the occasion in question. While a normative assessment of behaviour cannot in general be applied to two witnesses, the additional fact introduced constitutes a fundamental change in the basis of assessment in the proceedings in question. While the only demand we could make in relation to witnesses was that they should explain the situation to the best of their recollection and that they should peruse in advance any notes they might have made, we may, in relation to the debtor, point out that, apart from an analysis of the trustworthiness of his statement, other means were open to him which would have eliminated any doubt regarding the issue of payment, namely to ask for a receipt, and that the debtor has failed to apply these means. The judicial assessment will be focused upon this obvious negligence committed by the debtor in not securing a receipt.

In relation to a witness, such an approach is meaningless: it makes no sense to criticize a witness on account of his not having made notes of his experience or requested the parties involved to draft written statements of their views on the matter subsequently to the witness who has experienced an event. Occasionally, omissions of this nature may result in the witnesses in question being considered inattentive or uninterested in their surroundings, but this constitutes nothing but an element in the psychological analysis of their statement; it does not constitute a basis for a general demand upon persons who are in a situation such as the one in which the witness found himself.

Consequently, we may note the following differences between the assessment of the behaviour of parties and of witnesses. (1) Their *obligations* are different—the party may have a number of "obligations" in the sense of the definition submitted above in connection with the normative assessment of behaviour, but not an obligation sanctioned under the law of

procedure, whereas the witness does not have any well-defined obligations prior to proceedings and, during proceedings, is subject only to the general rules of obligation to appear as a witness, supplemented by sec. 180. (2) The *sanctions* are different: the relevant behaviour of the party decides the judicial assumption, whereas there are no sanctions against inattention or negligence on the part of the witness. (3) The *legal terms* of the analysis of the behaviour of the persons in question are different: the witness is assessed on the basis of a more or less expert evaluation of the trustworthiness of the person in question, whereas the legal terms as far as a party is concerned are more complex. One may point out that the party in question had such possibilities of producing evidence that, in view of the fact that they have not been applied, he cannot be trusted, or the possibility of evidence may justify placing the burden of proof on him. Regardless of whether one has in mind the evidential value or the burden of proof, the legal regulation appears as an expression of the same normative principle of assessment.

This tabulation of a normative assessment of the behaviour of the parties' evidential activity may be compared to the traditional systematizing of evidential rules. It is characterized by three types of rules:

(1) *Rules on the burden of proof* the purpose of which is to decide which party shall be penalized on account of the fact that relevant points have not been supported by sufficient evidence.

(2) *Rules regarding the duty to produce evidence* (false burden of proof) regulating which party will be penalized on account of the fact that additional evidence is not produced in the case at hand, a point to be decided in the light of the specific evidential situation at hand.[3]

(3) Rules regarding *obligation of elucidation* which *either* place the parties under a duty to submit certain information under certain conditions *or* authorize the court to request a party to submit specific information, so that failure to comply with this request may lead to a decision being based on the conception submitted by the other party.

These sets of rules have two sides. First, they constitute a requirement for a specific procedural activity, an activity the point of which is normally the submission of manifest evidential data; consequently, this aspect of the rules may be called *demands of manifestation*. Such demands are normally addressed first and foremost to the parties in the case, inasmuch as they

[3] By way of introduction reference is made to the distinction between a legal burden of proof and an evidential burden of proof, R. Cross, *On Evidence*, London 1974, pp. 73 ff., and burden of persuasion and burden of producing evidence, Wigmore, *A Treatise on the Anglo-American System of Evidence*, vol. IX, p. 284, F. James, *Civil Procedure*, Boston 1965, p. 248. Rules on "admissibility" play hardly any role in Nordic law.

are the ones to submit the evidential data of the case—either through their own statements, by summoning witnesses, by using expert witnesses, or through the submission of documents.

The other side of the rules in question has reference to the basis on which the judge is to decide what facts are to be considered proven. This depends upon the degree of probability (certainty) required in relation to the relevant fact in issue. This aspect of the rules may therefore be called *demands of probability (certainty)*.

Evidential rules may aim in different directions. If they aim at the parties, they are called *rules on party activity*; if they are aimed at the courts, one may call them *rules on considerations of the judgment.*

The relevance of separately classifying the latter type of rules under a special terminology lies in the fact that the regulation of evidential law may be independent of the parties. This occurs, above all, within the area of *administrative law,* whether because there exist no parties or because the regulation simply has not been framed with a view to the interest of the parties in the facts. Where the term burden of proof is used in such situations, it is not used in its literal sense but in a symbolic and, strictly speaking, meaningless way, inasmuch as there is no one to carry the "burden", but in any case one must naturally make certain basic claims regarding the certainty of a fact on which to base a decision.

Where producing evidence, i.e. producing relevant information, mainly depends upon the activity of the parties, all aspects of the evidential rules referred to may become relevant. The crucial point in this connection is not to demonstrate in detail in which situations one aspect of the rules is more dominant than the other, but to emphasize the underlying equivalent relation existing between the two aspects. The equivalent relation between rules on the burden of proof (as a requirement of certainty, e.g. the rule of burden of proof: "in dubio pro reo") and rules regarding the production of evidence (as a manifestation) depends upon these rules being directly relevant *both* in relation to the judicial decision on what facts to assume proven during the consideration of the judgment, *and* in relation to the procedural activity of the parties (and the preparation of this activity prior to proceedings), inasmuch as they may be transcribed into rules on party activity.

The interrelation—the possibility of transcription or the equivalent—stems from the fact that the various types of rules lead to the same consequence, namely that they decide the substance of the assumption of facts contained in the decision of the court.

3. THE TACTICS OF ADVOCACY AND THE PRODUCING OF EVIDENCE

A fundamental feature of procedural law is that of the autonomy of the parties being maintained and exploited in producing the basis for the judicial decision. Within that part of judicial proceedings where party autonomy rules, considerable freedom of action is left to the parties. The "results" of this "freedom of action", namely the evidential data produced by the parties, form the basis of a sensitively applied "free" assessment of evidence. The parties' freedom of action is not exploited in a casual but in a systematic way. The considerations which decide the procedure used by the parties during the production of evidence before the court are not in themselves an element of the general evidential regulation. The law of evidence, however, establishes the framework of the tactical considerations and these again are relevant to an understanding of the law of evidence.[4] Indeed, one might even say that only when such tactical considerations as are an integral part of the autonomy of the two parties are included does one acquire a fully elaborated description of a system of evidential law within a legal system based upon a liberal conception of society.

The considerations deciding the tactical behaviour of the parties during proceedings must become an integral part of the statutory rules on evidence. This is so for two reasons. First, an integration of this nature is necessary if one is to understand court proceedings. A party (or his advocate) intends to win. In this connection the specific goal may vary. Normally, the goal is the conclusion reached in the judgment, but the goal may also be statements of principle included in the grounds or the dragging out of the case. The advocate's tactics will vary accordingly. However, without an understanding of such a goal connected with opportunist tactics applied to reach the goal, it is not possible to acquire an understanding of the proceedings before the court. In the same way it is impossible to understand a game without an understanding of its goals and tactics.

The other reason for including the tactics of the parties during the proceedings with a view to understanding the law of evidence lies in the fact that the tactical safeguarding of the interest of a client during judicial proceedings is not merely a non-judicial phenomenon guided by interest, but is actually integrated into the statutory regulations of proceedings. The advocate's professional code of conduct, as well as the legal relations between advocate and client, authorizes the advocate to do his utmost to reach the client's "goal" once this has been established, see in this connection also sec. 133 of the Administration of Justice Act. If the *advocate* fails

[4] See D. Napley, *The Technique of Persuasion*, London 1970, pp. 78 f.

to adhere to this requirement of safeguarding the interest of his client, in that he does not gather and submit available evidential data supporting the client's conception of the fact, he becomes subject to specific legal sanctions, e.g. disciplinary action under secs. 143 and 144 of the Administration of Justice Act, or a reduction of his fee (not to mention the even more serious consequence that his reputation may be impugned). As for the assessment of evidence in the case at hand, the negligence of the advocate falls back upon the *party* owing to the identification referred to above under section 2 (III).

I suggest that I have now established that there is a sound justification for introducing basic elements of the patterns which are followed in preparing and conducting a court case, and which it is primarily up to the advocate to develop and abide by, since in Denmark there is an advocate's monopoly. This approach conflicts with the traditional view of the theory of the law of evidence as being evolved as a theoretical abstraction not understood in its relation to "everyday practice". This confrontation involves a deeper understanding of the general theory of evidence.

The basis for analysing the tactics applied by the parties and their advocates lies in the theory of tactics evolved by and for advocates. I have in mind monographs on "the technique of proceedings", "the advocate's calling", "the tactics of proceedings", etc. Such monographs serve as manuals giving an explicit outline of the ways and means which an advocate (or his client) makes use of during proceedings with a view to reaching his goal.

Below I propose to present, under five heads, a number of quotations from legal writing of a practical nature with a view to elucidating the guidelines that may be adopted by the advocate in handling a case. Naturally, this literature covers all stages of a court case and all the tasks that an advocate may or must solve in connection with the various stages of the case. In what follows, light will be thrown primarily on the handling of evidential material and the advocate's submission of the facts of the case. That is the part of the activity of an advocate during the case which has a direct relation to the evidential regulation, inasmuch as the practical result of such practical advice—namely the evidential material—is the object of the rules on evidence.

(1) *Initiative and framework.* Before analysing work having a directly evidential orientation, I shall make some comments on the initiative behind proceedings and the procedural framework of the facts under evaluation.

The initiative behind proceedings lies with one of the parties. This is a

fundamental feature of judicial proceedings, constituting a sharp distinction from the inquisitory proceedings and from the classical approach of public administration. Whether a party decides to bring an action depends upon a rational assessment of the possible results to which an action may lead combined with the interest of the party in these results and the likelihood of the various results.[5]

The problems inherent in a delimitation of the subject of proceedings (framework) and the production of manifest evidential data (the evidential material) and its submission to the court constitute components of the consideration whether to bring an action or not. For the party must consider what is the likelihood of reaching a favourable result in these respects, i.e. he must define such themes as substantially form the basis for a favourable decision and assess the chance that he will be able to prove these themes (facts) in court.

The term *framework* refers to the claims of the parties, containing their suggestions regarding the conclusion to be reached, as well as any allegations made. In terms of tactics, the main consideration is to establish a framework including one or more positions (conclusions and points substantiating them) considered reasonably tenable. The assessment of tenability depends upon a prognosis of the course of the court proceedings.

This may sound rather vague or self-evident. But in practice it means that certain alternative positions are rejected, the position or positions which are maintained thereby being strengthened.

> Spleth, a Supreme Court judge, states that conceivably a party may not submit "an alternative claim for fear that it might weaken his basic position. In relation to professional judges, however, such a fear is unfounded". Spleth goes on to say that there "may arise situations where a party makes a choice. If the point of view which he prefers to invoke in support of an alternative claim is in direct contradiction to considerations supporting his basic position it may be in order to give up one of the claims. Incompatible positions on the same side do not create trust."[6]

This "tailoring the case" involves not including under the themes to be judicially assessed such subjects as neither party considers it in his interest to have subjected to judicial assessment. The precondition for a certain theme's being subjected to judicial assessment is thus that at least one of the parties shall consider it at any rate possible that a judicial assessment of the theme in question would lead to a result favourable to him. The court may

[5] This rational assessment has been reviewed in detail by V. Aubert, *Rettens sociale funktion*, Oslo 1976, pp. 188 ff., who makes a comparison with so-called irrational motivation.

[6] Spleth in W. von Eyben (ed.), *Proceduren*, Copenhagen 1976 (hereinafter cited as *Proceduren*), p. 43, see also Rønnov, *loc. cit.*, p. 62, regarding allegations, and A. Victor Hansen on "tailoring the case", *loc. cit.*, p. 180.

get itself into a situation where it makes an assessment of facts on the basis of assumptions which each party actually considers incorrect.

In connection with the issue regarding the initiative in bringing an action and the delimitation of the subject of proceedings, it may be mentioned that during the preliminary stages of a court action there may frequently be a certain impact upon the "facts" which are under assessment:

> "The *natural* task of providing information regarding a certain factual train of events is somewhat *distorted,* because the decisive element during proceedings is not whether one is right or not but whether one is able to prove that one is right, and this provable fact is to some extent not finally fixed at the early stage" (italics added). For instance, the advocate of a party may tell the other party's advocate at an early stage the opinion of his client on a certain point, e.g. in connection with the dismissal of an employee. This fixing of the position in writing, which sometimes contains a clarification of a doubtful point, and occasionally a definite "twisting" of a doubtful point, is of particular importance because "an excessively large number of court cases are won or lost not on the basis of what actually took place between the parties but on the basis of what has been fixed in writing. It is not so surprising that the judge, having heard the incompatible statements of parties and witnesses, should fall back on the documents ... It goes without saying that the position of a client is strengthened considerably if the other party does not react to statements in correspondence within a reasonable time."[7]

The "clarifying" letter prior to proceedings means that the advocate furnishes the manifest verbal evidential datum on which the judge may fall back where oral statements are incompatible.

(2) *Procuring manifest evidential data.* The decision to procure manifest evidential data includes various questions: What evidential data should be procured, i.e. which witnesses should be summoned, which questions should be put to them, what should the reaction be to the examination of the other party, how should expert witnesses be selected among several possible candidates, how should the theme of an expert's statement be most appropriately phrased, etc. Two complementary main considerations guide the procuring of manifest evidential data.

(*a*) The material is defined *positively.* Anything which can be procured in favour of the client must be procured. This means that out of available evidential material the advocate selects whatever is in his client's favour. The selection of the evidential material, which is part of party autonomy, is

[7] Tjur, a Supreme Court Advocate, in *Proceduren,* pp. 22, 24 f. See also 1976 UfR 932 H reporting a case where an advocate subsequently to a meeting "confirmed" that the recipient had undertaken a personal liability.

decided unilaterally by considering whether the evidential data in question is favourable or detrimental to the client when hypothetically seen as a datum in the judicial consideration of what facts to assume. For practical reasons, this assessment must be made individually as far as each evidential datum is concerned, but it goes without saying that each and every evidential datum must be seen in that context with other evidential data in which, should the datum be submitted, it will constitute part of the picture presented to the judge. As a special aspect of this point of view, one may maintain that the point is to produce anything which is negative from the point of view of the other party.

(*b*) The material may also be defined *negatively.* Any material which is detrimental to the client will be withheld. Not only should an advocate advise against the submission of such material, but it is actually impermissible that he should submit unfavourable evidential data in a case where there is no legal obligations so to do. (I shall revert later on to the question what precisely this involves.)

In what follows I shall illustrate in greater detail these main points of view and support them by quotations and reports from manuals on the work of advocates.

The selection of evidential material according to whether it is favourable or unfavourable may, to a considerable extent, take place prior to the case.

> Should the issue of a case be defects in goods delivered, the quality of the goods may be elucidated by establishing whether other purchasers have notified objections, but whether this is brought to light depends upon whether the advocate represents the purchaser or the seller.[8] The judge is also aware that the advocates have certain one-sided expectations regarding the statements of witnesses, that certain statements are valuable for a party and that they may otherwise be detrimental.[9] Statements of expert witnesses which have been procured unilaterally will "practically always" be favourable and the other party hardly has a right to request the submission of unfavourable statements.[1]

In situations where the selection cannot be undertaken outside court it may be a more complicated matter to assess whether an evidential datum submitted is favourable or unfavourable. This difficulty is the background of the following main consideration:

> "... an advocate should know what he wishes to obtain through an examination, and his behaviour in court should depend entirely thereupon. The decisive point is what is to the advantage of his client and what is not." "One

[8] Tjur, in *Proceduren*, p. 25.
[9] Vollmond, a High Court Judge, in *Proceduren*, pp. 95, 99, 101.
[1] Tjur, in *Proceduren*, p. 25.

> should never put a question if one must envisage an answer which is unfavourable to the client."[2]

On the basis of the preparation of the case it must be obvious to the advocate whether the answer of a witness to a question will be favourable or unfavourable, and he must take this into account in preparing the examination. Consequently, an examination should be *interrupted* if an unfavourable answer to a relevant question must be expected. An elaboration of these tactics may be found in the distinction between "good questions" and "bad questions" established pedagogically by advocates:

> An example of a *bad* question is the following, according to Hartwig. During a criminal action a bartender claimed to have recognized the accused. To the question how many people had come to the bar on the evening in question the following reply was given: "Between 150 and 200." This reply means that the likelihood of the witness's having recognized the accused is very slight. The counsel for the defence should therefore have stopped the examination at this stage. But instead the counsel continued with the question (i.e. the bad question), asking how was it then possible to recognize the accused, and the witness gave an extremely plausible explanation of the recognition. In this way the witness's recognition of the accused person rose in evidential value.[3]

Where an advocate thus classifies a question as a "bad" one, or advises against such a question, this is not done on account of the question being irrelevant or for some other reason of no significance for the judicial decision; the reason is that the particular question involves a possibility that the witness might answer in a way which would be detrimental to the position of the client. And, *vice versa,* some questions are "good", not because they contribute to a verification but because, even though they may be illegal, they may have a certain (positive) effect.[4]

The question whether an evidential datum is favourable or unfavourable is often assessed outside the court and is then determinative for possible further investigations. For example, expert witnesses often differ in their opinions. In the one-sided strategy this is applied in the way that "[the advocate] does not acknowledge in advance the correctness of information unfavourable to his client".[5] In other words, continued critical investigation depends upon the information in question being unfavourable.

Each and every evidential datum is thus assessed separately in terms of whether it is favourable or unfavourable to the client. This preparation of the material on which the judgment is to be based begins during the

[2] Supreme Court Advocate Christrup, in *Proceduren,* pp. 111 and 108.
[3] Hartwig, in *Proceduren,* pp. 123 f., J. B. Hjort, in *Proceduretеknikk,* Oslo 1956, p. 129.
[4] See Hartwig's examples, p. 121.
[5] Christrup, in *Proceduren,* p. 109.

preparation of the case by preparing investigations undertaken by the advocate or directed by him, in selecting witnesses to be summoned and written evidence to be submitted to the court, as well as the questions to be put. As far as the procedural reproduction of the evidence in question is concerned, e.g. an examination of a witness, uncertainty as to whether the evidential datum in question will turn out to be favourable or not may influence the decision whether the question is to be put in the first place.

Do tactical considerations such as those applied in civil procedure also apply in *criminal procedure*? As far as the counsel for the defence is concerned no specific argumentation is necessary. The counsel's possibility of being one-sided in procuring evidential material and in presentation of the case is generally recognized. The "bad" question quoted above was put by a counsel for the defence. As far as the function of the public prosecutor is concerned, the issue is more complex. The prosecuting authority's task is partly to decide whether an action is to be brought, partly to carry it through in court as one of the parties to proceedings. An assessment of the task and tactics of the public prosecution during proceedings must be carried out on the basis that, once the public prosecutor has found that an action should be brought in the particular instance, the public prosecutor considers the accused to be guilty and expects that it will be possible to produce sufficient evidence of his guilt before the court.

The first question which arises is whether it is correct to assume in connection with the function of the public prosecutor that the prosecuting authority takes no interest in the result of proceedings or whether the public prosecutor—like a party to civil proceedings—may "win or lose" the case.

> "Within the limits of the obligations incumbent upon the public prosecutor it is his task to convince the court that the accused has committed the act described in the indictment."[6]

In this way two main considerations have been established. (a) The task of the prosecutor is to secure a conviction. This is based on the fact that "in issuing an indictment a position has been taken on the issue whether the case is sufficiently elucidated in the sense that it has been found reasonable and justifiable to issue an indictment".[7] In this way the role of procedural tactics is linked together with the assumption to which I referred above. (b) Needless to say, the convicting of the accused must be done with due regard to certain demands of objectivity—such demands apply in principle in civil as well as in criminal procedure, but their substance may vary

[6] Hertz (public prosecutor), in *Proceduren*, p. 391.
[7] Hertz, in *Proceduren*, p. 383.

between the two different types of cases and even from case to case within each category.

The one-sidedness which is a characteristic feature of the selection by a party to a civil procedure and his advocate of evidential material submitted to the court is, in principle, also to be found in the same form in criminal procedure, so far as the prosecuting authority is concerned. Although there may be differences between civil and criminal procedure in relation to delimitation of the task incumbent upon a party in terms of objectivity, the two procedures do have a common starting point, namely that the task of the parties is one-sided. As far as the prosecuting authority is concerned, this is based upon the fact that prior to the commencement of judicial proceedings an administrative decision has been taken, namely that of issuing an indictment, and this action is contingent upon particular demands which are completely decisive in understanding what governs the prosecuting authority's behaviour during the judicial criminal procedure. It is in this administrative decision that the procedural one-sidedness finds its legitimating basis.

The one-sidedness of the prosecuting authority appears to me to be immediately understandable if one considers the alternative which would be reasonable on the basis of a theory asserting the neutrality of the prosecuting authority. This alternative would mean that the prosecuting authority would submit the various conceivable hypotheses regarding the circumstances of the accused which there seemed reason to take into account and between which a choice had to be made on the basis of evidential data made manifest during the judicial proceedings. This has nothing to do with the criminal procedure which is being practised. The public prosecutor has made a decision and obviously maintains the appropriateness of this decision during the handling of the case. The description in the indictment of the circumstances of the accused which form the basis of the indictment is not an expression of a "theoretical possibility" explaining the evidential data of the case but reflects the prosecuting authority's conception of the case as a whole.

(3) *Submission to court.* In submitting the standpoints of a party one maintains the one-sidedness which governed the selection of evidential material. The interest of the party has acquired a legal expression in the claim submitted, in the allegations made, and in the evidential data submitted in support thereof. Where the party is represented by an advocate it is for the advocate to submit claims and allegations, i.e. they are maintained by a person, namely the advocate, as the representative of his client. The fact that it is for the advocate to represent his client, together with the fact that

the advocate cannot normally form a specific opinion regarding the issues of the case, leads to a problem regarding the relation between, on the one hand, the claim made on behalf of the client together with any adjacent substantiation and production of evidence and, on the other hand, the advocate's conception as it is manifested in the proceedings.

In my opinion the relation between the advocate and the standpoint taken by the party may best be described by saying that *it is for the advocate to identify himself with the position of his client* (or the accused, as the case may be). This view is not in harmony with the views that are generally advanced and the divergence is due, to some extent, to a definition of the concept of identification and of the object of this identification.

An advocate does not present in a detailed way a *possible* standpoint, an hypothesis to be tried, alongside a variety of other possibilities presented by another advocate (or other advocates). On the contrary, an advocate submits a point of view in presenting and maintaining his client's standpoint. Where the evidential results of the judge's consideration are phrased in psychological terms, namely as a problem of the conception held by the judge concerning the facts of a case, a favourable judicial conviction regarding facts obviously cannot be reached unless it is based on an assumption, among other things, to the effect that the advocate has a corresponding conviction. If the advocate cannot submit a conviction which is fully in accordance with the conviction that the advocate advances with a view to the judge adopting the conviction, there arises a discrepancy between the procedural behaviour of the advocate and his safeguarding of the interests of his client.

It should be noted that when I speak of identification I do *not* wish to imply that the advocate should be familiar with the circumstances upon which the party bases his understanding of the facts. Nor do I mean that in arguing in favour of a particular assessment of evidence the advocate should rely upon his own experience and observations. The advocate need not necessarily adopt the position that "the facts can be conceived of in only one particular way"—in other words disregard the fact that some doubt may arise in relation to the facts of the case; but, if it is recognized that there does exist some uncertainty regarding the facts, this recognition must be combined with an evidential argumentation leading to a result which is favourable to the client.[8]

[8] Any personal knowledge on the part of the advocate regarding the proper facts of the case or any personal support of the client's position is unnecessary and partly inadmissible. See Viktor Hansen, *Retsplejen ved Højesteret,* Copenhagen 1959, p. 101, Aksel H. Pedersen, *Indledning til advokatgerningen,* I, Copenhagen 1962, p. 117, A. Victor Hansen, in *Proceduren,* p. 176.

This situation is precisely the background against which it is possible to operate in terms of "advocate's substitution": the advocate who defends a certain position in proceedings held on one day may without the least difficulty defend the opposite position in different proceedings held on the following day:

> "In most cases one might equally well have represented the clients of one's colleague. The task with which one is confronted has, on the basis of the one-sidedness which is an indispensable quality of an efficient advocate, pervaded one to such an extent that one wishes to identify one's own person with the case, but one should never forget that one is an advocate and that the task before one is a limited one."[9]

An essential element in the technique by means of which judicial proceedings are carried on under party autonomy is the fact that the positions of the two parties are *represented* by the advocates. Just as the advocate is bound in his selection of evidential material to considerations of what evidence will be in his client's favour, one must also assume that the judge's cognition of the case is reached through the obvious one-sidedness. But the one-sidedness of an advocate should not be arbitrary. The advocate does not just throw out a possibility, a tentative hypothesis which may find some support in the evidence which is available. The advocate submits a position in that as the representative of his client he puts forward the latter's standpoint. This procedural representation of the position does not prevent the advocate from personally having a different view of the facts and the law of the case.

One may make a comparison between this conviction inherent in the advocate's submission of his client's position and the judicial conviction on which the judicial assumption of the facts of the case is based in the judgment. A judicial conviction need not necessarily be an expression of the judge's personal conviction. The judicial conviction is an *official* consequence of the proceedings and relevant rules.

(4) *Modifications of one-sidedness.* The one-sidedness in selecting evidential data submitted to court and in the advocate's presenting of the facts of the case, to which I have previously referred, does not apply without certain modifications. The one-sidedness is modified partly by a legal, partly by a tactical demand regarding respect for the interest of the other party and consequently respect for an objective elucidation of the case.

The *legal* demands are based upon the fact that the advocate's safeguarding of the interest of his client is subject to limitations. The

[9] K. Meyer in *Sagførerbladet* 1922, pp. 52–8, quoted in A. H. Pedersen, *op. cit.*, pp. 118 f.

starting point is obviously that the advocate "shall act only and exclusively in the interest of his client" (Code of Conduct of the Danish Bar Association, chap. VI, item 1), but when this principle is applied to specific situations, e.g. court proceedings, certain modifying circumstances appear: "In undertaking a case an advocate must not exceed what is necessary for the justifiable safeguarding of the interests of his client and it is in particular impermissible to engage in superfluous judicial steps or to attempt to promote the interests of the client in an improper way" (Code of Conduct, chap. IX, item 3). Such rules indicate that there are certain limits to the one-sidedness, but the rules do not specify these limits. Nor can any guidance be found from such standards as "good professional practice" or "the advocate's oath".[1]

There is no unconditional obligation for a party or the party's advocate to submit information that is in his possession but is not favourable to his party.[2]

In addition to the requirement of objectivity or "loyalty" that is based upon law there is a similar demand based upon *tactics*. This may be expressed by saying that the one-sidedness is in certain cases "obvious", so that it becomes unfavourable to the party in question. This *obviousness of one-sidedness* should not be confused with the loyalty demanded by law.

> When Christrup advises against talking to a witness outside the court—a standpoint on which there is no unanimity—it is not only because one should "avoid in any way influencing the witnesses" but also because "where witnesses appear well prepared during the case and the other party succeeds in demonstrating, through a cross examination, that the statements of the witnesses are not of such a quality that they should form the basis of the case, it may make the statements entirely worthless".[3]
>
> With the same double justification, captious questions are rejected: "Leading questions should not be put, partly because they may create a false picture of the case, partly because to do so may be detrimental to the client."[4]

In connection with the selection of evidential data the above-mentioned principle of the obviousness of one-sidedness means that, to some extent, an advocate should be interested in drawing attention to such evidential data as may, seen in isolation, be considered unfavourable to his client but which, on the other hand, can be expected to be produced by the other

[1] See Aksel H. Pedersen, *op. cit.*, pp. 39ff., Wiklund, *God advokated*, 1973, pp. 458ff., pp. 519ff.

[2] See Aksel H. Pedersen, *op. cit.*, pp. 103ff., and on 1942 UfR 363 H, H. Zahle, *Om det juridiske bevis*, 1976, pp. 631 and 657ff.

[3] Christrup, in *Proceduren*, p. 108.

[4] Christrup, in *Proceduren*, p. 111. See also Vollmond, *loc. cit.*, p. 88: "Leading questions may, however, have a boomerang effect and weaken the questioning party's position ... The answers given by the witness to the questions put may have been influenced by the suggestive effect of the questions. An advocate engaging in leading questions consequently runs the risk that the court does not dare to rely upon a statement provoked in this manner."

party, should they not be produced by the advocate himself. The principle regarding one-sided selection must be modified—not as a consequence of a principle of objectivity, but owing to more subtle one-sided tactics.

> Regarding criminal cases: "Pleadings (the pleadings of the public prosecutor) should be exhaustive ... Any weak points involved should not be evaded by the public prosecutor but tackled directly by him. Points which may appear weak frequently appear in a different light when they are brought forth and debated. The pleadings of the public prosecutor should also be exhaustive in the sense that in his pleading the counsel for the defence should not be able to refer to omitted information or adduce important considerations regarding the case that have not been touched upon by the public prosecutor."[5] This anticipation of any criticism by counsel for the defence of the public prosecutor's material is of particular importance in relation to the examination of the accused: the examination "must be thorough and exhaustive, obviously with attention being drawn to points that are in his favour. This is an obligation of the public prosecutor and furthermore it is tactically unwise to evade or refrain from exploring anything which may be a weak point for the public prosecutor. The object of the examination is that there should be no new relevant element in the case, not divulged to the court and the jury, to which counsel for the defence could draw attention during his examination of the accused."[6]
>
> During the proceedings the advocate should not fail to refer to legal writing or judicial practice not in his favour: "If the advocate waits until it has been brought out by the other party he will be at a disadvantage." And even though the pleading "is a submission on behalf of a party and not a judicial opinion", it must not become dishonest: "Such a procedure is not to the client's advantage."[7]

(5) *The one-sidedness of the parties and the objective assessment of the judge.* The tactical one-sidedness of advocates has been reviewed in the foregoing and attention has been drawn to the fact that it is modified by an attempt to reach a certain "objectivity" founded on legal as well as tactical considerations. The question then arises whether this combination of one-sidedness and modifications thereof—engaged in by both parties—does not provide a general basis for the judicial decision. The one-sidedness of each party modifies and supplements that of the other in such a way that the judge acquires a general basis for his decision.

From time to time the dramatic elements of pleadings are described in a way difficult to reconcile with the idea that the result should be objective and general:

> "Proceedings are a battle and regardless of whether oneself or the other party has to start, one cannot prepare appropriate proceedings without having

[5] Hertz, in *Proceduren*, pp. 419 f.
[6] Hertz, in *Proceduren*, p. 408.
[7] Richard, in *Proceduren*, p. 175.

> imagined how the attack of the other party will be launched, and one must consequently try to obtain the clearest possible conception of it ... From this one's thoughts will pass directly to one's own defence against the expected attack. In some situations it becomes a matter of kill or cure, in other situations there may be a variety of positions on which one can fall back, and the point then is to make the proper choice so that one does not, at a later stage, have to abandon a particular daring position which might result in one's not being able to fall back on the next alternative and hang on to it."[8]
>
> "When the counsel for the prosecution has tested his case thoroughly and conscientiously it is his duty, according to the nature and circumstances of the case, to submit the points of view of the public prosecutor with strength and conviction and to be prepared to meet opposition or aggression with an appropriate degree of firmness. The counsel for the defence should not be allowed to take over. In the courtroom there should be a balance between the parties of the case, and this is also desirable from the point of view of the court."[9]

The fact that one-sidedness influences the procedural material in spite of legal and tactical modifications may be demonstrated by a few examples.

In the first place, one-sided selection means that there are certain questions that will not be put. For whether a question will be put will—on the basis of the tactical points of view referred to above—depend upon the expectations of the questioning party as to whether there is a reasonable probability that the witness's answer will be favourable to the client. *This assessment may be a negative one for both parties*: each party may have reason to fear that the evidential datum in question may turn out to be unfavourable and, consequently, it will not be procured. The witness involved will not be summoned or, if he is, the particular question will not be put to him.

> "During examination one may find oneself in a situation where one has to decide whether or not to put a particular question. One is faced with a so-called dangerous question. Should the witness answer in the *affirmative,* the case is up for the accused. Should the witness answer in the *negative,* the answer may turn the case in favour of the accused. In these circumstances, should one put the dangerous question? ... There are those who would argue that obviously the question must be put since that is the way to reveal the truth ...
>
> "It has also occurred that I have refrained from putting the question and then, after the trial, asked my opposing colleague whether he was aware of the question. I have had the following reply: 'Yes, of course, I was, but I dared not put it.' In other words the two of us were in agreement. Needless to say, the judge, too, may be aware of the point, but it may also be that he overlooks it, and if so the trial will end without the dangerous question having been put."[1]

[8] Tjur, in *Proceduren,* pp. 195 f.
[9] Hertz, in *Proceduren,* p. 384.
[1] Alf Nordhus, *Jeg tar saken,* Oslo 1967, pp. 79 f.

One-sidedness may also be demonstrated by the fact that it is not always compensated for by one-sidedness on behalf of the other party. This means that evidential data not produced by an advocate because they are unfavourable to his case will not always be produced by the advocate of the other party.

Particularly where conversations outside court take place with parties and witnesses, an attempt is made to frame their statements in court in a manner which limits the possibility of assessing their trustworthiness.

The overall strategy is generally based on the desire first of all to point out the circumstances which are most favourable to the client, and this strategy only makes sense if it is assumed that the other party will not fully compensate for this one-sided selection. As a matter of fact the one-sidedness will completely lose its relevance if it may be assumed in general that it will be compensated for by the other party.

If in the example given earlier the public prosecutor had asked the barman on what basis the accused was recognized, the guiding meaning of the example would obviously disappear. The suggestion of breaking off an examination presupposes that the other party is not able to react to the tactical presentation. A "fundamental principle of the elucidation of the case" may be based on the following maxim: "Dig a shade deeper than the other party"[2]—a maxim that cannot be lived up to by *both* parties.

Consequently, it is not surprising that advocates are fully aware of conflicts between, on the one hand, supporting the case of the client and, on the other hand, procuring information regarding the case:

> "One point may from time to time give rise to difficulties, namely the fact that the purpose of an advocate's work in court is to try to have the case elucidated in the best possible way for the convenience of the court, while at the same time the purpose is also to safeguard the interests of the client in the best possible way. These two objectives cannot always be completely reconciled. There are particularly narrow limits to the factual information favouring the other party that an advocate may be entitled to withhold. However, no one can reasonably expect that an advocate having special knowledge should make this knowledge available to the other party, nor can anyone demand that an advocate should try to acquire knowledge which he may fear would be detrimental to his client's case."[3]

One may hope that a balance in the relation between the parties may be achieved by their both being represented by an advocate. Naturally this may result in a balance, but even though each party is represented by an advocate, one does not eliminate the discrepancy pointed out by Christrup between the one-sided activity of an advocate and the assessment of the

[2] Tjur, in *Proceduren*, p. 29.
[3] Christrup, in *Proceduren*, pp. 113 f.

judge. With regard to situations where a balance is not achieved, Christrup has this to say by way of consolation:

> "Should this not be achieved in certain cases, there is nothing one can do about it except refer to the fact that it is a consequence of a system which could not be other than it is. After all, the parties choose their own advocates and they must accept the advantages or disadvantages that may follow from their choice."[4]

4. AUTONOMY AND OBJECTIVITY

What relation exists between the one-sided behaviour during the production of evidence that characterizes judicial proceedings under party autonomy and the neutral assessment of the facts of the case which the judge must undertake? This was the issue formulated in section 1 of this paper.

Before attempting to answer this question in the light of the foregoing analysis, it may be reasonable to mention a point of view which has been advanced in Scandinavian legal writing. The Nordic theory of evidence is dominated by the conception (1) that the assessment of evidence undertaken by a court must be seen as an evaluation of probability, (2) that this evaluation of probability should be framed in conformity with mathematical models of probability, and (3) that the evaluation of evidence does not include, or at any rate should not include, any normative elements in so far as normative elements constitute part of the rules on the burden of proof.[5] The rules on the burden of proof govern the probability which must be demanded if a fact is to be considered proven. Should the evidential data of the case not provide sufficient probability of the correctness of the relevant facts in question, the correctness of the facts is not accepted.[6] Although the rule on the burden of proof may thus be rephrased in mathematical terms, it is none the less normative in the sense that normative points of view govern the issue of precisely where the point of dichotomization should be placed on the scale of probability. The requirements concerning evidence are stricter in criminal cases than in civil cases.

[4] Christrup, in *Proceduren*, p. 114.

[5] See especially P. O. Ekelöf, "Free evaluation of evidence", 8 *Sc.St.L.*, pp. 45–66 (1964), M. Edman, "Adding independent pieces of evidence", in *Modality, Morality and Other Problems of Sense and Nonsense. Essays dedicated to Sören Halldén*, Lund 1973, pp. 180–88. See furthermore, P. O. Ekelöf, *Rättegång IV*, Stockholm 1977, pp. 17 f., A. Stening, *Bevisvärde*, Uppsala 1976, and P. O. Bolding, *Bevisbördan och den juridiska tekniken*, Uppsala 1951.

[6] P. O. Bolding, "Aspects of the burden of proof", 4 *Sc.St.L.*, pp. 9–28 (1960), P. O. Ekelöf, *Rättegång IV*, pp. 70 f., T. Eckhoff, *Tvilsrisiko*, Oslo 1943. An application of these points of view may be found in K. Waaben, "Criminal responsibility and the quantum of proof", 9 *Sc.St.L.*, pp. 243–79 (1965).

The use of traditional probability-theory methods of computation presupposes that the data so processed are completely stochastic—in other words that they have not been produced with the very object of influencing the assessment. Introducing a theory of probability in relation to procedural data consequently presupposes that it is possible to make such a computation regardless of the special circumstances under which the procedural data have been provided. A distinction must be made between the way in which evidential data are produced before the court and the way in which such data are evaluated.

It would take us too far to analyse in detail the tenability of this position.[7] There is no doubt that an approach based on the theory of probability is to some extent applied within procedural law, just as it is gaining ground with experts whose statements contribute to the judicial evaluation of the facts. None the less one must maintain that this influence is limited and, in particular, that it does not include the major group of "typical" civil and criminal cases, the elucidation of which depends upon traditional means of evidence produced by the parties with greater or lesser efficiency. It is with this group of cases in view that the issue above has been framed.

When one then proceeds to analyse the relation between, on the one hand, rules on the burden of proof, the production of evidence, and an obligation to provide information and, on the other, the tactical, opportunistic considerations outlined in the preceding section, one must examine the interrelation between the legal regulation of the evidential productivity of the parties, their tactical submission of the evidential material, and the principles on which the court is to evaluate the evidential material as a whole.

The parties have *an incentive to engage in evidential productivity* already for the reason that the more evidence a party can produce in favour of his position, the more favourable is his position during the proceedings. However, proceedings cannot be carried on merely under a continued requirement that evidential material be maximized. The economic and human burden of preparing, securing, and producing evidential data involves a division of the task. This is achieved by means of rules on the burden of proof. But the fact that, on the basis of the rules on the burden of proof, one of the parties has the main responsibility for producing evidential material does not imply that the other party may remain passive. In order to maintain the opposite view of the facts, it may be necessary to submit evidential data demonstrating that the material provided by the party having the burden of proof is none the less insufficient, both parties

[7] See H. Zahle, *Om det juridiske bevis,* Copenhagen 1976, pp. 209 f. and 396 f.

consequently acquiring an incentive to produce evidence. The relation between the rules on the burden of proof and tactical considerations may also be expressed by saying that the rules on the burden of proof may change the demand upon security on which the parties' production of evidence pivots—the object of tactics.

Selectivity. In analysing the tactics of advocates the selectivity of the parties in relation to their procedural activity has been underlined. Needless to say, a similar selectivity governs the steps prior to proceedings. The issue is whether it is for the creditor to secure evidence of the fact that *payment has not been made,* or whether it is for the debtor to secure evidence of the fact that *payment has been made.* The evidence-securing activity is conceivable only to the extent to which it relates to a fact which it is in the interest of the party in question to maintain.

Recognition of this fact is the background against which there have been advanced theories on the burden of proof that hold that the burden of proof should be incumbent upon the party that has an interest in maintaining the facts in question. It follows from what has just been stated that a rule of this nature is meaningless. Where one party has an interest in maintaining a fact, the other party has an interest in denying it.[8]

Selectivity applies partly in relation to the evidential data which are made manifest during judicial proceedings, partly in relation to the subject which is introduced through the allegations of the parties.

From the practical point of view, though not from the logical, the explicit considerations of the advocates regarding "favourable" *versus* "unfavourable" evidence hinge upon manifest evidence, especially testimony and documents.

Calculation. It is generally recognized that the evidential data submitted during proceedings may be either "accidental" or calculated, i.e. secured prior to the proceedings with a view to the production of evidence during the proceedings. If we consider first those evidential data which, in accordance with this conceptualization, are "calculated", we find that their origin does not harmonize with the assumptions on which a stochastic assessment of probability is based. As manifest evidential data during the judicial proceedings they are not "accidental events" which may be considered representative in assessing the probability of the relevant subject. On the contrary, they have been procured for the very purpose of creating a judicial conviction of a relevant subject.

This applies, however, not only to the calculated evidential data proper but also, on the whole, to any evidential data procured by the parties. No

[8] P. O. Ekelöf, *Rättegång IV*, pp. 93f.

evidential datum is "accidental" in the sense that it may be observed by the judge as an event which has occurred independently of the assessment to be made. This is *not* due to the fact that the parties try to distort the basis which they procure with a view to the judicial decision, but is a consequence of the autonomy of the parties as far as procuring manifest evidential data is concerned.

This interrelation between the actions of the parties regarding evidential data and the judicial assessment of evidence can be further elaborated. To the calculations of the parties regarding the judicial assessment of evidence there corresponds a judicial calculation, in that the courts develop norms for assessing the situations of the parties, and these norms have a bearing on behaviour. Obviously, this is primarily the case in relation to the regulation, in the true sense, of behaviour (e.g. criminal law). There has, however, also developed a regulation of behaviour which is directly pertinent to a judge's choice between accepting and rejecting a relevant fact. This regulation of behaviour aims at procuring a set of manifest evidential data constituting a safe basis for accepting or rejecting a fact at issue.

In the light of the mutual calculation and normative approach of the parties (the advocates) as well as the court, it is not possible to think in terms of a "natural" or empirical evidential value in relation to a set of evidential data. For example, there is no "natural" or, in itself, empirical basis for assuming that a person who does not appear in court at a given time is a party to a particular specified legal relation. Nevertheless this is what a judge must assume where the person in question has been summoned as a party to a court action and where the other party has defined a particular fact as the subject to be assessed. The party's failure to appear is seen in the eyes of the law as a "passivity" conceding the fact defined by the other party. One may compare this to the calculation made by a party with a view to procuring a judicial conviction in so far as the rule governing behaviour in itself, so to speak, constitutes the evidential data which form the basis of the judicial assessment. The judicial rule constitutes a particular behaviour on the part of the party involved (in itself irrelevant to the fact in question) forming a basis for a judicial assessment. In other words, the behaviour which *per se* is irrelevant becomes relevant because the judge includes the behaviour in his assessment of the fact in question. Otherwise, as far as the passivity of the party is concerned, be it in civil or criminal procedure, it turns out that the weight attached to passivity is arbitrary in the sense that it is deduced from the *demands* for information addressed to the party.

The selectivity which is primarily ascribed to the parties and the calculation just referred to may be combined under the heading that the judicial

position on what facts are to be considered proven depends upon an interaction between the parties to the case and the judge. But this interaction is not a mutual one: although the parties as well as the court are independently guided by their claims and interests the criteria of the position of *the court* are, in the last resort, the overriding ones. Parties subject themselves to these criteria—and this is taken into account by the court.[9]

Passing on to characterize the judicial objectivity in relation to party-orientated regulation of evidence and the inherent tactics, the most fruitful way to proceed is to compare the judicial method of cognition with other methods of cognition. *For it is not only in court that a human cognition evolves from the struggle between two mutually incompatible positions.*[1] In a number of other societal contexts, too, cognition is produced under such conditions. Of particular importance here is the parliamentary struggle between political parties, a struggle that goes on not only in Parliament as far as having an influence upon parliamentary decisions is concerned, but also in connection with support by the electorate at elections. This struggle forms the basis of an expectation that the society in question will get the best possible government. In relation to private consumers there is a competition between individual enterprises regarding the sale of their products, and information on these products aims at ensuring that the consumer will choose the best product, assessed on the basis of information appearing from the advertising of the various businesses.

Whether this antagonistic method of cognition is satisfactory or unsatisfactory is a political issue. Presumably, it is less satisfactory in regard to parliamentary activity and consumer advertising than in regard to the production of evidence before a court, where one-sidedness has easily maintainable limits and where the legal profession may guarantee a certain quality in the efforts made on behalf of the parties. The crucial point is, however, that the fundamental justification of this method of cognition stems from the fact that it safeguards the integrity of the parties in question. It secures that participation in the administration of justice is voluntary in the sense that the parties can compare the outcome of a court action with other interests of the party. Public interest in a clarification of the facts of the case is never confronted with this integrity.

It follows from this that my elaboration of tactics, opportunism, and

[9] Consequently, it is tempting to analyse evidential rules on the basis of games theory, see Arne Jensen, *A Decision Problem,* 1957, H. D. Backhausen, "En decisionsteoretisk kommentar till retsstridighedsproblemet", *Erhvervsøkonomisk Tidsskrift* 1964, pp. 41–62. The application of games theory is discussed by H. Zahle, *op. cit.*, pp. 201–8.

[1] In so saying I do not intend to subscribe to J. Frank's confrontation between "fight theory" and "truth theory", see *Courts on Trial,* 1949, which appears to me superficial.

one-sidedness does not necessarily imply any criticism, since these features are a price which has to be paid for securing an autonomous decision on cooperation or non-cooperation in the court's clarification of facts during judicial proceedings. One may, however, speculate whether there are groups of cases where maintaining this integrity jeopardizes major social interests, because the courts are prevented from arriving at an adequate knowledge of the relevant facts. One should also consider whether the fact that an action is brought against a public authority should result in rescinding such limitations upon the possibility of enforcing the production of information as may follow from the principle of integrity, for the simple reason that a public authority does not need the same protection against public intervention.[2] In cases of this nature the basic difference between the procedural position of parties and witnesses is blurred.

[2] In Denmark and Norway (unlike Sweden and Finland) actions against the executive branch are brought before the ordinary courts handling civil cases.