Expert Knowledge as a Condition of the Rhetorical Situation in Criminal Cases

Eva Friis
Senior lecturer in Sociology of Law, Lund University
eva.friis@soclaw.lu.se

Karsten Åström
Professor in Sociology of Law, Lund University, and in Welfare Law, Linköping University
karsten.astrom@soclaw.lu.se

ABSTRACT:
This article focuses on the use of expert knowledge as a basis for legal decisions in serious criminal cases. Using a model that describes rhetorical situations, as well as empirical material based on 150 court decisions, the aim is to analyse the conditions surrounding the use of expert evidence in criminal law processes, to what extent and by whom such evidence is used, and how it affects the outcome of the cases. The rhetorical situation in criminal cases is reconstructed to include the exigence (urgent issue that requires addressing) and, thereby, the related discourse, in order to retrieve relevant conditions, which could be identified as evidentially favourable or unfavourable to the suspect and the prosecutor respectively. It is concluded that there is a theoretical imbalance between the parties to the benefit of the defendant. Empirically grounded analysis of the criminal cases shows, however, that the defendant’s theoretical advantage does not correspond to the actual situation in court. The results indicate that the defendant usually adopts a passive stance and therefore does not use favourable constraints effectively. The study also shows that the defendant’s chances of winning the case increase when they use written expert evidence and expert witnesses.

Keywords
Legal reasoning; expert knowledge; criminal law process; rhetorical situation; rhetorical constraints
1. INTRODUCTION

This article focuses on the use of expert knowledge in serious crime cases. An important component of the knowledge with which the expert provides the court constitutes a basis for the presented evidence. Therefore, this is a matter that concerns the fundamental basics of evidence and evidential evaluation – matters that pertain to all types of cases, but perhaps most saliently to criminal cases. Using a model that describes rhetorical situations as well as empirical material based on over 150 court decisions, the purpose of this article is to describe the prerequisites for the use of expert evidence in criminal law processes, to what extent and by whom such evidence is invoked, and to what extent it affects the outcome of the cases.

1.1 The criminal law process

The criminal law process in Sweden is regulated by the Swedish Code of Judicial Procedure (Rättegångsbalken: hereinafter RB). A criminal case is initiated by a preliminary enquiry, which, when a suspect is held on good grounds, is led by a prosecutor (RB Ch. 23). Should the prosecutor find that there are good grounds for prosecution and that there is no cause for exemption, he is to bring a prosecution (RB Ch. 20, § 6). The court’s consideration of charges occurs in two stages: a hearing of evidence at a main hearing, and a subsequent evaluation of the evidence following the hearing’s conclusion (RB Ch. 30, § 7, Ch. 43 § 8, Ch. 46, § 6).

The procedures of the main hearing are contradictive, since (at least) two parties are positioned against each other, and both have equal right to full disclosure of, and response to, each other’s court documents. Further, it is the responsibility of the parties to provide evidence (RB Ch. 35, § 6). In accordance with the right to fair trial under the European Convention on Human Rights (ECHR) Article 6, the parties shall have equal rights to produce both evidence and rebuttals. The court may also obtain evidence (RB Ch. 35, § 6), but should first bring the need for additional complementary material to the parties’ knowledge. The objective is to delimit the court’s work to evaluating the body of evidence presented in the case. By doing so, the court’s objectivity is assured, while it is also provided with a contextual overview of the entire body of evidence.

The expert’s role in court is to contribute non-legal expertise to the case. Such expertise is brought to the fore in the court’s evaluation of evidence, during which the judge should take consideration of ‘general experience’, but should not rely on his own knowledge in issues that pertain to specialized knowledge. The parties may appoint an expert or request the court to appoint such a person. The court may obtain expert evidence ex officio (RB Ch. 40, § 1), but should consult with the parties first (RB Ch. 40, § 3).

However, the use of expert evidence is not uncontroversial, as is apparent in a number of appeal reviews in which experts have played a significant role in incorrect decisions. In some cases, it is also apparent that the defendant has not been afforded the same opportunity to produce expert evidence as the prosecutor. Experts are often invoked to assess the credibility of both the plaintiff’s and the defendant’s testimony in these cases.
expert opinions in court are not limited to credibility assessments and testimonials, but can also underlie written evidence, such as technical evidence based on DNA analyses, or opinions based on forensic medicine and psychiatric enquiries.16

In the present article, we study the role of expert knowledge as evidence in crime cases. We explore, in part, the theoretical and practical opportunities afforded to defendants to invoke and make use of expert evidence in comparison to prosecutors, and, in part, how prevalent expert evidence is and how it affects case outcomes.

Our methodological starting point is that the contradictory (adversarial) court process is fundamentally a rhetorical activity.17 The problem can therefore be understood and analysed by using a model of a rhetorical situation.18 This model exemplifies the rhetorical components of a speech situation in the form of a speaker who wishes to achieve an objective, an audience that decides whether the speaker succeeds or not, and the conditions the speaker must relate to and invoke to influence the audience’s decision. As an analytical model, it is useful in all contexts in which rhetorical situations arise, including criminal cases.

The rhetorical situation includes the preparation for, and performance of, rhetorical speech, while the audience’s responses to the speech are a part of its (the audience’s) rhetorical situation.19 In criminal cases, two rhetorical situations can be discerned. The first arises in the prosecution and continues during court proceedings until the ruling. The other situation occurs when the court is to compose its written reasoning, and continues until the decision has been published.20 In the former situation, the audience consists of the court, while in the latter it consists of various groups, such as involved parties, the legal staff of a judicial review, and the legal society in general.21 The first-mentioned of these two situations is here denoted as the procedure-related rhetorical situation, and the second-mentioned as the decision-related rhetorical situation.22

The present study concerns the procedure-related situation. We use the written decisions to gather quantitative data on how the parties use expert evidence, and how this relates to the outcome of the case. We do not, however, conduct a qualitative analysis of the rhetorical style and argumentation in the decisions that might, for example, determine how well the court communicates the justice of the decision to the involved parties.23

1.2 The rhetorical situation – the model and the application

In a rhetorical situation,24 the speaker is faced with a (real or potential) exigence or urgent issue that can be changed through discourse.25 The change is mediated through an audience whose decisions and actions the speaker strives to influence through discourse. The situation involves conditions or constraints,26 which have the power to constrain and enforce the decisions, and actions that are necessary to deal with the urgent issue. The speaker both adapts his discourse to the constraints and uses them to influence the audience’s decision.27

When the speaker enters the situation and responds with discourse, new constraints are added, such as the speaker’s personal character, logical proofs or arguments and stylistics.28 This means that there are two classes of constraints: (1) those that can be sourced to the speaker or are managed using the speaker’s method, and (2) other constraints of the situa-
tion that may be operational. This division of constraints corresponds to Aristotle’s ‘artistic’ and ‘inartistic’ proofs.29

Rhetoric, according to Aristotle, is an art that is tasked with examining what is persuasive or not in each individual case, while its benefit is to persuade people.30 The inartistic forms of persuasion are those not made accessible by the speaker but are ‘already present’, while the artistic are those that can be produced by the speaker through the art of rhetoric.31 The first means of persuasion – the inartistic – the speaker must make use of, while the second -the artistic – he must find himself. The artistic means of persuasion are linked to the speaker’s character or ethos, the emotions the speech may stir in the audience to pathos, and the actual argument itself to logos.32 In the context of the criminal case, this entails that the evidence and expert opinions presented during the preliminary enquiry and presented as evidence in the main hearing are ‘inartistic’. The rhetorical function and value of this evidence depends on how the parties use them.33 Therefore, it is the parties’ use of the evidence for the purpose of influencing the court that makes it ‘artistic’ evidence. The following examples of expert evidence may illustrate its rhetorical function.

The rhetorical value of an expert statement lies primarily in that it constitutes relevant, expert opinion in the matter under investigation.34 An expert statement, invoked by a party to strengthen a claim concerning actual facts, appeals first and foremost to the members of the court’s logos – their intellectual and rational capacity to draw conclusions.35 Therefore, it is the expert’s professional competence that guarantees the credibility of the statement. Professional competence is associated with the expert role, and the expert role is endowed with high personal credibility in contemporary society.36 This also means that ethos is involved in this form of rhetorical influence.37 It is, then, not so much the experts’ competence in the matter at hand that determines the court’s acceptance of the statement, but rather the credibility they impress on the court members in their capacity as experts. For the audience to be persuaded, it is important that they have confidence in the speaker.38 Ultimately, it is the audience’s feelings concerning what the correct facts of the matter are that is the decisive point, which experience constitutes rhetorical pathos.39 This means that the expert can also be used to influence the court members’ intuitive understanding of the objective facts.

The key components of a rhetorical situation are thus the rhetorical constraints. In the following, the relevant constraints in criminal cases are investigated in three steps:

Firstly, the constraints of the average criminal case situation’s urgent issues are reconstructed, viewed from a social perspective, and from that, the associated discourse. The focus here is on constraints that may be operational, i.e. constraints that ‘already’ exist within the situation and that the speaker might theoretically use. Relevant operational constraints in this context would be those that affect the parties’ evidential prerequisites in the form of laws, policies and legal practice, which are denoted as evidence-related constraints. These are bound to constraints that are either favourable or unfavourable to the parties’ objectives, and are identified in the following as favourable and unfavourable.40

In the second step, the study examines who in actual fact uses the evidence-related constraints by invoking evidence during the proceedings, the extent to which this occurs,
as well as the outcome of the cases based on the empirical material of written decisions. Our particular focus is on constraints related to expert evidence.

In the third and final step, the theoretical benefits of the constraints are compared with the practical benefits they imply for the parties.

In practical use of evidence-related constraints, the parties may seek an advantage by linking themselves to constraints associated to them as persons and to their methods. In the following, these are distinguished from operational constraints by denoting them as method-bound constraints. These should be noted in the analysis in stage two, to the extent that their use can be inferred from the empirical material.

2. EVIDENCE-RELATED CONSTRAINTS AT A GENERAL LEVEL

2.1. Introduction

In the following, the rhetorical situation of the criminal case is reconstructed to include the urgent issue and the thereby related discourse, in order to retrieve the relevant constraints. The focus is on the operational constraints of the procedure-related situation, which, from a rhetorical point of view, could be identified as evidentially favourable or unfavourable for the criminal suspect.

The urgent issue in this current situation links to the legal proceedings brought against criminal suspects. On a general level, the discourse concerns the balance between the legal certainty of the rule of law and the legal rights of security before the law. On the one hand, legal certainty must guarantee that the suspect is not found guilty of a crime unless guilt is established beyond reasonable doubt. On the other hand, one must also take into account the general public’s legal rights not to be subject to crime and, should a crime occur nevertheless, that all reasonable steps are taken to bring legal proceedings against the guilty party. A strict enforcement of the first principle risks leading to a number of guilty persons walking free, which threatens the legal rights of the general public, while strictly maintaining the latter principle risks having the opposite effect. Regardless of which direction such an exaggerated reaction might take, it risks leading to a loss of confidence in law and justice in the general public.

The solution to the problem, according to the Swedish model, is an accusatorial procedure with inquisitorial elements. The preliminary enquiry is characterised by an inquisitorial and truth-searching investigation led by the prosecutor, who also decides whether prosecution is to be instigated. During the main hearing, the procedure is essentially accusatorial, which entails that it is based, on the one hand, on the parties, and, on the other, on the court as one of these independent bodies. Since the court also has a responsibility for the enquiry with regards to the issue of liability, and even more so when passing sentence, the negotiating procedure also includes inquisitorial elements. The functions of the procedure can therefore be described as enforcing the law during the investigation, while the main hearing strives for both law enforcement and legal certainty, as well as emphasising legal certainty during deliberations.
Based on this, operational constraints related to evidence at a general level can be divided into three groups: constraints that are associated with (1) the preliminary enquiry; (2) the hearing, and (3) deliberations. In the following sections, the theoretical value of evidence-related constraints generated from these three situations is examined in terms of favourable or unfavourable constraints for both the defendant as well as the prosecutor.

The subsequent sections are based on an empirical approach, and the study is founded on a body of collected written decisions. In this section, we thus examine the practical use of evidence-related constraints, focusing on constraints related to expert evidence. This section ends in conclusions about the relationship between the theoretical values of the constraints and their actual, practical benefits.

2.2 The constraints of the preliminary enquiry

Among the principles and rules that regulate the preliminary enquiry, the following are the most relevant evidence-related constraints.

One such constraint that significantly favours the defendant is the prosecutor’s duty of objectivity. The prosecutor shall, during the preliminary enquiry, consider not only evidence that is unfavourable to the defendant, but also evidence that is in their favour (RB Ch. 23, § 4). In contrast, the suspect has no obligation to assist the prosecutor during the preliminary enquiry, and can remain passive. Indeed, the suspect need not speak at all during the questioning of the preliminary enquiry, or later during the main hearing.

An individual who is suspected of a crime on good grounds has the right to defence counsel (RB Ch. 21, § 3). This right is associated with a number of favourable constraints for the suspect that simultaneously weaken the prosecutor’s advantage during the preliminary enquiry. For example, the suspect and their defence counsel have the right to continuous full disclosure of whatever emerges during the preliminary enquiry – albeit on the condition that this can be accomplished without harming the enquiry (RB Ch. 23, § 18). The defendant and defence counsel only have the unconditional right to full disclosure of copies of the preliminary enquiry if the prosecutor decides to bring charges (RB Ch. 23, § 21). This right does not include material that relates to details in the preliminary enquiry but does not pertain to the proceedings.

Another important provision is that the suspects and their defence counsel have the right to request additional investigation and otherwise cite whatever they consider appropriate (RB Ch. 23, § 18).

To balance the suspect’s advantageous position, the prosecutor is assigned special procedural powers. In this area, the constraints are instead favourable for the prosecutor and unfavourable for the suspect.

A favourable constraint for the prosecution is that the prosecutor leads the preliminary enquiry, and therefore also determines how the enquiry is to be conducted. By virtue of their leadership role, the prosecutor also receives a greater overview of the information in the matter than the defendant, and can control the dissemination of information.

Another favourable constraint for the prosecutor is the procedural coercive measures at their disposal, including detention and arrests, communications surveillance and house
searches. Perhaps the deprivation of liberty is the most intrusive coercive measure (RB Ch. 24), since the suspect is then isolated from the outside world.\footnote{55}

In summary, the constraints that relate to evidence presented during the preliminary enquiry can be grouped into three categories: (1) the prosecutor’s duty of objectivity; (2) the suspect’s right to defence counsel and the rights granted to the defence, and (3) the prosecutor’s special procedural powers and control of information during the preliminary enquiry. The first and second categories of constraints are favourable for the suspect and unfavourable for the prosecutor. The third category of constraints is favourable for the prosecutor and unfavourable for the suspect.

2.3 The constraints of the main hearing

During the main hearing, evidence is presented. Among the provisions and principles that generate evidence-related constraints, the following are particularly important.

The adversarial principle (ECHR Article 6) entails that the parties have the right to full disclosure of the evidence in the case, and should also be granted the necessary time and practical opportunities to respond to the evidence and produce evidence in rebuttal.\footnote{56} Further, the process should guarantee equality between the parties, meaning that if one party is permitted to take a procedural action, such as introducing new evidence at a late stage, the other party should also be granted the same opportunity.\footnote{57}

Specifically regarding expert evidence, expert opinion should be presented at the preliminary enquiry and must then be immediately forwarded to the parties (RB Ch. 40, § 7).\footnote{58} Additionally, the expert can also be heard at the main hearing (RB Ch. 40, § 19).

The prosecutor’s duty of objectivity implies that expert opinions that are favourable for the defendant cannot be withheld from him or her. A defence counsel who has obtained an expert opinion that is unfavourable for their client, however, may conceal this.\footnote{59} This option, in conjunction with the defendant’s other privileges vis-à-vis the prosecutor, such as the defendant having the right to lie, or that their lawyer can limit their proceedings to circumstances that benefit their client,\footnote{60} is based on the principle that the defendant is not obliged to incriminate themselves (the privilege against self-incrimination).\footnote{61} This principle generates evidentially favourable constraints for the defendant and unfavourable constraints for the prosecutor.

The adversarial principle is often termed the negotiating principle, which refers to those activities the parties may conduct of their own will.\footnote{62} The court’s option to work actively and independently in the process is usually attributed to the official principle.\footnote{63} It involves the court’s option for a direction of proceedings (RB Ch. 46, § 4), which, in conjunction with other investigation-related options, constitutes an inquisitorial element.\footnote{64} For example, the court may appoint an expert ex officio (RB Ch. 40, § 1) as well as reject evidence that it deems irrelevant (RB Ch. 35, § 7). The court may not intervene in the enquiry in any way that benefits one party, which follows from the tenet of equality. On the other hand, the court is presumed to be able to take the initiative to eliminate any ambiguity without prior consideration of whether this may favour either party.\footnote{65} This means that the constraints that are linked to the court’s option for direction of proceedings should be regarded as equally favourable or unfavourable to the parties.
During the oral proceedings, the parties have the opportunity to use method-bound constraints. Under the adversarial principle, the parties shall have equal opportunities to be heard during the main hearing, and the rules of procedure (RB Ch. 46, §§ 6, 9, 10) should therefore produce constraints that are equally favourable.

In summary, the constraints that relate to the main hearing can be divided into three categories: (1) the adversarial principle, which requires that the parties are treated equally, but allows some benefits for the defendant since the prosecutor, unlike the defendant, has the duty to talk truth; (2) the official principle, which allows the court some leeway to intervene in and control the process, and (3) rules of procedure for the parties’ activities during the main hearing, which allow them the option to use method-bound constraints. The implication of the parties’ constraints in the first category of constraints is that these are favourable for the defendant and unfavourable for the prosecutor. The constraints of the other two categories are equally favourable or unfavourable for the parties.

2.4 The constraints during deliberations

The evidence is evaluated during deliberations. The court shall, after conscientious examination of all the facts that have been presented in the case, decide on what has or has not been proven (RB Ch. 35, § 1). This provision expresses the principles of freedom of evidence and free evaluation of the evidence.

However, the court is bound during the evaluation of evidence by the prosecutor’s statement of the acts as charged, and must judge according to the statements contained therein (RB Ch. 30, § 3). Furthermore, the decision is based on the evidence presented during the main hearing (RB Ch. 30, § 2). This principle of immediacy implies that the decision can only be based on the evidence presented at the main hearing and the conclusions the court draws from this. A further implication is that court members are prohibited from using private knowledge of relevant facts during the evaluation of evidence.

It is of crucial importance for the outcome of the evaluation of evidence that the standard of proof is high (established by Supreme Court practice), which entails that the defendant’s guilt must be established beyond reasonable doubt. Evidence evaluation focuses on constraints that exclude the defendant’s criminal liability, which is premised on the court providing alternative hypotheses. It is the prosecutor who bears the burden of ensuring that this high standard of proof is met.

In summary, the evaluation of evidence is expected to focus on legal security. The implication, however, entails constraints that are favourable for the defendant, but unfavourable for the prosecutor.

2.5 Evidence-related constraints on a general level — conclusions

One conclusion of this inversion of evidence-related constraints is that there is a theoretical imbalance between the parties’ evidential constraints, to the benefit of the defendant. A summary of the constraints and their theoretical values is presented in the graph below.
Table 1. Summary of evidence-related constraints and their theoretical values

<table>
<thead>
<tr>
<th>Constraints/value</th>
<th>Prosecutor</th>
<th>Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preliminary Enquiry: Prosecutor’s duty of objectivity</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>Preliminary Enquiry: The defendant’s right to defence, the defence’s rights</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>Preliminary Enquiry: Prosecutor’s control of the preliminary enquiry, special procedural powers</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>Main Hearing: The contradictive principle</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>Main Hearing: The official principle</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Main Hearing: Rules of Procedure</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>Deliberations: High standard of proof, prosecutor’s burden of proof</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>Values Summary</td>
<td>3 +/4 -</td>
<td>6 +/1 -</td>
</tr>
</tbody>
</table>

3. THE USE OF CONSTRAINTS RELATED TO EXPERT EVIDENCE

3.1 Introduction

The following text explores the issue of how constraints related to expert evidence are invoked in practice in criminal case procedures, based on the results of a quantitative study of written criminal case decisions. The study includes court cases published in 2010 from three different courts (a large, a medium-sized and a small district court). In some cases, the decisions have been reviewed in the Court of Appeal, which is why a number of appeals decisions are also included and categorised under each court case respectively in the material.

The compilation of criminal case decisions was conducted in two stages:

1) Swedish courts register cases in an automatised data-processing system called VERA. Using VERA, a list was compiled of database hits for all cases of offences against the person under public prosecution that were ruled upon during 2010 at each court. In all, the hits produced 1,055 criminal case decisions.

2) We decided to delimit ourselves to serious crime, since we determined that expert participation was more likely to occur in serious crimes than in less serious. We selected the crime categories of rape (including statutory rape), violation of women’s integrity, aggravated assault, and murder/manslaughter including attempted (of both children and adults), as well as a category for other serious crimes. The selection was conducted using the record sheet of the statement of the act as charged that accompanies all decisions. After the selection, 151 verdicts remained.

The majority of the material (123 verdicts) consists of decisions involving one defendant. However, a number of decisions (28 verdicts) involve two or more defendants. Analysis is based on either the total number of verdicts or on those verdicts with only one defendant.
3.2 The study in relation to the legal procedure in general

The legal process moves forward via a progressive decision-making system that screens out certain crimes from the process at each stage, while others continue toward prosecution. In 2010, almost 1.4 million crimes were reported to the police. In roughly over a tenth of the crimes, the preliminary enquiry led to criminal proceedings, of which two-fifths resulted in a conviction in the district court. This can be compared to the results of the present study, in which over four fifths of criminal proceedings led to conviction.

Offences against the person constitute a relatively marginal crime category. One explanation for the differences in results may be that the prosecutor spends more time on the criminal investigation in this type of case than in other types of cases. This could be because serious crime cases demand a full investigation. Other contributing factors may be general public morals or a desire to maintain confidence in the administration of justice.

A comparison of the crime rate in this study and official crime statistics shows greater consistency. The largest single crime category within the group of offences against the person is assault. In the present study, aggravated assault constitutes over a third of the reviewed crimes (all decisions). Further, according to this study, the second largest category consists of sexual offences against children and adults, which account for a fifth of the crimes, closely followed by violations of a woman’s integrity, which make up almost one fifth. Less common are murder/manslaughter (including attempted), which represent less than one tenth of the crimes. Finally, the category for other serious crimes constitutes one sixth of the criminal investigations.

The relative distribution of decisions according to type of crime is summarised in the table below.

Table 2. The distribution of verdicts according to type of crime (in percentage, rounded values), N = 151

<table>
<thead>
<tr>
<th>Type of crime</th>
<th>Proportion of verdicts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aggravated assault</td>
<td>37 %</td>
</tr>
<tr>
<td>Rape (including statutory rape)</td>
<td>20 %</td>
</tr>
<tr>
<td>Gross violation of women's integrity</td>
<td>18 %</td>
</tr>
<tr>
<td>Murder/manslaughter, including attempted</td>
<td>9 %</td>
</tr>
<tr>
<td>Other serious crimes</td>
<td>16 %</td>
</tr>
<tr>
<td>Total</td>
<td>100 %</td>
</tr>
</tbody>
</table>

3.3 The use of evidence-related constraints in general

The present study examines the use of four types of evidence that are mentioned in the law (RB) and can therefore be considered operational evidence-related constraints. These consist of the defendant’s confession, non-expert witnesses, expert witnesses, and expert opinions or equivalent written evidence. The use of expert evidence has been examined with regards to both liability and passing sentence. This section covers the general features of the use of evidence-related constraints, and focuses on confessions and other parties.
statements as well as witness evidence not included in the expert evidence. The following section focuses on constraints related to expert evidence.

The defendant’s confession constitutes evidence (RB Ch. 35, § 3) that corroborates the prosecutor’s statement of the criminal act as charged in its relevant details.\(^8\) The defendant’s not-guilty plea to the criminal act as charged means, in general, that the prosecutor has a more difficult task.\(^8\) The present study includes prosecution cases that are wholly or partly based on confessions in nearly half of the cases. Full confessions are less common, and occur in about one in ten cases. Partial confessions occur in slightly over one third of all cases. In almost half of the cases, the defendant wholly denied the statement of the criminal act as charged.\(^7\) The results show that a not-guilty plea on the one hand increases the likelihood of acquittal, but on the other show that the most common outcome in such situations is a conviction.\(^8\)

The evidential value of either a confession or a not-guilty plea largely depends on factors related to the method-bound constraint. This concerns the credibility and reliability of the individual giving testimony and of the given testimony,\(^9\) which in conjunction involve all forms of artistic evidence (ethos, logos and pathos). The evidential value may also increase if further evidence is presented in the case that strengthens the credibility of the testimony,\(^9\) which then comes to involve the use of operational constraints.

In its decisions, the court generally refers to the narratives of the injured person and the defendant during deliberations.\(^1\) In many decisions, it is not clear how the court has arrived at its assessment of the credibility of the parties and their testimonies. In cases where it is made clearer, the court uses the term credibility for both the party and their testimony. Based on the available data, one can discern the following pattern: in over half of the verdicts (all decisions), the injured party and their testimony were assessed to be wholly credible, while the defendant and their testimony were deemed wholly credible in only a tenth of the verdicts.\(^2\) Furthermore, one can conclude (of decisions that involve one defendant) that the likelihood of conviction increases if the injured person’s testimony is deemed fully credible, or if the defendant’s testimony is considered less credible.\(^3\)

Regarding operational evidence-related constraints, results show that the most widely used form of evidence consists of non-expert witnesses. The study shows that the prosecutor primarily uses this type of witness evidence, while it is seldom invoked by the defendant. In over four-fifths of the verdicts, non-expert witness evidence was invoked by the prosecutor, and in just under a third of the verdicts by the defendant.\(^4\)

A focus on the crime type (all cases) shows that non-expert witnesses were commonly used by the prosecutor in cases concerning gross violations of women’s integrity, as well as being common in rape crimes and aggravated assault cases. This type of evidence was also common in the categories of murder/manslaughter (including attempted) and other serious crimes.

A compilation of the prosecution’s and the defence’s use of non-expert witness evidence for each type of crime follows below.
Table 3. The prosecutor’s and defendant’s use of non-expert witness evidence for each type of crime (per cent, rounded values), N=151

<table>
<thead>
<tr>
<th>Type of crime</th>
<th>The prosecutor’s use of non-expert witnesses</th>
<th>The defendant’s use of non-expert witnesses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aggravated assault</td>
<td>86 %</td>
<td>34 %</td>
</tr>
<tr>
<td>Rape (including statutory rape)</td>
<td>87 %</td>
<td>29 %</td>
</tr>
<tr>
<td>Gross violation of women’s integrity</td>
<td>96 %</td>
<td>22 %</td>
</tr>
<tr>
<td>Murder/manslaughter, including attempted</td>
<td>69 %</td>
<td>50 %</td>
</tr>
<tr>
<td>Other serious crimes</td>
<td>58 %</td>
<td>25 %</td>
</tr>
</tbody>
</table>

If one analyses the cases according to confession and not-guilty pleas (cases that involve one defendant), we see that the prosecutor invoked witness evidence in more than four fifths of each case category. With regards to the defendant, witness evidence is most commonly associated with not-guilty pleas, and is also used in partial confession, but hardly occurs at all in connection with full confessions.95

Further, a clear correlation emerges between, on the one hand, the prevalence of witnesses that contribute non-expert status to the prosecutor’s case, and on the other, credible injured person’s testimonies and convictions.96 With regards to the defendant, there is no clear correlation between their credibility and the use of non-expert witness evidence. The relationship is clearer with regards to acquittals, where defendants invoked witness evidence in more than two fifths of the cases. This compares with convictions where witness evidence was invoked by the defendant in only roughly a quarter of cases.97

In summary, the results thus far indicate that the defendant’s theoretical advantage does not correspond to their actual situation in court. Part of the explanation lies in their actions being of a defensive nature, either in the form of full or partial confession, or by not seeking to disprove the prosecution by invoking witness evidence to any significant degree. Such actions favour the prosecutor. Another part of the explanation lies in the prosecutor’s offensive role, which leads to an evidential advantage. Primarily, it is the prosecutor that invokes witness evidence, to strengthen the credibility of the injured person’s statements, for example.

3.4 About constraints specifically related to expert evidence

The term ‘expert’ in the present study refers to individuals with special knowledge (cf. RB Ch. 40, § 1). Included in the group of experts are technicians (the staff of the National Forensic Centre and of the police), physicians, psychiatrists, psychologists and nurses (with medical, psychiatric, psychological and forensic expertise), as well as correction, probation and social services officers. We have included the written reports and opinions of these expert groups in the category of expert statements (or equivalent).98 This kind of written expert evidence is referred to as expert opinion.

Expert evidence occurs to a far greater extent in the form of written statements to the court than expert testimony during the main hearing. Primarily, forensic experts, doctors
and psychiatrists followed by forensic scientists are involved in the cases. It is less common for more than one expert to be involved in one case, but it does occur in nearly one third of cases, generally as a combination of forensic scientists and physicians.

One expert witness group that is not visible in our material is witness psychologists and other professionals who specialise in credibility assessments of witnesses and their statements. Other research showing similar results has linked this to Supreme Court recommendations to use expert opinion restrictively when assessing the credibility of an individual heard in person in court.

It is clear that the constraints concerning the prosecutor’s and the defendant’s options to invoke expert evidence differ considerably. In two thirds of cases (all decisions), the prosecutor relied on expert opinion, while expert witnesses were called in less than one fifth of the cases. The defendant invoked expert opinion in one sixth of the cases, and called expert witnesses in less than one tenth of the cases.

Turning to types of crime (all cases), the prosecutor regularly invokes expert opinions in cases of murder/manslaughter including attempted, and usually also in aggravated assault cases. The rate decreases for other categories of crime and occurs in almost two out of three cases concerning gross violations of women’s integrity, while the prosecutor uses expert opinions in less than every other rape case. The reason that expert opinion is not used in these two types of cases to the same extent as in the first two could be the lack of documentation of the effects of the crime, for example damages or other evidence such as DNA. The rate is also relatively lower in the category for other serious crimes, where expert evidence that supports the prosecution’s case is invoked in roughly every other case.

Expert witnesses who favour the prosecution’s case were, with one exception, less common. This exemption concerns murder/manslaughter including attempted, where expert witnesses were called in more than half of cases.

In comparison with the prosecutor, the defendant invoked expert evidence less frequently, with the exception of the category of murder/manslaughter, including attempted.

A compilation of the prosecutor’s and the defendant’s use of expert evidence follows below.

Table 4. The prosecutor’s and defendant’s use of expert opinion and expert witnesses in each type of crime (in percentage, rounded values), N = 151

<table>
<thead>
<tr>
<th>Type of crime</th>
<th>Use of expert opinion: Prosecutor</th>
<th>Defendant</th>
<th>Use of expert witness: Prosecutor</th>
<th>Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aggravated assault</td>
<td>84 %</td>
<td>16 %</td>
<td>10 %</td>
<td>2 %</td>
</tr>
<tr>
<td>Rape (including statutory rape)</td>
<td>45 %</td>
<td>13 %</td>
<td>22 %</td>
<td>10 %</td>
</tr>
<tr>
<td>Gross violation of women’s integrity</td>
<td>63 %</td>
<td>15 %</td>
<td>15 %</td>
<td>4 %</td>
</tr>
<tr>
<td>Murder/manslaughter, including attempted</td>
<td>92 %</td>
<td>30 %</td>
<td>53 %</td>
<td>23 %</td>
</tr>
<tr>
<td>Other serious crimes</td>
<td>50 %</td>
<td>0 %</td>
<td>20 %</td>
<td>17 %</td>
</tr>
</tbody>
</table>
When the judgments (that involve one defendant) are divided into cases including full or partial confessions as well as not-guilty pleas, the following pattern emerges: the prosecutor’s use of expert witnesses occurred in just over one in ten cases in which the defendant confessed in full or in part, and increased to almost one in four of cases where the defendant had pleaded not guilty. Expert opinion was more prevalent, and was invoked by the prosecutor, in roughly two thirds of the cases concerning full or partial confessions, as well as cases of not-guilty pleas. The defendant’s use of expert witnesses and expert opinions was extremely marginal in cases including confessions, but somewhat more frequent in cases that included not-guilty pleas.

With regards to the relationship between expert knowledge and acquittals/convictions, the study shows the following pattern (in decisions that involve one defendant): the prosecutor’s use of expert opinion was linked to convictions in nine of ten cases, compared to convictions in eight of ten cases in which the prosecutor had not used such evidence. The prosecutor’s use of an expert witness was linked to convictions in seven of ten cases, compared with convictions in nine out of ten cases in which the prosecutor had not used such evidence. The likelihood of conviction thus decreases when the prosecutor uses expert witnesses.

On the part of the defendant, the likelihood of an acquittal is increased by invoking expert evidence, although the most common verdict in these cases, too, is a conviction. The court arrived at an acquittal in four in ten cases (that involve one defendant) where the defendant invoked expert opinion, compared to one in ten in cases where expert opinion was not invoked. Acquittals were announced in three in ten cases in which the defendant had called an expert witness, in comparison to nearly every sixth case that did not involve an expert witness. Therefore, we see here that the defendant’s use of expert witnesses increases the likelihood of acquittal.

A compilation of case outcomes in relation to the use of expert evidence follows below.

<table>
<thead>
<tr>
<th>Case outcome</th>
<th>Use of expert opinion: Prosecutor</th>
<th>Defendant</th>
<th>Use of expert witness: Prosecutor</th>
<th>Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Acquittal</td>
<td>12 %</td>
<td>20 %</td>
<td>40 %</td>
<td>10 %</td>
</tr>
<tr>
<td>Sentence</td>
<td>88 %</td>
<td>80 %</td>
<td>60 %</td>
<td>90 %</td>
</tr>
<tr>
<td>Total</td>
<td>100 %</td>
<td>100 %</td>
<td>100 %</td>
<td>100 %</td>
</tr>
</tbody>
</table>

Finally, it is worth commenting on the use of expert evidence in relation to the court’s deliberations on the sentence. In just over two-fifths of the cases that led to convictions (involving one defendant) the court referred to expert opinion. In nine out of ten of these cases, the court followed expert advice when passing sentence. In conclusion, the results of the use of expert evidence when deliberating the question of guilt confirm that the defendant’s theoretical advantage does not correspond to the actual situation in court. Primarily, it is the prosecutor who invokes and uses expert evidence, and also often wins the case.
Even without expert evidence, the likelihood of a conviction is high, but it increases further when the prosecutor invokes expert evidence in written form. The same does not apply, however, when the prosecutor summons an expert witness. One explanation may be that in a court hearing, the expert is subject to the defence’s questions. The hearing thereby provides the defence the opportunity to undermine the expert statement’s evidential value through the use of method-bound constraints. Whatever the explanation is, we see here a better concordance with the theoretical constraints. Such concordance also applies in situations where the defendant actually invokes an expert-related rebuttal. The problem is that the defendant rarely takes the initiative to employ the opportunities that expert evidence provides.

4. CONSTRAINTS IN PRACTICE – CONCLUSIONS
The results show that, in practice, it is mainly the prosecutor who uses the evidence-related constraints of criminal case procedure with success, while the defendant, to a limited extent, invokes the constraints. A partial explanation may be found in the phase of the preliminary enquiry that favours the prosecutor’s constraints, enabling an offensive gathering of evidence, including expert evidence. These constraints favouring the prosecutor do not explain, however, why the defendant does not to a greater degree use the options to offer evidence in disproof that follow from the adversarial principle. The study shows that, in conjunction with the defendant’s not-guilty plea, the likelihood of an acquittal increases when invoking non-expert witness evidence and the two forms of expert evidence. Offering evidence in disproof is thus a favourable constraint for the defendant, but is seldom invoked.

The procedural rules of the main hearing make it possible for the prosecutor and the defence to use rhetorical argumentation, which includes the use of method-bound constraints. The results indicate that the defendant usually adopts a defensive and passive stance during the hearing, and therefore does not use their method-bound constraints effectively. There are many factors that might explain the defendant’s passive proceedings – for example, that they have not understood the statement of the criminal act as charged, or are lethargic or depressed as a result of the prosecution or (when it is the case) of deprivation of liberty or other psychological factors. Passivity, however, increases the risk of conviction.

Therefore, the high rates of conviction might be explained not only by the prosecutor’s offensive presentation of evidence, but also the defendant’s passivity. The court’s evaluation of the evidence must be based on the evidence presented in the main hearing (RB Ch. 30, § 2). Passivity on the defendant’s part, both in the presentation of evidence and rhetorical arguments during the main hearing, leads to, for the defendant, a negative impact on the court’s evaluation.

In summary, this entails that the defendant, unlike the prosecutor, often does not invoke the opportunities afforded by the adversarial principle and the rules of procedure. This has a negative impact in the court’s evaluation of the evidence, which often favours the prosecutor.

A compilation of the empirical values for the constraints follows below.
Table 6. Summary of evidence-related empirical values for the constraints

<table>
<thead>
<tr>
<th>Constraint/value</th>
<th>Prosecutor</th>
<th>Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preliminary enquiry: The prosecution’s duty of objectivity</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>Preliminary enquiry: The defendant’s right to defence counsel, the defence counsel’s rights</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>Preliminary enquiry: The prosecution’s control of the preliminary enquiry, the special procedural powers</td>
<td>+</td>
<td>–</td>
</tr>
<tr>
<td>Main hearing: The adversative principle</td>
<td>+</td>
<td>–</td>
</tr>
<tr>
<td>Main hearing: The official principle</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Main hearing: Rules of procedure</td>
<td>+</td>
<td>–</td>
</tr>
<tr>
<td>Deliberations: High standard of proof, the prosecutor’s burden of proof</td>
<td>+</td>
<td>–</td>
</tr>
<tr>
<td>Sum value</td>
<td>5 +/2 -</td>
<td>3 +/4 -</td>
</tr>
</tbody>
</table>

Finally, we conclude that the present study has shown that the use of expert evidence-related constraints in written form is an integral part of the prosecutor’s proceedings; for example, the majority of cases concerning serious violent crimes use evidence from technical experts. Without such evidence, the number of acquittals would probably increase. In contrast, the prosecutor’s use of expert witnesses poses the risk of losing the case. We cannot fully explain this paradox. The study has also shown that the defendant’s options to win the case increase when they use written expert evidence and expert witnesses.

NOTES
1. Our sincere thanks to the Swedish Research Council for approving the research grants that are the basis for this article.
2. The research has been conducted at the Department of Sociology of Law at Lund University between 2012 and 2016 within the framework of a research project titled ‘Expert Knowledge as a Basis for Legal Decisions’. The project studies how non-legal expert knowledge is communicated and used by legal staff in a number of different types of Swedish court cases.
3. SFS (Swedish Code of Statutes) 1942:740
6. Ibid 30-33.
8. Ekelöf and others (n 5) 56.
9. Ibid.
'General experience' is based on inductive knowledge of the link between two phenomena that generally applies to both. This generalisation can be more or less based on science. Depending on the scientific value, this can refer to anything from prejudices to laws of nature: Ekelöf and others (n 5) 281.

12 Lena Schelin, Bevisvärdering av uttager i brottmål [Evaluation of Evidence of Testimonies in Criminal Cases] (Norstedts Juridik 2007) 50; see also Ekelöf and others (n 5) 281-282.

13 See Edelstam (n 10) 232-238.


15 JK, Felaktigt dömda (n 14) 457.

16 Edelstam (n 9) 22.


20 In the Swedish court system juries are not used in criminal cases.

21 Graver, Rett, retorikk og juridisk argumentasjon (n 17) 95.


23 Graver, Rett, retorikk og juridisk argumentasjon (n 17) 122.

24 Bitzer (n 18) 6-8.

25 The term ‘discourse’ is used in rhetorical analysis as a synonym for argumentation. See e.g. Perelman and Olbrechts-Tyteca (n 17) 7.

26 When the English term ‘constraint’ is translated into Swedish, we use the term ‘villkor’ (condition), with the meaning ‘possibilities and restrictions in the situation, which the speaker must relate to and make use of’. Cf. Jens Elmelund Kjeldsen, Retorik idag. Introduktion till modern retorikteori [Rhetoric Today. Introduction to Modern Theory of Rhetoric] (Studentlitteratur 2008) 85, 92. See also Grant-Davie (n 19) 272.

27 Bitzer (n 18) 6-8; cf. Grant-Davie (n 19) 272; Kjeldsen (n 26) 92-93.

28 Bitzer (n 18) 8.

29 Ibid.

31 Aristoteles: Retoriken (n 30) Bok 1.2.2.

32 Ibid 1.2.3.

33 Kjeldsen (n 26) 33, 92.

34 Graver, Juridisk overtalelsekonst (n 17) 147, 153-154.

35 Göran Bergström & Kristina Boréus (eds), Textens mening och makt [The Text’s Meaning and Power] (Studentlitteratur 2005) 89.

36 Graver, Juridisk overtalelsekonst (n 17) 153.

37 Ibid.

38 Ibid 144.

39 Ibid.

40 Grant-Davie (n 19) 272.

41 Friis (n 22).

42 JK, Rättssäkerheten i brottmål (n 14) 56-59.

43 Ibid 59-60.

44 Ibid.


46 Ibid 637.


49 Lindblom (n 45) 632-638.

50 Ibid.

51 Ekelöf and others (n 5) 34-35.

52 Ekelöf and others (n 4) 133-146; Ekelöf and others (n 48) 74.

53 Ekelöf and others (n 4) 145.

54 Ekelöf and others (n 5) 73.

55 Ibid 72-73.

56 Ekelöf and others (n 5) 30-34.

57 Ibid.

58 Edelstam (n 10) 314ff. See also Ekelöf and others (n 5) 292ff.

59 Edelstam (n 10) 317.


61 Ibid 119.

62 Ekelöf and Edelstam (n 48) 69.

63 Ibid.

64 Lindblom (n 45) 637-638.
65 Prop. [Government Bill] 1986/87:89, 110; Ekelöf and others (n 4) 201.
66 See Ekelöf and others (n 5) 191-206.
67 Ekelöf and others (n 5) 26.
69 Ibid.
70 Ibid 151-154.
72 Ekelöf and others (n 5) 150-151.
73 Lindblom (n 45) 633.
74 The present study is incorporated in the previously mentioned court research project.
75 Offences against the person are regulated in the Penal Code, (Brottsbalken) SFS (Swedish Code of Statutes) 1962:700, Ch. 3-7. The delimitation is for serious crimes for which the minimum sentence is 6 months imprisonment. The range of punishment varies according to the seriousness of the crime. However, some crimes are seen as inherently serious enough to warrant long prison sentences even at a ‘normal’ degree, for example murder, manslaughter, as well as rape and statutory rape.
76 The selection in the category of ‘Other serious crimes’ is based on the actual prevalence of serious offences against the person in our court materials, which do not fit in the other defined categories. These are causing another’s death/grievous bodily harm, gross violation of a person’s integrity and kidnapping. The category of ‘Other serious crimes’ therefore includes the Penal Code Ch. 8 (the crime of robbery).
78 Ibid 15. Ca. 180,000 crimes led to prosecution, which represents almost 13 % of the reported crimes. Ca. 75,000 prosecutions led to conviction in the district court, which represents roughly 40 % of the prosecutions.
79 Out of 123 verdicts with one defendant, 85 % resulted in conviction.
80 Ibid 154. Ca. 11 % of crimes in 2010 were offences against the person.
81 Schelin (n 12) 88.
83 Brå (n 77) 151-156.
84 Ibid.
85 Ekelöf and others (n 5) 74-76. The extent to which a confession supports the charge is decided during the court’s evidence evaluation (RB Ch. 35, § 3).
86 Schelin (n 12) 90.
87 Cases including full confessions were measured at 10 %. Partial confessions were measured at 35 %. Not-guilty pleas occurred in almost 50 % of the cases. In other cases, it was not possible to see the defendant’s plea.
88 Ca. 25 % of cases where the defendant pleaded not-guilty resulted in acquittal. Ca. 5 % of cases with partial or full confessions resulted in acquittal. In the group of cases where the defendant’s plea was not discernible, only convictions were announced.
Almost all cases of the total material (151 verdicts) refer to the statements of the injured person and of the defendant (ca. 93 %).

The calculation of the assessment of credibility is based on the total materials (151 verdicts). With regards to verdicts with more than one injured party or defendant, the data is based on the person first noted in the verdict. Ca. 50 % of injured parties statements were assessed as wholly credible, ca. 20 % as less credible, while there are no records for the remaining (or it was irrelevant).

Based on verdicts involving one person (123 verdicts), the following emerged: ca. 94 % of verdicts where it could be discerned that the injured person’s statement had been assessed as wholly credible correlated with a conviction. Cases where the injured person’s statement had been assessed as less credible correlated with almost 60 % of convictions.

The prosecutor invoked witness evidence in just over 80 % of the verdicts, and the defendant in almost 30 % of the cases.

The defendant’s use of non-expert witness evidence occurred in almost 70 % of cases involving a not-guilty plea, and in ca. 25 % of cases involving partial confessions.

In just over 80 % of cases where the injured party was assessed as wholly credible, and in almost 90 % of cases that led to conviction, the prosecutor used non-expert witness evidence.

In almost 45 % of acquittals, the defendant invoked non-expert witness evidence. In just over 25 % of verdicts that led to conviction, the defendant invoked non-expert witness evidence.

Personal case studies that only include details on the person’s personal living conditions have not been included as expert opinion. Statements by the probation office and social services concerning verdict recommendations have, however, been included as expert opinion.

Expert opinion and expert witnesses called by the prosecution occurred in ca. 67 % and almost 20 % of the cases respectively (out of 151 cases). Expert opinion and expert witnesses called by the defendant occurred in 14 % and 8 % of the cases respectively (out of 151 cases).

In just over 40 % of cases that led to conviction, the court referred to expert opinion, which the court in ca. 90 % of the case followed the recommendations of in their verdict.

See for instance Ekelöf and others (n 4) 192-200, 205-206.

Ekelöf and Edelstam (n 48) 72; see also Ekelöf and others (n 5) 75-76.

Ekelöf and Edelstam (n 48) 72.