paramount. The French believe that a fair determination of the facts as well as protection of the rights of litigants is safeguarded by their system and they feel that the lack of strict and detailed rules of evidence gives better opportunity to the court to serve the ends of justice.

Sweden

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This report will outline briefly, and in broad compass, some of the salient characteristics of the prooftaking system in Sweden. Although it does not purport to do more than lightly skim the surface, reference is made in the notes to more detailed sources.

A principal feature of the proof system in Sweden, in both civil and criminal proceedings, is the absence of a prohibition of hearsay evidence. In general, the concepts of relevance and admissibility are co-extensive.[1] Thus, the permissible scope of examination at an adjudicatory session approximates that authorized for discovery under the Federal Rules of Civil Procedure: a witness may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Moreover, the court may freely evaluate all occurrences in the course of a proceeding – matters formerly urged as proof by one side or the other and the demeanor of witnesses, as well as the general deportment of the parties, and their claims of privilege with respect to testimonial or documentary proof.[2]

The main rule concerning exclusion of evidence is stated in the Code of Judicial Procedure as follows:

> If the court finds that a circumstance which a party desires to prove is without importance in the case, or that an item of evidence is unnecessary or evidently would be of no probative effect, the court should reject that proof. The court may also reject an offered item of evidence if the proof may be presented in another way with considerably less trouble or cost.[3]

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[1]There are, of course, exceptions. E.g., Code of Judicial Procedure 35:14 (written account of a statement made by reason of a pending or contemplated action is not admissible, except when specifically authorized by legislation, unless the court finds special justification for its admission).

[2]For a description of the proof-taking system in Sweden, *Ginsburg & Bruzelius, Civil Procedure in Sweden* 281-98 (1965).

[3]Code of Judicial Procedure 35:7. *See also* Code of Judicial Procedure 43:4 (specifying the court's obligation to insure that the case is fully developed and that irrelevancies are not introduced, and providing that, to this end, the court should, through questions and reminders, attempt to obtain amplification of unclear or incomplete statements).

Code provisions dealing with matters which may be taken into account in finding the facts include:

> After evaluating everything that has occurred in the proceeding in accordance with the dictates of its conscience, the court shall determine what has been proved in the case. . . . .[4]
> If a party fails to respond to a court direction to appear before it or to perform any other procedural act, or refuses to answer a question relevant to the investigation, the court shall determine, in view of all the attending circumstances, the evidentiary significance of the party's behavior.[5]

Sweden's approach to the question of admissibility is reflected in the form of witness examination authorized by the Code of Judicial Procedure. Although a literal reading of the Code provision[6] indicates that the primary interrogator is the judge, in practice, examination is generally conducted in the first instance by counsel. And in fact, it was the intent of the framers of the present Code, which became effective in 1948,[7] that, as judges and attorneys acquired experience under the revised procedure, counsel would assume the dominant role in questioning witnesses reserved under the old code to the judge. However, in sharp contrast to proceedings in the United States, and indeed unthinkable in a system operating under a regimen of tight exclusionary rules, the Swedish Code provides that a witness should commence his testimony by relating all he knows of the matter under investigation in narrative form, without interruption. After the witness has told his story in his own words, direct and cross-examination occur.[8] His testimony may be recorded verbatim, or, when the court and the litigants find it sufficient, in summary paraphrase.

The principal rule on witness examination reads as follows:

> Witnesses shall be examined by the court. With the consent of the court, however, a witness may be examined by the parties, initially by the party on whose behalf the witness has been called and subsequently by the adverse party.
> The witness should be invited to give his testimony in continuous sequence without interruption. After he has given his account of the matter on which his testimony was sought, the court and the parties may put questions to him. If it

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[4]Code of Judicial Procedure 35:1.

[5]Code of Judicial Procedure 35:4.

[6]Code of Judicial Procedure 35:17.

[7]An English translation of the Swedish Code of Judicial Procedure is scheduled for publication in 1968 as part of the American Series of Foreign Penal Codes. The Code governs both civil and criminal proceedings; some of its chapters apply to both, others exclusively to one or the other.

[8]Unlike the pattern familiar in the United States, in Sweden, counsel often remains seated while addressing the court and questioning witnesses, while witnesses generally stand throughout their examination. In most courtrooms the witness lectern is situated opposite the bench and between the tables provided for counsel and parties.

> is not evident from the testimony, the witness should be questioned as to the manner in which he obtained knowledge of the matters on which he has expressed himself. Absent special cause, questions inviting a specific answer by their content or form, or by the way they are presented, may not be put to a witness. The court shall exclude questions that are plainly irrelevant, confusing or otherwise inappropriate.[9]

In sum, receipt and evaluation of evidence tends to be regarded by contemporary Swedish judges as a common sense matter.[10] Sweden's less technical and relatively informal rules with regard to prooftaking should be assessed, however, in the light of the marked difference in the composition of an American trial court and that of a Swedish court of first instance. While laymen do participate in Swedish courts of first instance, they do not function as a common law jury. Rather, a panel of elected lay judges, 7 to 9 in number at a full hearing, deliberates together with the presiding judge, and under his guidance, takes part in the decision of questions of law as well as questions of fact. Because the lay judges must vote as a body, the professional judge generally has the controlling voice: The opinion of the lay judges will not prevail over the contrary opinion of the professional judge unless seven members of the lay panel agree upon both the decision and the reasons advanced in its support.[11]

Moreover, the Swedish judge remains governor of the trial in his relationship to the parties as well as to the lay judges.[12] As indicated earlier, he may conduct the examination of witnesses himself if he finds it appropriate. Of perhaps greater significance, the pre-trial development of a case occurs under the direct supervision of a judge. Swedish procedure does not offer to the litigants the largely extra-judicial discovery devices through which a litigant in the United States may obtain information as to his opponent's case. There are no out-of-court depositions, requests for admissions, documentary disclosures, or interrogatories.

On the other hand, Swedish procedure does keep distinct the preparation of a case and its formal presentation at a concentrated trial episode. During the preparatory stage, the parties disclose their respective positions and the evidence they wish to present. Although the initial disclosure generally takes the form of an exchange of writings roughly corresponding

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[9]Code of Judicial Procedure 35:17.

[10]*See* Bolding, *Aspects of the Burden of Proof*, in 4 SCANDINAVIAN STUDIES IN LAW 9 (1960).

[11]For further detail on the panel of lay judges (the *nämnd*), *see* GINSBURG & BRUZELIUS, CIVIL PROCEDURE IN SWEDEN 83, 112-17 (1965).

[12]*See* Ginsburg, *The Jury and the Nämnd: Some Observations on Judicial Control of Lay Triers in Civil Proceedings in the United States and Sweden*, 48 CORNELL L.Q. 253 (1963).

to pleadings, eventually there will be one and possibly several sessions in court at which the dimensions of the main hearing—the evidence and arguments urged by the contending parties in support of each of the disputed issues—will be outlined with a fair degree of precision. Often, the case or a part of it will be settled at the preparatory stage, or so pared down that summary adjudication at a so-called "little main hearing" can be effected.

By American standards, fact investigation and prooftaking in Sweden are inexpensive and, in many cases, correspondingly less exhaustive. Despite the 1948 innovations, the judge, who holds a career civil service position, plays a more paternalistic role, while the adversary style of the attorneys is less zealous than that with which we are familiar.[13] Our own system may well afford wider opportunities for refined, meticulous pursuit of the facts in the particular case. But it may be that in the generality of cases, the Swedish system does at least as good, and perhaps a superior, job. However, any evaluation of this nature cannot be stated, even tentatively, without the kind of study in depth that jurists alone are not competent to undertake. And it must be remembered, as so aptly put by Professor Benjamin Kaplan, that "in the end the mélange of rules and habits which together make up a procedural system somehow accords with the larger patterns of the society which the system serves."[14]

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[13]For a capsule view of Swedish civil procedure, *see Comment*, 14 AM. J. COMP. L. 336 (1965).

[14]Kaplan, *Civil Procedure: Reflections on the Comparison of Systems*, 9 BUFFALO L. REV. 409, 432 (1960).