

Objectivity in Swedish Criminal Proceedings¹

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¹ This is a revised translation of an article published in Swedish in *Juridisk tidskrift* 2004-05 p. 42-60. As the footnotes contain almost only references to Swedish sources, the footnotes are excluded. Readers knowledgeable in Swedish are referred to the Swedish article.

1 Introduction

A judge must act strictly impartially when deciding procedural and criminal issues. This means that all judgments, decisions and assessments are to be objective. The decision-making is not to be affected by personal views. The public prosecutor and police also have a duty to act objectively during the pre-trial stage. They are to gather evidence pointing not only to the guilt of the suspect but also evidence favourable to him or her. It is not clear under Swedish law whether a prosecutor has a duty to safeguard a defendant's rights during trial when represented by counsel. The case may be that the prosecutor then has no duty to act impartially. The principle of objectivity ought at least then be modified and less stringent.

What does the principle of objectivity mean? Is it to be construed and applied in the same way by both judges and prosecutors? What are the rules and the principles of relevance? To what extent may general principles in scientific theory be helpful? Is there a need to modify such general views when they are used in a legal analysis?

The problem of objectivity has been widely debated in philosophy and scientific theory. It is not possible to give a general, concise and precise definition of objectivity. Several criteria are decisive for the concept of objectivity. Different intellectual activities may be the subject of objectivity. In this respect the concept may vary. The objectivity may refer to a person or to statements, a report or reasoning. A method may also be objective and free from subjective assessments. The material designed for scientific purposes can be collected in an objective manner. Arguments can be objective or characterised by personal attitudes. A scholar cannot disregard any of the requirements of objectivity. If his or her investigation does not meet all the requirements of objectivity, the analysis is no longer scientific. There then is a risk that the results are based on personal preferences even if the individual is not aware of this.

When it comes to the administration of justice, it is not clear to what extent different requirements of objectivity have to be met. That objectivity may be a relative phenomenon and not absolute will be demonstrated below.

2 Legal Objectivity from a General Scientific View

Objectivity is an integral part of both the administration of justice and legal reasoning in jurisprudence. There appears to be no reason for lessening the requirements of objectivity and accepting that a judge's personal preferences can play a significant role in the administration of justice. Neither is there any scope for subjectivity and personal views in jurisprudence.

A legal scholar dealing with consumer law and the interpretation of different rules is not to base the analysis solely on a consumer friendly view, even if a consumer protection argument is stressed in the legislative history. The scholar is to pay attention to fundamental opposing interests of business even if the interests of consumers are to be prioritised. Such a balancing of interests reflects

the objectivity. Incomplete analysis in this respect cannot be accepted simply because certain conclusions or results are new and unknown in the literature. A strong personal consumer friendly attitude is no scientific excuse for totally disregarding business interests. The lack of funds and time constraints are not reasons for a legal researcher to conduct incomplete investigations and publish reports with distorted results. If the author makes all necessary reservations as to the correctness of the results, it appears that scientific requirements are met. However, there is a risk then that the results have no importance. Generally, objectivity is absolute in jurisprudence.

Relative objectivity means that it is not possible in practice to completely adhere to all the objective criteria that are the ideal in theory. A lack of resources usually forces legislators, courts and prosecutors into the realm of relative objectivity. Even if these requirements are applied less vigorously, this does not entail that there is to be unlimited room for personal views. A relative objectivity may involve incomplete investigations excluding subjectivism. Relative objectivity is acceptable as long as the aspects of the requirements of objectivity that are reduced are clearly indicated, and that there are preconditions for checking that a judge's personal views do not affect decisions. If it is not possible to formulate and check in what respects objectivity has been reduced, there is a risk that the decision-making procedure will be subjective. There is consequently a need for high quality instruments for controlling relative objectivity. Relative objectivity means that to a certain extent there is a lack of objectivity. The objectivity in the administration of justice may only be relative if there are objective reasons for reducing scientific objectivity.

In the administration of justice, objectivity is often relative. Striving to investigate a criminal case in all respects and determine the truth has to defer to other import goals that often are expressed by fundamental principles of procedure. Conflicts may sometimes arise between the requirements of objectivity and these principles. Issues of objectivity cannot therefore be analysed independently of other procedural goals. The requirement that the administration of justice be inexpensive, efficient, and simple must take into account the need for procedural safeguards as well.

2.1 Inter-Subjective Testing

There are to be opportunities for lawyers in general to test the correctness of decisions made by judges or prosecutors and to decide whether they would have reached the same or different results when applying the relevant procedural rules. Feelings and personal views do not form an acceptable basis for presumptive decisions. There presumably is only a limited risk that judges or prosecutors allow themselves to be governed by personal preferences even if they affect their intellectual capacity as a private person. The danger of an unacceptable influence may be greater when a judge's feelings are weak or defuse or when personal preferences are shared by a majority of the citizens, and therefore not generally provocative. Subjectivity may sometimes be based on arguments or reasons of an objective character. Subjectivity cannot be accepted scientifically simply because it has roots in objectivity.

Is it really possible to decide whether personal views have motivated a decision made by a judge or a prosecutor? Under one apprehension it is possible

to do so by analysing the reasons for the decision. However, this method cannot be used if a judge has taken a preliminary decision upon somewhat diffuse grounds without stating clearly whether personal views have influenced the decision. When a judge as a second step in the decision-making procedure tries to find acceptable reasons for a preliminary assessment, it is true that the judge can sometimes change standpoints when he or she cannot motivate them objectively. However, there is a risk that a judge is reluctant to reconsider a preliminary decision and exaggerates the importance of arguments in favour of the chosen solution, disregarding arguments contradicting his or her own assessments. The judge then is not objective. Neither is the judge objective if failing to consider whether other solutions are better grounded than his or her preliminary assessments. Under another apprehension, it is essentially the use of scientific methods that create safeguards for objectivity. The method produces, and is the basis for, the solution instead of a preconceived solution wrongfully limiting the search for arguments.

There is a danger that subjective reasoning can be mixed up with objective analysis. The subjectivity may be concealed by those parts of the reasoning that clearly are objective. For instance, personal views and feelings may slip into a judge's evaluation of the evidence in a case where his or her intuition has affected the decision in addition to factual reasons as indicated in the judgment. Intuitive assessments mean *inter alia* a personal feeling of conviction that the accused has committed the crime for which he or she is being prosecuted. A judge has to avoid such subjective reasoning. This kind of intuition is to be distinguished from assessments of the evidence on the whole based on the judge's great experience of criminal cases. It has been argued in the Swedish legal literature that the evaluation of evidence must not be based on a judge's previous experience, since each case is unique. Against this view it can be objected that all judges gain an increasing ability to weigh evidence in consultation with colleagues. The assessments of judges become similar and personal views suppressed unless a judge is unaware of his or her own personal inclination to conceal personal views with objectivity or over simplified reasoning. As a rule, intuition is not to be a part of the decision-making procedure, as it is difficult for a judge to control that it is used within the limits of objectivity. General and diffuse assessments are to be replaced by motivated stances when judges are evaluating evidence. There is an obvious risk that intuition may conceal incomplete analysis. It is another matter that intuition may form a basis for questioning, which in its turn may create a ground for a scientific analysis. Thus, intuition sometimes is an excellent instrument for creativity.

In cases where there are no reasons included in the written decision, no opportunity is presented in which to conduct inter subjective tests. A defence counsel or scholar cannot determine whether such a decision is based on objectivity. Many decisions made during police investigations and at trial are not documented and motivated. Thus, a Swedish judge gives no reasons for a decision forbidding a question during the examination of a witness, nor presents reasons for a decision to ask questions in order to clarify facts or assist a victim or the accused. Further, a judge seldom explains in writing why he or she has decided to refrain from taking certain procedural measures. When a prosecutor

informs a person that he or she is suspected of having committed a crime, the prosecutor seldom indicates how the assessment of all the pieces of evidence was made. As a rule, there is no basis for the defence or a legal representative of the victim to decide whether this kind of decisions is influenced by the decision maker's personal views. For cost reasons, it is not possible to introduce an obligation for judges and prosecutors to explain each decision in writing.

In some cases, a judge or prosecutor may consider it impossible to state any reasons for the determination, as the applicability depends on the outcome of a discretionary assessment. However, even in such cases, certain facts and arguments are relevant, but personal views are not. In situations commonly occurring during a hearing, judges and prosecutors often make decisions rapidly and routinely or intuitively. The proceedings often continue immediately after the determinations are made. The decision maker then is not given a second opportunity to reflect upon the determination and clarify what facts and arguments have been of significance. A judge or prosecutor then needs to develop some elementary mechanisms and habits for performing a quick self-control before making a decision. Otherwise, there is a risk that personal views affect the assessment without the judge's knowledge and control. Subjective and contradictory practices may then develop. When the subjectivity is less conspicuous and the assessments deviate only slightly from the acceptable standard, it will be almost impossible for the parties to demonstrate a lack of objectivity. There are a great number of procedural orders that belong to the category of non-motivated determinations, those issued without written statements as to reasons. There are limited opportunities for scholars to analyse these determinations and demonstrate any lack of objectivity.

2.2 Difficulties in Proving a Lack of Objectivity

All human beings have personal views. Nonetheless, a judge or prosecutor must not let themselves be influenced by personal views when resolving legal and factual issues. They are to disregard personal opinions during the proceedings. It is often difficult for the parties to prove that personal views had an influence on a non-motivated decision, as the parties do not have access to those views. However, methods indirectly demonstrating a lack of objectivity can be used. If a determination is based upon material presented by one party, there is an obvious absence of objectivity, unless the other party has failed to present its case. There is no need to prove that the judge has acted subjectively, because this is demonstrated indirectly by the violation of the principle of contradiction. If both parties have presented their cases in all relevant aspects, it is difficult to prove that a judge to some extent has disregarded what one of the parties has stated. An indirect method cannot be used for proving lack of objectivity when the decisions have no written reasons.

The objective of avoiding arbitrariness and subjectivity in the administration of justice does not mean that the personalities of judges and prosecutors are to be changed and that they are to be transformed into insensitive decision makers functioning like computers. One has to rely instead upon their ability to disregard personal views. There can be a need to improve that ability through educational training programs. It is also important that judges and prosecutors

continuously try to develop their ability to disregard personal opinions. It can be easier to strengthen objectivity in the administration of justice by refining and supplementing criminal procedural rules, especially when the rules have been enacted without any consideration of the need for objectivity. Apart from changing the legislation, internal practices and methods for conducting proceedings may be improved in those fields where there is an obvious risk for subjectivity.

2.3 Science and Objectivity

A conclusion is not to be based upon incorrect facts or unproven or controversial premises. The danger of committing such a mistake increases if the scientific form of a conclusion works as a subjective factor rendering the conclusion convincing and attractive. The premises may be partially concealed or described too vaguely. It is then easy to forget to check their correctness. Swedish evidentiary law does not exclude that a conclusion is based on unproven, but probable facts, as long as it is made clear that the conclusion is uncertain. Legal conclusions may be drawn from reasonable, but unproven premises.

Pre-conceived opinions sometimes operate in such a way that the decision maker only considers whether it is possible to draw inferences supporting his or her prejudices. However, it is often possible to draw several conclusions justifying contrary results. A prosecutor has to consider, therefore, whether facts justifying a conclusion that supports the case may also justify an opposite conclusion in favour of the defence. A judge may also fail to observe that several conclusions may be drawn from a fact.

In the initial stage of the proceedings, a judge sometimes forms a preliminary view of the case and the outcome. After the prosecutor and the defence counsellor have presented their opening statements, a judge may be inclined to accept one of the statements. A judge cannot be criticized for making a preliminary analysis of a case, but this must not affect his or her objectivity and capacity to change views. The judge may not express any preliminary views to the parties, as this may render the judge disinclined to change any views for subjective reasons. If the judge has read and analysed the police report shortly before the trial, he or she is not to reveal any impressions or preliminary views for the parties

If a judge would be *prejudiced*, there is a risk that he or she will listen to the witness examination in a selective manner. The judge may even not be aware of this. There is a danger that the judge does not realise that he or she is only focusing on facts speaking in favour of a view justifying conclusions supporting a preconceived opinion. Therefore it can be held that a judge must not study the police report before the trial. Allowing a judge to read the report, but forbidding him or her to analyse it and draw conclusions, is not possible in real life. However, the relative requirement of objectivity must not be taken so far that judges are prevented from preparing themselves by reading the police report in complex cases. If they were prohibited from reading the report, they would be deprived of the opportunity to understand and analyse the cases during the main hearing and to identify, structure and solve problems. In complex criminal cases, it is extremely important that a judge is prepared and has identified all the essential legal issues and studied cases and other legal material before the trial.

One criterion for lack of objectivity is *insufficient analysis of the material*. Intellectual difficulties and lack of time sometimes constitute reasons for a judge or a prosecutor to limit the analysis of the evidence. A Swedish judge drafting a judgment often faces the problem of how to assess different pieces of evidence. The prosecutor has to deal with the same type of problem when considering indicting a person. After a judge or prosecutor has made an analysis with reasonable carefulness, he or she may find it futile to carry out any further highly detailed analysis, predicting that this would not change the conclusion of whether the accused is guilty. This is an acceptable type of relative objectivity in decision-making as long as the judge has made a correct assessment when deciding that there is no need for further investigations. However, it is often difficult for a judge to know whether further considerations would cause any change in the conclusions and assessments.

A judge or prosecutor often has no precise knowledge as to certain facts. There is a risk then that this gap is filled out by assumptions or diffuse conclusions. They can be based on subjective views or insufficiently founded preliminary views. Such views cannot be confirmed by themselves, by arguing that an *uncertainty creates a possibility* that the view is correct. A possibility does not include any knowledge or evidence, and the lack of knowledge cannot create any knowledge. In this respect, the absence of precise provisions as to how to evaluate evidence may result in subjectivity.

The existence of *contradictions in a legal reasoning* means that it does not meet scientific requirements. It is obvious that the judge's own reasoning in a judgment may not contain any contradictions. Human beings may act in an inconsistent way and a testimony may include conflicting statements. If a judgment contains an account of such facts, it cannot be criticized for lack of objectivity. These kinds of contradictions must be dealt with in different ways when the judge is evaluating the evidence. They often can be explained by that a person has acted inconsistently. His or her statements may very well be true. However, it is often hard to rely on a testimony in all respects if it is contradictory. A judge must not apply different standards in relation to two persons when assessing inconsistent statements without having an objective reason for this. If the judge places a heavy burden on a victim to explain seemingly inconsistent allegations, for instance, the judge ought to question whether the same stringent requirement has been applied when assessing statements made by the accused. Such a question may result in the judge realising that there is no true basis for questioning the reliability of the accused in spite of the fact that he or she has not been able to fully explain all inconsistent acts.

Different kinds of *incomplete reasoning or analysis* may involve elements of subjectivity. The absence of evidence may be explained by the fact that the police have not made the same efforts when collecting evidence supporting an indictment and supporting the defence. This in turn may be explained by a criminal investigator's personal feelings, based on a great number of earlier criminal cases, that a suspect as a rule is guilty.

A decision maker has not been objective if he or she is not able to give any reasons for assessments. Sham or clearly incomplete reasons demonstrate lack of

objectivity. Convincing arguments showing that a legal requirement is fully met cannot compensate for the absence of reasons for other requirements being met.

3 Objectivity and Procedural Law

3.1 *The Interplay between the Judge, Prosecutor, Defender and Police*

Legal personnel of different types are involved in police investigations and subsequent trials. Varying requirements of objectivity may be raised against them and the requirements can be more or less stringent during different stages of the criminal proceedings. The members of the court are to act strictly impartially during all proceedings. A prosecutor has to comply with the principle of objectivity before an indictment, but where the defendant is represented at trial by counsel, a Swedish prosecutor is not absolutely required to be impartial during the trial. In practice, it seems that the prosecutor acts more like a representative of the party safeguarding the state's interests.

The defender is to safeguard the interests of the accused and assist him or her during the police investigation and trial. The defender has no duty to act objectively. On the contrary, the defender has a duty of loyalty in relation to his or her client. Even if there is scope for subjectivity, this is highly limited in practice as it is not possible for a defender to affect a strictly impartial judge with subjective arguments. This means that the right of the defender to use subjectivity as a means to convince a judge can only be used in certain special situations. The defender may select material in favour of the accused and refrain from revealing facts negative to the defendant. Further, the defender may also use a subjective technique in the opening or closing statements by stressing a perspective favourable to the accused that makes defendant's acts excusable.

The objectivity requirement in the Swedish constitution means that courts are to treat the parties equally. Further, the courts are to be impartial and judgments are to be based on facts, not prejudices or unfounded assumptions. A party is not to be treated in a discriminatory way because of personal circumstance, unless there is support in the law. Judgments are to be based on the law. This is an expression for the principle of objectivity. A great number of procedural issues are not regulated in the law, at least not in detail. This means that a judge has the right to use discretion. The lack of procedural rules does not mean that this discretion entitles a judge to act arbitrarily. On the contrary, the judge has to be objective. General requirements of objectivity in science then are of importance.

The duty of a prosecutor to be objective means that he or she is to take into consideration not only circumstances that speak against the defendant, but also circumstances which are favourable to the defendant. Evidence that is advantageous to the defendant is to be gathered. To the extent that something favourable emerges during the police investigation, these circumstances cannot be kept from the suspect. The objectivity duty governs the acts of the police and prosecutors. There is no support in the law that the principle of objectivity is to be applied by the prosecutor during the trial.

The objectivity duty of a prosecutor may be relative. Such a relative duty does not mean that personal views may influence the prosecutor, for instance when deciding whether a person is to be indicted. There is no scope for subjectivity. However, one may ask if a relative duty to act objectively really creates sufficient procedural safeguards in all respects. This depends upon whether there are acceptable and objective reasons to limit the prosecutor's duty to act objectively.

A defender and prosecutor have a duty to tell the truth during the trial. Their duties have different meanings. It has been held that a prosecutor may not make statements about facts that he or she cannot prove. However, a prosecutor ought to be empowered to do so if he or she expressly states there is only a probability for these acts.

A member of the Swedish bar association has a duty to tell the truth. This duty is characterised as positive, meaning that the duty is limited. The lawyer has no obligation to give an account of all facts that have come to his or her knowledge. Unlike a witness, a lawyer may refrain from making statements about facts that are unfavourable to the client. A lawyer may also refrain from asking questions during the examination of his or her client and a witness even if the lawyer believes that the answers will be of great importance for the outcome of the case. To the extent a lawyer decides to make statements and acts positively, he or she has to keep to the truth. Subjectivism is accepted so far as a defender is empowered to select the facts to present to the court. The duty to tell the truth has different meanings for the defender and the prosecutor. They thus are not treated equally.

3.2 *Procedural Principles Limiting Objectivity*

3.2.1 The Principle of Relevance

The court is to ensure that no irrelevant matters are introduced during the main hearing. Questions and evidence aimed at offending a party, the victim or a witness are not to be presented. However, a court is to use its right to prohibit offending questions in a restrictive way. A question may be answered in many ways and it is often impossible for the court to know whether the question is justified. When the court is in doubt, it seems that it is to accept the question.

The prosecutor is not always allowed to pose questions to the accused and the victim about acts and statements that are embarrassing, but do not constitute any criminal act or have any bearing to the indicted acts. If the questions concern an act that has not been prosecuted due to lack of evidence, there are seldom reasons for the prosecutor to ask questions in this respect. If a judge would permit such a question, in theory there is a risk that the judge would unintentionally be influenced by the answers when considering other relevant factual or legal issues, in spite of the circumstance that such an answer as a rule has no relevance. The judgment is not to include any particulars about such irrelevant facts even in cases where the court deems that the accused ought to be strongly criticized for his or her behaviour.

When a party's counsel is cross-examining a witness, a judge may find certain questions irrelevant. When considering prohibiting questions, a judge ought to take into account that the questions often have been framed in such a way that the witness is not to understand the purpose of the question in order to

deprive the witness of the opportunity of adapting the answers in accordance with the interests of the other party. The question may in fact be highly relevant, for instance when the answers are intended to form only a minor part of an account of great importance. For these reasons, a judge is often disinclined to forbid a question that seems to be the first in a series of related questions. The judge can hardly require that the interrogator explain the aim of the question before it is allowed. The purpose of the question often has to be concealed from the witness. In Sweden, it is not a practice that the prosecutor and defender discuss matters with the judge *in camera*. A defender who has drafted a number of ingenious questions is normally not prepared to reveal them beforehand for the prosecutor.

3.2.2 The Principle of Not Becoming Personally Involved

The prosecutor is not to become personally involved in a criminal investigation; neither is he or she to commit in favour of the victim. If the prosecutor keeps a distance from the persons involved in the case, it will be easier to remain objective. In practice, there is only a minor risk that a judge on a communicative level will come too close to persons during the examination in the courtroom. However, there is a danger that a prosecutor or defender will lose their distance during such informal conversations with the accused or witnesses taking place before trial. The strict legal language used by lawyers counteracts that conversations take a personal turn. Prosecutors and defenders often use this language in court. They avoid emotional words. The victim, on the other hand, may give a detailed emotional account of a crime and its effects. This means that the prosecutor's opening statement often contrasts with the victim's narrative. Even if the victim's statements are emotional, they sometimes reflect the truth and the victim's personal experience of the crime. The principle of objectivity then constitutes no basis for the court to disregard the victim's emotional statements or to prevent the victim from giving an account for the relevant occurrence.

3.2.3 The Principle of Discretion

Under the law, the preliminary investigation is to be conducted by the police and the prosecutor in such a way that no person is unnecessarily exposed to suspicion or put to unnecessary expense or inconvenience. A prosecutor is to be considerate and discreet and to try to apply the same standard toward the suspect and any victims. The prosecutor and police are not to refrain from asking victims questions about sensitive matters when the answers would demonstrate that a crime has been committed or otherwise would affect an indictment decision. During the trial, the principle of objectivity may also force a prosecutor to ask sensitive questions, for instance in cases on sexual crimes. This can be necessary even if the victim considers the questions offensive. It is not easy to draw boundaries for acceptable questions that can be asked by a defender in such cases.

3.2.4 The Principle of Due Speed

The principle of due speed is applicable during all stages of the police investigation and the court proceedings. The principle does not justify inactivity.

A prosecutor is not to terminate a preliminary investigation without making any enquiries. The need for due speed is not to operate as a basis for a prosecutor to refrain from taking necessary measures. This is a misinterpretation of the law that violates the principle of objectivity.

The duty of the police to carry out needed enquiries is not to be thwarted by the application of internal procedures such as that police resources are to be divided equally between departments working with different kind of crimes. For fraud cases, the police had applied a routine that not more than four minutes should be used for deciding whether a police investigation should be initiated. This practice was held unacceptable. The reason for this was that it is not possible under such time pressures to conduct a sufficiently careful assessment of whether a reported crime should be formally investigated under the rules in the Code of Procedure.

If principles as to the allocation of governmental resources lead to the effect that no real investigations can be conducted, then there is a violation of the principle of objectivity. Only if there is support in the law may a prosecutor for cost reasons refrain from carrying out needed and relevant investigations. A prosecutor cannot, just as a legal scholar, excuse deficient work by lack of time or resources. The conflict between the requirement of objectivity and sparse governmental funds is of great importance and it is difficult to find simple solutions.

3.2.5 The Principle of Equal Treatment

It is a fundamental principle of procedure that the parties are to be treated equally. Under Swedish law, the victim is a party during the court proceedings if claiming damages or supporting the prosecutor in the criminal action. The victim is not a party during the preliminary investigation. During this stage, the suspect has procedural rights that the victim lacks. As soon as the preliminary investigation has proceeded to a point where a person is reasonably suspected of having committed a crime, this person is to be informed of the suspicion. The suspect or defence attorney may then require that other persons be examined by the police. The suspect and defence attorney are entitled to be present at such an examination. The victim has no unconditional right to be present under the law and is not empowered to force the police to carry out other supplementary enquiries. The police have no duty to examine a person just because the victim has requested that the police do so. Neither may the victim require a second police examination because the first interrogation did not give any support for the suspicion. As a rule, an interrogator is not to allow the victim's presence during police examinations. The reason for this is that statements made during such examination may influence the victim's statement in court. The evidence is not to be tainted in this manner. A legal representative assisting the victim according to the Code of procedure is to safeguard the interests of the victim and provide support. This legal representative has no duty to act objectively. This means that the representative may advise his or her client in such a way without regard to whether the police investigation is made more difficult. It is possible that the legal representative has an almost unconditional right to be present when the victim is examined just like a defender has this right during interrogations of his or her client.

The principle of equal treatment means that the police must not postpone the collection of evidence favourable to the suspect. There is a risk that oral evidence will deteriorate as time passes and even get lost. The police investigation is not to be conducted in such a manner that the police delay the collection of evidence advantageous to the suspect until all other evidence is secured. There is also a danger then that the police fail to investigate alternative hypothesis until it is too late to do so.

There is no general procedural principle on passivity safeguarding the impartiality of the judge. In order to be impartial in the eyes of all persons involved in criminal case, a judge usually intervenes only restrictively. Under the law, a judge has a duty to intervene and clarify things. A judge often is too passive, which means a violation of the objectivity requirement. For instance, a Swedish judge often refrains from forbidding unlawful questions as long as the defender does not make an objection.

A judge to some extent may assist the accused, but not the prosecutor. This is explained by the objective of avoiding erroneous verdicts of guilty. The victim and the accused sometimes have difficulties in explaining things for the court. Is the judge to assist the victim more restrictively than the accused? Assume that the statements made by the accused are incomplete but easy to understand. Then a court may be disinclined to ask the victim about circumstances that are detrimental to the accused, if the victim has failed verbally to explain those particulars. It is doubtful if the judge is to apply different standards for intervention in relation to the accused and the victim.

3.2.6 Principles on Examination

Sometimes an interrogator uses the technique of interrupting a person several times during an examination. This method can be employed in order to create an incomplete and distorted account or to reduce a witness' credibility. It can also be used to strengthen a party's position by influencing a witness to adapt a narrative in favour of the party. This technique is a clear violation of the principle of objectivity. Even if this principle is not formally applicable to a defender or the legal representative of the victim, they may not use this method. Neither is a prosecutor allowed to do so. During the examination in chief, it is evident from the Code of Procedure that a prosecutor or defender who has called a witness or victim may not interrupt them during the initial stage of the examination when they are to give their account in a continuous sequence. According to the wording of the applicable provision, a party who has called a witness is only allowed to ask questions if needed. The meaning of the word "need" does not entitle a party to interrupt a testimony whenever need is perceived, for example for tactical reasons. A prosecutor may only interrupt a testimony when the witness needs assistance. A prosecutor is empowered to ask questions with such need in order for have a witness to give a continuous and comprehensible narrative, for instance in cases where there is a gap in a chronological account. This kind of questions creates a more reliable testimony and makes it easier for the court to decide the case.

Sometimes the prosecutor will find that the accused has given a false account during the police investigation. This does not mean that the prosecutor is allowed to start a cross examination before the accused has been given an

opportunity to give an account before the court during trial. The judge is to end such an initial cross-examination. However, a judge is permitted to take over the examination before inviting the prosecutor to ask questions.

Leading questions may be asked during cross-examination. Confusing and undue questions are not allowed during any examination. The judge consequently is to prohibit questions which are confusing and may cause the witness to lose the thread. If an interrogator occasionally interrupts a witness and requests the witness answer complex questions at once, they can be characterised as undue. It is not always easy for a judge to decide whether a question is acceptable. Therefore, judges often remain rather passive and tacitly approve even somewhat confusing and undue questions. Presumably judges refrain from intervening in order to appear impartial. Such passivity many times does not constitute objectivity. In fact, it may include a subjective assessment if the passivity is partly caused by the judge striving to avoid an awkward atmosphere. As soon as a question is unacceptable, a judge is to intervene and prohibit it. If a judge were to approve that either a prosecutor or a defender asked a great number of such questions, the judge would be accepting several violations of the law. This means that one party is favoured in an inappropriate manner. The principle of objectivity does not create a basis for justifying a principle of passivity.

3.2.7 The Principle of the Burden of Proof and *Favour Defensionis*

There are principles that clearly favour the accused. The obverse of the coin is that the procedural positions of the victim and prosecutor are weakened. The prosecutor has the burden of proof. This presumption of innocence gives the accused advantages. This can be conceived as a limitation of the principle of objectivity. If the presumption of innocence is also to be reflected when questions are asked by a judge, the victim may perceive this as a sign of lack of impartiality. It seems that the principle of objectivity would create a basis for prohibiting such questions. A court instead is to frame them in a neutral way.

The principle *favour defensionis* means that a court is to construe procedural and criminal law provisions in favour of the accused when there is doubt of how the law is to be understood. This involves a court choosing an alternative favourable to the accused, but disadvantageous to the victim. This principle can also be understood as a limitation of objectivity.

3.2.8 The Principle of Cost Efficiency

Courts try to administer justice in a rapid and efficient manner and to limit governmental costs for adjudication. A judge's personal interest in facilitating and reducing a workload must not affect the management of the proceedings. The principle of cost efficiency does not justify this. A judge is to try to avoid creating an impression that he or she is more inclined to listen to the prosecutor and take account to his or her statements. A judgment or procedural order is not to be explained simply by reference to the prosecutor's arguments as expressed in a submission. The court is to take the trouble to draft intelligible reasons.

The police are not to try to convince a suspect that the accusation is a mere trifle in order to influence the suspect with respect to retaining counsel that would make the investigation more complex and time consuming. In order to

make a police investigation more cost efficient, several persons cannot be interrogating simultaneously in one room, even if the interrogator has strong reasons to believe that all persons will give the same account. The mere possibility that one of the persons may influence the others means that this kind of interrogation does not meet the requirements of objectivity. A method for examination is not to unnecessarily create dangers for reducing a person's credibility. Generally, interrogations are to be carried out in such a manner that crimes can be investigated as reliably as possible. Clearly inferior methods for interrogations cannot be accepted just because they would reduce governmental costs.

3.2.9 Does the Prosecutor have a Duty to be Objective at Trial?

A relative duty to be objective involves that a decision maker may refrain from being strictly scientifically objective where there are strong reasons for this. It may be questioned whether it is appropriate to apply the principle of objectivity only during some stages of the criminal proceedings and not others.

Under Swedish law, the prosecutor and police have a duty to collect evidence favourable to the suspect during the preliminary investigation. The Code of procedure does not state that there is duty for the prosecutor to act in the interest of the accused later on during the trial. Thus the law does not provide that a prosecutor has to ask questions if he or she believes that they may result in answers advantageous for the defence. However, it is provided in the Code that a prosecutor has a right to appeal in favour of the accused. It is a right, not a duty. This right has not been explained by the principle of objectivity, but by the right of a prosecutor to safeguard the state's interests in criminal proceedings. It seems unreasonable to accept a right for the prosecutor to refrain from appealing a verdict of guilty if he or she after the district court proceedings is convinced that the verdict is erroneous and the accused not guilty.

A leading commentator, Professor Ekelöf, has stated that the duty to be objective is to be observed by the prosecutor also during district court proceedings. He has added that there are different opinions in this respect amongst judges. He considers that a prosecutor ought to intervene in favour of the accused when the defender has failed to safeguard the interests of the defendant. He goes on to state that a prosecutor has to ask questions to parties and witnesses even if the answers may be favourable for the accused. Against these statements, in contrast is his view that prosecutors in practice will not be as active in favour of the accused as to his detriment. Ekelöf explain this by stating that the prosecutor otherwise would not be able to carry out the important mission in the struggle against crime. Other commentators have stated that the principle of objectivity has less importance when a defender assists the accused. Against this view it has been asserted that the prosecutor in such cases has a subsidiary responsibility and that he or she must not contribute to an erroneous verdict of guilty which later has to be appealed in favour of the accused. To summarize, it seems that the principle of objectivity is not strictly applied in criminal proceedings where the accused is assisted by a defender.

If the accused has no counsel, the prosecutor is to intervene in his or her favour when needed. The prosecutor must not rely on the courts ability or willingness to assist the accused. The prosecutor is not to wait to intervene until

convinced that the judge is not going to do so. The duty of a prosecutor to act in favour of the accused does not constitute grounds for a court to refrain from appointing a defender when the accused is entitled to a defender under the express provisions in the Code.

If there is a need to reopen the preliminary investigation after the indictment, the prosecutor ought to be bound by the principle of objectivity. This is also true where the prosecutor had come to the conclusion that it is necessary to collect further evidence in order to prove the case.

3.2.10 Does the Prosecutor have a Duty of Loyalty when Claiming Damages for a Victim?

The prosecutor is usually obligated to claim damages for a victim when so requested. Then the prosecutor has a position similar to that of a legal representative in civil law cases. The prosecutor therefore ought to have a duty of loyalty as counsel in civil proceedings. This duty of loyalty may conflict with the prosecutor's obligation to apply the principle of objectivity in relation to the accused. This latter duty ought to have priority, as the most important goal is to prevent erroneous verdicts of guilt. This goal ought to be more important than the victim's compensation interests. The relation between these two duties of the prosecutor is elucidated by example.

A prosecutor is not to meet a witness or victim shortly before trial to go through statements and prepare for questions that presumably will be asked by the defender. No undue influence may exist before the trial. It is important that witnesses and victims give true unaffected statements before the court. It is quite a different matter when supplementary enquiries are carried out. The prosecutor may not meet a victim and ask such questions and make such remarks that the victim becomes inclined to amend earlier statements and adapt accounts in the police report in favour of a claim for compensation. If some statements in the police report are vague and unclear because of the victim's incomplete memory, he or she is not to be influenced to change the statements. In civil law cases, it is common that counsel meet with a party's witnesses before the main hearing. When preparing a witness, the legal representative may assist a witness in remembering facts that supplement the account where there is a gap, and assist a witness as to realising the need to give true and reasonable explanations to statements that seem contradicting or strange. The legal representative may do so as long he or she is helping the witness to give a true and complete story. Such a pre-trial witness conference in the counsellor's office may create opportunities for the witness to give a comprehensive account. The convincing effect may increase.

It is scarcely consistent with the principle of objectivity that a prosecutor meets a victim to prepare for the defender's cross-examination in order to create opportunities for the victim to change the account before the cross starts. Extensive assistance provided by the prosecutor before the hearing in court may involve risks that the victim's statement only will reflect a kind of subjective "truth". The aim with this would be to achieve a verdict of guilty, which in turn will form the basis for the accused to pay damages to the victim. If a victim phones a prosecutor shortly before a trial to ask questions, the prosecutor is

restricted to comments and answers that create no ground for questioning objectivity.

The requirement of objectivity may perhaps be less stringent when the prosecutor's assistance does not concern matters of significance for criminal responsibility, but only concern damages or the amount of the damages.

It has been stated above that the prosecutor must not be strictly objective during the main hearing if a defender assists the accused. This is also true when the prosecutor is claiming damages in favour of the victim. In order to prove the criminal case and discharge the burden of proof, the prosecutor often needs to ask the victims such questions that result in answers that may support either the indictment or the defence. Such question may be asked where the victim's statements in court are incomplete or strange and explanations are needed to prove the criminal case.

4 Conclusions

Judges must always act in an impartial manner. This means generally that the principle of objectivity creates no theoretical or scientific problems. The scope and applicability of this principle causes great practical and theoretical problems for prosecutors. The duty of a prosecutor to act objectively is relative in many aspects due to the need to take into account important goals reflected in other procedural principles or in other significant procedural provisions. For these reasons, the principle of objectivity applicable to prosecutors deviates from that applied strictly in academic legal scholarship.