THE JUDGE'S PART IN MODERN CIVIL PROCEEDINGS

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1. INTRODUCTION

In European Continental law it has long been a controversial issue whether judges should be active or passive in civil proceedings. It is a question which has been answered in widely different ways in different places and at different times. The problem has led to an immense and somewhat diffuse literature and judicial practice. The debate started around 1800 in German legal writing, when a number of different principles were presented. Directly or indirectly these principles suggested a particular approach to the problem and several of the principles acquired international recognition. From around the middle of the last century, in some places, they became the basis for the entire legislation in the field of civil procedure. This applies to the codifications of procedural law in Austria, Germany, Denmark, Norway, and Sweden, all of which are, to a greater or lesser extent, based upon the so-called principle of negotiation. However, while a number of other major issues of procedural law—such as, e.g., the question whether the ordinary procedure in the court of first instance should be oral or written and whether it should be public or non-public—were gradually solved according to principles which now are, in all essentials, firmly established, it still remains, to this very day, a dubious and open question in many West European countries to what extent judges should or may actively contribute to the elucidation of civil cases. In most places the problem is of considerable and increasing interest. This certainly applies to Denmark, where in a recent study[1] the present author has demonstrated a trend towards a higher degree of activity on the part of judges.

In what follows, a brief survey of the legal evolution in Denmark, outlining various principles and concepts, will first be presented (part 2). Thereafter, the main results of my study, particularly the results concerning Danish judicial practice, will be reported (part 3). Finally, I will try to assess the various considerations of legal policy (part 4).

[1] Finn Taksøe-Jensen, *Materiel procesledelse i borgerlige sager,* Copenhagen 1976 (hereinafter cited as *Materiel procesledelse*).

2. HISTORICAL SURVEY

The rules of civil procedure contained in the Danish Code of Christian V, 1683, and the judicial practice during the period lasting until some time after 1700 demonstrate that judges were fairly active when it came to elucidating civil cases.

However, after 1725 a new concept came to the fore, namely that the judge should remain inactive in cases in which the parties were represented by counsel. Furthermore, written proceedings came to be used more and more during the same period; under this system the court received written pleadings from the parties and pronounced a judgment on that basis. This procedure, which did not stem from actual legislation but was apparently a result of the impact of German law, reached its peak around 1850. For all practical purposes, the judge was completely inactive,[2] in conformity with the principle of negotiation which was established in German law around 1800 and which was introduced in Danish legal writing on procedural law in 1819.[2a] The basic idea of this principle is that the entire substantive part of the procedural material such as claims, allegations and evidence should be produced by the parties to the case and that, in passing its judgment, the court may not award a party anything not covered by his claim, or take into account an allegation not actually made, i.e. drawn attention to by the party, and that evidence may not be produced on the court's initiative. It is always up to the court, however, to apply the proper rule of law to the facts in question even if that particular rule of law has not been invoked by the parties.

In Denmark the opinion prevailed that the Danish law of procedure was in conformity with the principle of negotiation. As a natural consequence of the purely written proceedings, there was no room for the judge to put questions, apart from a certain possibility of doing so for the purpose of clarification during the production of evidence. The counterpart of the principle of negotiation, namely the principle of investigation, under which it is incumbent upon the court, within the framework established by the claims of the parties, to have cases elucidated on its own motion, had thus been rejected in Danish law.

The Administration of Justice Act of 1916, which is still on the statute book, introduced oral proceedings in civil cases. The same step had already been taken in corresponding German reforms. Indeed, on exam-

[2] In this connection petty proceedings, particularly before the so-called "police court", are disregarded, *Materiel procesledelse,* pp. 83 and 93 ff.

[2a] I. O. Hansen, *Udvikling af den Preusiske og den Danske Proceslovgivnings forskjellige Grundsætninger med Hensyn til Dommerens Deltagelse i Processen,* Copenhagen 1819, pp. 89 ff.

ining the background of the various committee drafts one finds that the Danish Act was modelled after contemporary Continental reforms[3] to a much greater extent than has previously been assumed. The Act was based upon the principle of negotiation.[4]

However, as a necessary part of the oral proceedings, introduced by the Act, a right for the judge to put questions was introduced; but in comparison with similar rules in German and in Austrian procedural law this right was a narrow one. The judge was entitled to put questions merely with a view to counteracting any lack of precision and completeness in the procedural material produced by the parties (Administration of Justice Act, sec. 282, para. 1). The *travaux préparatoires* of the Act clearly establish that the right to put questions was not to be used with a view to provoking amendments or extensions of the claim—e.g. regarding the amount obtainable in a case regarding damages—but only with a view to clarifying the meaning of a claim which had already been made but which appeared imprecise. Nor was the judge allowed to search for new allegations by means of putting questions. Thus, he was not allowed to suggest to a party that it should produce relevant facts which might substantiate the claim, or part of the claim, such as, e.g., the fact that an agreement existed because a representative had a power of attorney; the judge was allowed to put questions exclusively for the purpose of eliminating any lack of clarity or completeness in allegations already made by the parties. Nor was the judge entitled to suggest the production of evidence, apart from expert witnesses. The court was, however, entitled to put questions to parties, witnesses, and expert witnesses when these were examined, provided these questions were posed for the purpose of elucidating the case, i.e. with a view to independent production of evidence which was merely of evidential significance for facts already submitted by the parties (facts substantiating law).[5]

This procedural system reduces the court to passivity in relation to the producing of procedural material, partly through the prohibition against the court itself initiating the production of information regarding the case (as could have been done if the principle of investigation had been applied), and partly through the prohibition against the court exercising its right to put questions with a view to having the parties produce missing procedural material (a more extensive right to put questions). In other words, the Act did not introduce a system of substantive guidance of pro-

[3] *Materiel procesledelse,* pp. 95 ff.

[4] See in particular secs. 293, para. 1 (claims), 293, para. 2 (allegations), and 292.

[5] However, a more far-reaching obligation to guide a party appearing without a lawyer was introduced in proceedings before the lower courts, see sec. 429, para. 2.

ceedings, i.e. an activity by the court with a view to producing procedural material. The Act does, however, contain provisions on a formal guidance of proceedings by the court, i.e. establishing the specific external framework of the proceedings. This means that the judge acts as chairman and takes decisions on the summoning and examination of witnesses, on holding the proceedings *in camera,* extension of proceedings, etc.

The proceedings outlined above were introduced in courts of first instance as well as in courts of appeal; as for cases in the first instance the proceedings were introduced in the lower courts with one professional judge on the bench—such courts adjudicate some 99 % of all cases—as well as in the High Courts, which have three professional judges on the bench—they adjudicate major civil cases. The Act prescribes a somewhat more formalized procedure in the High Courts.

3. HOW ACTIVE ARE DANISH CIVIL JUDGES?

It is a clear fact that in ordinary[6] civil cases, Danish courts do not produce procedural material themselves. In the period since the adoption of the Administration of Justice Act of 1916—and particularly during the last few decades—the courts have, however, increasingly neglected the rule that the judge has no right to put questions for any other purpose than for clarifying and completing procedural material already produced.

An investigation was made by the present author to find out to what extent the right to put questions was used in practice. In 1973 a questionnaire was distributed to all Danish civil judges.[7] First, a number of questions were put to judges of the High Courts as well as judges of the lower courts regarding their use of the right to put questions when allegations are incomplete or missing and when the questions concern an amendment of the claims. The imaginary situation and the replies from the *High Courts* were as follows.

Examples (a), (b) and (c) referred to allegations:

> "In civil cases of the first instance it happens that a party represented by counsel does not substantiate his claim in a cogent manner in situations where the circumstances indicate that a cogent basis for the claim in fact exists."

[6] This does not apply to paternity cases and it applies only in part to matrimonial cases. In those cases the court has to act on its own motion with a view to safeguarding certain societal interests.

[7] The inquiry was replied to by slightly more than 75 % of the judges, so the results may be considered representative; see for further details *Materiel procesledelse,* pp. 439–85.

(a) *The example of the rule of negligence*

"A plaintiff claims damages under the rule of negligence and describes a certain chain of events but fails to point out the circumstances which indicate that the defendant acted negligently.

"Would you in such a situation intervene and draw the attention of the party in question to the missing link in his substantiation?"

The example which pointed to incomplete allegations was answered affirmatively by 53 % of the presiding judges and negatively by 29 %.

(b) *The example of the sale of goods*

"A purchaser who has been sued for the performance of a purchase contract claims that he has cancelled the contract. However, this is not the case. But the circumstances suggest that a final purchase contract was never entered into.

"Would you in such a situation intervene and draw the attention of the party in question to the alternative objection?"

This question regarding a negation of the allegations of the plaintiff not yet made was answered in the affirmative by 35 % of the presiding judges and negatively by 41 %.

(c) *The example of limitation*

"The defendant claims that judgment should be given in his favour for some reason or other which cannot, however, be upheld; on the other hand, the circumstances of the case point to the claim being extinguished according to rules on limitation.

"Would you in such a situation intervene and draw the attention of the party in question to the issue of limitation?"

This question refers to a completely new allegation, namely extinction because of limitation. Of the presiding judges 29 % replied in the affirmative and 59 % in the negative.

The next two examples, (d) and (e), referred to claims:

"In civil cases of the first instance it happens that a party represented by counsel has made an incorrect claim."

(d) *The example of delivery or compensation*

"A plaintiff claims that a particular item should be delivered to him in a situation where the defendant is no longer in possession of the item in question. The plaintiff would, however, be entitled to compensation if he so claimed.

"Would you in such a situation intervene and draw the attention of the party in question to the possibility of amending the claim?"

This question refers to an alternative claim. It was answered in the affirmative by 53 % of the presiding judges and in the negative by 29 %.

(e) *The example of additional damages*

"In a case regarding personal injury the plaintiff claims a specified amount of compensation for personal injury. However, the circumstances of the case indicate that he would be entitled to claim a considerably higher amount.

"Would you in such a situation intervene and draw the attention of the party in question to the possibility of increasing the claim?"

This example refers to an increase of a claim. The question was answered in the affirmative by 12 % of the presiding judges and in the negative by 59 %.

Subsequently, the same five examples were submitted to the presiding judges but with the variation that the party was *not represented by counsel.* The replies, which are tabulated below, indicated a higher frequency of intervention in all situations.

The lower courts

Precisely the same examples were furthermore presented to *judges of the lower courts* in both variants. The replies tabulated below demonstrate a higher degree of intervention in all situations. The fact that judges of the lower courts intervene in practically all situations where a party is not represented by counsel must be seen in the light of the fact that sec. 429, para. 2, of the Administration of Justice Act instructs the judge to assist the party in such situations.

In a corresponding manner the questionnaire inquiry also demonstrated that most Danish judges, at the High Courts as well as, and in particular, at the lower courts, would with greater or lesser frequency draw the attention of the parties to the fact that the case would be better elucidated if a particular document was produced, a particular person examined, or an expert witness brought in. But other judges stated that they never *suggested the production of evidence* in this manner.

The great majority of judges, High Court judges as well as judges at lower courts, would from time to time discuss with the parties the *law* which should apply to the case.

The inquiry demonstrates with considerable certainty that, occasionally at least, many Danish judges indulge in a material substantive guidance of proceedings, i.e. in an activity with a view to producing additional pro-

Answers referring to examples (a)–(e)
Numbers in per cent of answers

	The High Courts		The Lower Courts	
	Party represented by counsel	Party not represented by counsel	Party represented by counsel	Party not represented by counsel
(a) The example of the rule of negligence				
Affirmative	53	65	64	93
Negative	29	12	29	2
(b) The example of the sale of goods				
Affirmative	35	59	55	94
Negative	41	24	33	
(c) The example of limitation				
Affirmative	29	35	51	95
Negative	59	35	38	2
(d) The example of delivery or compensation				
Affirmative	53	76	65	94
Negative	29	12	32	2
(e) The example of additional damages				
Affirmative	12	47	49	97
Negative	59	41	38	2

cedural material. It is equally certain that other judges remain inactive. The result of a case which is submitted in an incomplete fashion therefore depends to some extent upon the attitude of the judge who is assigned to try the case.

Some of the comments made by judges on the questions in the inquiry reveal the frequency with which the judge called attention to the fact that relevant procedural material was missing.[8] In most answers it was taken for granted that it was rare, or at least fairly rare, for the counsel not to produce all relevant procedural material. This view was particularly prominent in the replies from the presiding judges of the High Courts. As for the replies from the lower courts, however, there were some judges—according to the inquiry all of them among the most active—who considered that it was a fairly frequent, or even normal, phenomenon that the judge had to intervene with a view to having the cases sufficiently elucidated for adjudicating them in an acceptable manner. Consequently, it is possible

[8] The comments are printed in *Materiel procesledelse*, pp. 502 ff.

that a considerable number of cases would have been adjudicated on an incomplete basis if the judge had remained inactive. The results of certain experiments made in Western Germany in the late sixties at the Landgericht Stuttgart point in the same direction. The conclusion from these experiments was that close on one half of the cases would have been insufficiently elucidated had the court remained completely inactive.[9]

Austrian, German and Swedish law[1]

Under *Austrian* law the right to put questions is to only a very limited extent used with a view to producing new claims and allegations; on the other hand, there is a radical and far-reaching right to put questions in relation to other parts of the procedural material.

In *Western Germany* judges are in the main fairly active. But the Supreme Court has laid down specific limits to the exercise of the right to put questions, particularly in relation to new claims and allegations. However, these limits are far from referred to by all courts, and they were clearly deviated from under the Stuttgart experiment referred to above, which, to a considerable extent, has created a precedent. In other words, as in Denmark practice varies considerably from court to court.

The *Swedish* Code of Procedure of 1942 is based upon the principle of negotiation and the legislative history of the Code indicates fairly narrow limits for the exercise of the court's right to put questions. Although certain judges are now fairly active, it is safe to say that by most courts the right to put questions is exercised with considerable restraint. This applies to the preliminary hearing of a case as well as to the main hearing.

4. CONSIDERATIONS OF LEGAL POLICY

A. *The classical principle of negotiation*

When the principle of negotiation was launched by *Gönner* around the year 1800, it was a non-ideological imaginary construction used by its founder as a model for the German procedure of that time with a view to providing systematical order. In all essentials the function of the principle was seen to

[9] See for further details *Materiel procesledelse*, pp. 268–90, particularly at p. 274. The author's own experience from a year (1977/78) as a civil judge of the City Court of Copenhagen is that in around one third of the cases which came to trial relevant procedural material would have been missing.

[1] The use of the right to put questions in Austrian and German law has been examined by studying the legal writing and the court reports. A questionnaire inquiry has been undertaken in Sweden. See on these aspects *Materiel procesledelse*, pp. 163–94 (Austrian law), pp. 222–59 (West German law) and pp. 317–50 (Swedish law). Particularly as far as Swedish law is concerned, the results do not have the same degree of certainty as those of the Danish inquiry.

be that of a technical aid in the presentation used in legal writing and in commentaries on legislation in order to express in a simple and conspicuous manner something fundamental to procedural enactments.

However, in the course of the 19th century, the principle acquired such prestige that it came to have an ideological content. During the epoch of individualism it became an expression of the free citizen's prerogative of securing his rights through the courts independently of the state. In this way the principle of negotiation became part of the trend in Western Europe which turned its back on the paternalistic government of earlier epochs and dissociated itself from the guardianship of the state. There is no doubt that through this evolution the principle acquired at that time a "validity" which raised it above any doubt or objection. During this period it had a powerful influence on legal thinking. Thus, it is clear from the *travaux préparatoires* of a number of procedural acts of that period that the principle of negotiation was established and accepted to such a degree that legislators did not discuss or attempt to substantiate its justification but simply outlined the contents in the statutory rules. In certain instances the principle actually became part of statute law.[2] The drafts of a new Danish Administration of Justice Act, which were made in the period 1859–99, contain a number of rules providing for a considerable passivity on behalf of the judge as a necessary consequence of the principle of negotiation. The contents of each rule, including the rules on the limitations of the right to put questions, were consequences of the principle of negotiation. No reasons were given why this principle should apply.

In the legal writing on procedural law at that time, basically the following three reasons were considered decisive. First, the state should not be the guardian of the citizen. Secondly, each party has to carry his risk. Thirdly, the parties have the right to "dispose over" their case (the meaning of this expression is explained below, on p. 222). While there is no need for any further discussion here of the argument of non-guardianship, some comments on the other two points will be presented.

The point as to risk has been framed in different ways. Thus, *Heffter*[3] wrote in 1843:

> Court proceedings are a special type of regulated state of war allocating equality of arms to the parties, hence any additional interventions must be considered unjustified since the procedural warfare is meant to replace an individual assertion of power.

[2] See *Materiel procesledelse*, pp. 28–32 and 98–103.

[3] August Wilhelm Heffter, *System des römischen und deutschen Civil-Prozessrechts*, Bonn 1843, p. 4.

In 1847 *Morstadt*[4] said:

> It is up to the parties themselves to safeguard their interests of a private nature during court proceedings. The fact that the more talented party may thereby secure certain advantages at the cost of his opponent is simply in line with conditions of life in other respects. Everybody is master of his own fate.

Today, such statements appear to express a conception according to which the stronger party should be allowed to have special privileges at the cost of the other party.

Gradually, the statements of legal writers were toned down. Writers held that "the principle of negotiation places the risk or the responsibility for the cases being elucidated upon the parties", or used other words to that effect.[5] It is absurd to argue in this way since no indication is given as to what actually are the considerations upon which the passivity of the court is based. Today it goes without saying that more recent Scandinavian legislation does not conform to a basic attitude aiming at, or at least approving, a situation whereby the stronger party is allowed to acquire advantages merely on account of his procedural position.[6]

In Scandinavian legal systems the parties are said to have a right "to dispose over the case". Thus each party chooses which facts he will present and what claims he will make. In other words, the court is not allowed to try other facts than those submitted by the parties. Present-day writers point out that there is a natural interrelation between the right "to dispose over the case" and the principle of negotiation.

The author considers that the rule that it is for the parties themselves to submit claims and allegations cannot be seen as a necessity stemming from the right of the parties to "dispose over" the substance of the case. The possibility for a party to renounce his right could merely lead to the rule that the court is not allowed to sustain a claim or take into account an allegation—submitted by the parties or produced by the court—without the party in question having had the opportunity to take up a position on the issue of waiving his rights. Clearly the right of the parties to "dispose over" the case cannot be invoked in favour of limitations upon the right of the court to put questions. Should a party have had the intention to deal with his claim by omitting to produce procedural material, and should the court raise the point whether such material ought not to be included, the

[4] K. E. Morstadt, *Gemein-deutscher Civilprozessschlüssel*, Heidelberg 1847, pp. 129 ff.

[5] As for Danish law, reference should be made to J. H. Deuntzer, *Den danske Civilproces*, 1901, pp. 129 ff., Kr. Fr. Hammerich, *Forhandlingsmaximen*, Copenhagen 1910, pp. 126 ff., and perhaps H. Munch-Petersen, *Den danske Retspleje*, vol. 2 1924, p. 250.

[6] See *Materiel procesledelse*, pp. 509 ff.

party merely has to state that it should not be included, and the court must abide by this wish. Presumably such situations, where the party is unwilling to change his position in spite of a discussion of the relevance of the point in question, rarely occur; where relevant procedural material has not been produced, there will normally be other grounds for this omission.

Consequently, the reasons on which the classical principle of negotiation is based should not be considered decisive for the maintenance of rules prescribing passivity on the part of the court.

B. *Arguments recently adduced in favour of the court's passivity*

The Danish scholar Professor Gomard[7] mentions three reasons for the maintenance of a rule that the judge should be passive:

(a) the parties know best what information is relevant and therefore an independent initiative by the court is generally unnecessary; (b) the court should be impartial; (c) the parties have to pay the costs of proceedings and should be allowed to decide whether or not a piece of evidence should be produced. These three points will now be discussed in turn.

(a) The point that "the parties know best" may simply mean that they should have the initiative in stating and establishing the object of the case and its framework. In such a case it states something obvious.

But if it implies a claim that there should be a limitation of the right of the court to put questions during the subsequent proceedings, this thesis is hardly tenable. A proper description of the facts of the case which constitute legal rights and the allegations involves a screening of the facts which form the actual circumstances out of which the court proceedings emanate. This screening of allegations is determined by relevant rules of law. But as a matter of fact the relevant rules cannot be pinpointed until the party is familiar with all the actual circumstances of the case. Often a party does not acquire such complete knowledge until the confrontation with the other party and with evidence, a confrontation which takes place during the proceedings. Admittedly, there are certain major or significant cases where the counsel of the parties engage in major research prior to instituting proceedings, including negotiations and confrontations with the other party and his counsel. But in most minor cases a procedure of this nature would be too costly for the parties, and in quite a few cases it will be impeded or rendered impossible by considerations of a tactical nature or a climate unfavourable to cooperation. One must therefore expect that a

[7] B. Gomard, *Civilprocessen*, Copenhagen 1977, p. 261.

great number of cases will be presented in a defective manner at the time when court proceedings are instituted. The experience and the result of the experiments mentioned above under part 3 (at footnote 8) appear to confirm this assumption.

(b) The point as to impartiality involves two aspects, namely that the judge becomes biased and that he will leave others with the impression of being biased. In Denmark as well as in a number of other countries this point is often made as an argument in favour of limiting the right to put questions.

In legal writing it has been held that the judge should adopt a reserved position during proceedings, as this will enable him to avoid involving himself in the case and taking up a position prior to the stage of passing judgment.[8] As an argument in favour of this point of view one may refer to the human tendency to attach exaggerated importance to one's own observations or points of view. It remains, however, a moot point whether this risk would be greater under a procedural system which permitted judges to be active. After all, a judge who has to remain passive may be inclined to attach too much importance to procedural material which seems to be missing and of which he happens to be aware. Danish writers are divided in their opinions on this issue. The present author is in favour of a rule that the judge should be permitted to put questions, particularly because possible misconceptions or even incorrect feelings on the part of the judge—be they of a factual or of a legal nature—can thereby be more readily revealed. In my opinion there is no risk that the judge will become bound by his conception of the case and take up a position prior to the stage of judgment just because he may have contributed to the elucidation of the case by putting questions. During the hearing of a case every judge has certain ideas about it and these will change as soon as new relevant procedural material is produced. And all experienced judges know that this may happen up to the very last moment—and sometimes even after the conclusion of the hearing.

Consequently, the argument of impartiality does not appear to have any major significance, at any rate where the judge limits himself to questions within the framework constituted by the presentation of the parties and abstains from taking the full elucidation of the case into his own hands.

The point that a judge who is actively helping one party may leave the other party with an impression of his being biased is more relevant.

As pointed out in a Swedish government bill,[9] it is inevitable that losing

[8] B. Gomard, *Tvistemål*, 4th–6th eds.
[9] *Proposition* 1973:87, pp. 147–53.

parties should sometimes come to believe that they lost their case because the judge was biased. Admittedly, one should avoid framing rules of procedural law in such a way that they in themselves provide a special reason for assuming that the judge was biased. But does a system that permits the judge to take an initiative with a view to procuring procedural material within the framework of the proceedings inevitably contain elements of this nature?

To begin with, it is generally acknowledged that it is for the court itself to identify and apply the proper law. Any thought that the court is partial because it introduces a new legal rule would not arise.[1]

As to the factual part of the procedural material, the situation is entirely different. An unlimited and uncontrolled right of the court to engage directly in the production of procedural material would undoubtedly give rise to serious suspicions regarding its impartiality. The mere possibility of a secret discussion between the judge and one of the parties or his witnesses would involve such reasons for suspicion that rules permitting such a procedure should be rejected for that reason alone.

Where procedural material is produced in the course of the court meetings at which the parties are present, the situation seems fundamentally different. Thus, it has long since been accepted that in this situation the judge is permitted to produce factual evidence by putting questions to witnesses and that in such a case no suspicions will arise regarding his impartiality.[2]

The main problem is that the exercise of a right to put questions regarding more basic parts of the procedural material—such as claims, allegations, significant facts of evidence—may possibly give the party who suffers detriment from the step grounds for assuming bias on the part of the judge. What really matters is that the party may get a feeling that the other party is being assisted. On the whole, I am of opinion that one may discount the possibility that the party's counsel will feel that the court is biased. The crux of the problem is what the parties themselves think. Presumably, assistance of a purely technical nature will be regarded as innocuous. Possibly it is relevant whether the procedural material was already part of the case and by whom it was produced. Finally, a fair reason for suspicion normally arises only where assistance is given exclusively to one of the parties.

Paradoxically, the discrimination which would actually occur if the court did not intervene in support of a party, but purposely let him lose the case,

[1] It is, of course, assumed that the relevant facts have been produced by the parties.
[2] See the Administration of Justice Act, sec. 357, para. 2.

does not give rise to any suspicion of partiality. Possibly this is due to the fact that it is not immediately observable. Even if a study of the judgment should reveal such a discrimination, it would not be thought that the court had been partial, because it is generally taken for granted that the parties themselves are responsible for elucidating the case and if they were unfortunate enough to hire an inefficient advocate this is a risk they have to bear.

From this it seems to follow that the attitude would be different if it was generally accepted that the court should strive to ensure that a case is not lost simply because it has been poorly elucidated, and that the court has a duty to provide a certain guarantee for the proper elucidation of the case. If these expectations existed, the fact that the parties were rendered assistance by the judge would not give rise to suspicion unless he did so in a particularly infelicitous manner.

The overall considerations thus seem to lead to the conclusion that this problem would arise during the period of transition following the introduction of a new system. However, it is also certain that there is a close interrelation between the psychological realities inherent in the suspicion of partiality and the methods applied by the court in procuring information.

The question then arises, what is the method best suited to exclude suspicion of partiality? Ideally it should be applied by a judge whose basic position is such that he is not afraid of appearing biased and who in an open, direct and natural way makes it a regular practice to participate in procuring procedural material. He should, of course, avoid making personal reflections. Where such a method is applied, even direct questions regarding vital points will be seen to express a perfectly neutral position. As long as the judge proceeds freely and unimpeded by speculations regarding impartiality, the risk that he will appear biased is remote. This assumption is decisively confirmed by the experience of the very active Danish lower courts and particularly by the German experiment in Stuttgart referred to earlier.

However, even where the procedure whereby the judge takes an active part in procuring material is fully recognized, there will still be a real risk if one of the parties is known as what we call a "litigious person". The inquiry undertaken demonstrates that judges who are otherwise of the active type occasionally remain completely passive "in relation to notoriously litigious persons where it is to be feared that any type of intervention would be misinterpreted". However, the author submits that even in such cases a system of firm, regular, natural participation appears to be the best procedure. Incidentally, the interest of the other party is a clear argument

against passivity. In extreme cases of a party appearing without counsel there remains the possibility that an attorney will be appointed by the court.

Therefore, the decisive element is the basic position expressed in legislation, provided that it is considered just by the public. Where the judge is required by law to be active, he would be thought to favour one of the parties if, by remaining passive in relation to the other party, he caused that party to lose his case. On the other hand, if the law instructs the judge to be passive, the judge may seem to be biased when he assists a party by putting significant questions.

From these considerations it would seem to follow that the law should prohibit the judge from procuring procedural material on his own initiative without consulting the parties. Furthermore, in my opinion activity on the part of a judge should never be extended to the point where elucidation of the case is no longer based upon material submitted by the parties. Exercising a right to put questions in a manner which would amount to directing the elucidation of the case through examinations could undoubtedly give rise to criticism. It would, furthermore, also mean that the right of the parties to submit their case in their own way would actually become more or less illusory. Finally, it is clearly established that questions regarding points beyond the scope of the case which the parties have submitted to court may give rise to suspicion of partiality. It should therefore be made a rule that putting questions should be confined to circumstances which are part of the course of events upon which a case is based.

Where a far-reaching right to put questions exists it is particularly important to settle in what way the judge should exercise this right. It should never reach the point of consultation with one of the parties only.

(c) Nowadays there appears to be unanimity on the following point: Because the parties have to pay the costs of producing evidence they should also be entitled to decide its extent. The court should not act on its own motion, but it should not be deprived of the possibility of pointing out that additional evidence might be useful. Occasionally this may result in costs which, strictly speaking, were unnecessary but which were the consequence of the court's initiative. If so, the court may and should take any possible criticism into account by emphasizing, when putting a question, that it is always up to a party to decide at his own risk the extent of the production of evidence and that the court cannot say in advance whether evidence will actually lead to additional conclusions. In practice, matters will rarely be quite as clear-cut as this, since the costs are normally fixed on the basis of an overall assessment. This is not so, however, in the case of expert

witnesses. Strangely enough, the Danish Administration of Justice Act permits the court to "suggest" evidence only in the case of expert witnesses.

C. *An evaluation of the Danish debate*

The theoretical framework regarding active judges in civil cases which emerges from the considerations reviewed above displays a wide span.

Those opposing a substantive guidance of proceedings argue, above all, that a deeply-probing activity by the judge could easily compromise his independent position in the individual case, and that proceedings would be protracted because questions would be brought up which are irrelevant in the eyes of the parties. In consequence there would therefore be an increasing lack of confidence in the courts, proceedings would be prolonged, the costs of proceedings would rise, and demands for more personnel in the judicial sector would be made.[3]

Those, on the other hand, who support a more far-reaching substantive guidance of proceedings believe that the decisions of the courts would be more just than they would otherwise be because judges and parties would concentrate more on the essence of cases, be it in relation to the law or the facts. Such a concentration would simplify the handling of cases, shorten the time taken by proceedings, and decrease the costs, just as the number of cases of appeal could also be diminished. Consequently, a substantive guidance of proceedings, planned in a systematic fashion and applied in a rational manner, could result in lower personnel requirements and would contribute to the strengthening of the prestige and position of the courts in the eyes of the public.[4]

Several authors see the fact that in the last few years a large number of special tribunals have been set up—the Consumers' Complaints Board being a conspicuous example—as a symptom that court proceedings have failed to satisfy the needs of the public; they are of opinion that one of the ways to strengthen court proceedings is to introduce a preparatory stage, the efficacy of which should be secured through a substantive guidance of proceedings.[5]

There is no doubt that during recent years public opinion in Denmark has changed considerably in favour of an extended activity by the courts.[6]

[3] Thus the advocate Kristian Mogensen, *Advokatbladet* 1977, pp. 3ff.

[4] The President of the City Court of Copenhagen, N.C. Bitsch, recommends a system of substantive guidance. See *Juristen og Økonomen* 1978, pp. 251ff.

[5] These views have been put forward by Chief Justice K. Arildsen and Professor Gomard in *Juristen og Økonomen* 1978, p. 422.

[6] This assessment is based, among other things, on views which have been expressed at a number of meetings of law associations, etc., during 1977 and 1978.

In 1973[7] the Danish Administration of Justice Board proposed that, in connection with the introduction of an actual stage of preparation, the courts be given a statutory possibility of exercising a fairly free right to put questions. Discussions regarding the introduction of a more far-reaching substantive guidance of proceedings in petty cases instead of establishing the Consumers' Complaints Board, etc., were, however, brought to an end in 1973/74 on account of opposition from members of the bench. It has now been proposed that these deliberations should be resumed.[8]

In my study, *Materiel procesledelse i borgerlige sager,* published in 1976, the present author advocated the establishment of experimental arrangements in the courts introducing an optimal substantive guidance of proceedings on the basis of a radically changed procedural system so that we might acquire more certain knowledge as to the probable benefits or disadvantages of making such a change. Since then I have had the opportunity to sit on the bench at the City Court of Copenhagen for some three years, more than one of which was spent dealing with civil cases. The experiences from this period clearly indicate that an expedite handling of cases and a much more simple and efficient handling of petty cases are possible. It was surprising to find that an open discussion of the problems with the parties and their counsels appears to have been a major reason why some 92 % of the cases were settled by the parties themselves. The great majority of these settlements could be achieved without the court acting as mediator, merely because an informal discussion of the case made procedural questions, especially the burden-of-proof problems, much more understandable to the parties.

[7] *Betænkning om behandling af borgerlige sager,* no. 698/1973.
[8] K. Arildsen and B. Gomard, *loc. cit.,* pp. 424 ff.