ADJUDICATING CIVIL CLAIMS IN CRIMINAL PROCEEDINGS

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I. INTRODUCTION

The subject of the following discussion is the *procedural consideration (adjudication) of civil (civil law) claims in criminal cases (consolidated civil and criminal proceedings)*. This special type of procedure is often referred to in civil-law countries—as well as in what follows—as *"adhesion procedure"*.

In Danish law, as in most other legal systems, the point of departure is that civil claims are considered in one form of legal procedure, known as civil procedure, while penal questions and similar legal consequences are considered in a very different form of legal procedure, namely criminal procedure. In the act which regulates the Danish administration of the law—the Administration of Justice Act, no. 90, April 11, 1916[1]—the two forms of legal procedure mentioned are sharply differentiated in the third and fourth book(s) respectively; it is only for practical reasons that all the more general procedural rules are collected in one act.

As an exception to the above-mentioned main principle—that civil claims are considered in civil proceedings and penal claims in criminal proceedings—civil claims may, according to an old tradition in Danish law, be adjudicated by the court in criminal cases when the civil claims are closely related to ("are based on or arise from") the circumstances which have given rise to criminal proceedings. The rules on this are to be found in *AJA, ch. 89 (secs. 991–6)*.

In addition to these general rules, the insufficiency of which we shall attempt to prove in section III below, there are particular rules about adhesion procedure in special legislation which are more satisfactory. Of these, *sec. 67 of the Road Traffic Act,* no. 153, May 24, 1955,[2] should be pointed to first and foremost. These

[1] Statutory order no. 609, December 19, 1969—cited in what follows as the *Administration of Justice Act* and abbreviated as AJA.

[2] Statutory order no. 231, June 27, 1963—cited in what follows as the *Road Traffic Act* and abbreviated as RTA.

In substantial agreement with RTA sec. 67 are secs. 10 and 11 of the *Law on Dogs,* no. 164, May 18, 1937 (statutory order no. 380, June 26, 1969).

rules can only be applied in connection with the more comprehensive rules of motor-vehicle responsibility under sec. 65 of the same act.

In Austrian, Norwegian and German law, there are adhesion rules which in large part correspond to the rules in AJA ch. 89. This relationship can be explained in historical terms; this will not be done, however, in the present context. French legal rules on compensation of claims for damages in criminal cases are not in complete agreement with the other Continental systems, primarily because of the peculiarity of the general rules of prosecution. Since 1948, Swedish law has had a more modern and a more flexible system of adhesion procedure. To a great extent, its actual application is similar to the application of the Danish rules on motor-vehicle adhesion procedure, even if it is not actually used as much as the Danish procedure is.

Except where it is otherwise stated or is evident from the circumstances, the following presentation only concerns general adhesion procedure in the Administration of Justice Act, but the rules under the Road Traffic Act are to a great extent included in the examination.

II. THE HISTORICAL BACKGROUND AND THE BASIC CHARACTERISTICS OF THE DANISH ADHESION PROCEDURE

The general adhesion rules of Danish law (AJA, ch. 89) have evolved as a result of a gradual development since the middle of the 18th century. These rules do not diverge substantially from the procedure which was in force before the Administration of Justice Act. When it is furthermore considered that the institution of adhesion rules originates from a time when no substantial difference existed between the consideration of civil and criminal suits, it may seem surprising that this type of procedure—in almost unchanged form—has been able to survive the changes which the administration of justice in Denmark has undergone since then; here one thinks primarily of the 1916 Administration of Justice Act. The changes which this act brought about in civil and criminal trials have had practically no influence on the adhesion procedure.

Thus it is natural to ask at this point whether the rules in AJA, ch. 89, have retained their *raison d'être* and, if not, whether the institution should continue, though in a different form. Seen from our present point of view, some of the rules may seem peculiar; moreover, court practice is often contradictory. Several judicial decisions show that the courts—on the present legal basis—have had difficulties in reaching satisfactory results; in several instances, clear legal rules have been completely set aside in order to reach practical and reasonable solutions. This alone indicates a need for legislative action—since it is considered desirable that at least the basic rules of litigation shall be the same in all courts of law.

In Danish law—in contrast to 19th-century German law—there is no theoretical discussion on the institution of adhesion rules which could have influenced court practice. Furthermore, there is hardly any reason to believe that court practice has been influenced by German (*gemeinrechtliche*) legal writing. Thus it was the case in German law that the more the adhesion procedural terms were developed theoretically with scientific precision and perfection, the less significance this type of procedure was given in legislation as well as in court practice. One may therefore infer that it was precisely this thorough literary discussion that revealed the weakness in the German institution of adhesion rules in its existing form. It was abolished in 1877 and not restored until 1943.

One of the peculiarities which stands out most prominently in the present Danish adhesion-procedure system is that in the same trial two types of questions are considered—penal and compensation questions—even though the same kind of procedure is not applicable to both. Since penal questions are always regarded as the most important, it has generally been possible to resolve this dilemma by assuming that rules on the administration of penal justice should in principle also be applied in cases dealing with compensation claims.[3] Such a point of departure must, of course, lead to difficulties, both of a substantive and a procedural character. A close analysis also shows that the actual nature of the present procedural joinder (consolidation) cannot be precisely defined by present legislation and litigation practice.

[3] The term "compensation claims" or "claims for damages" is used synonymously with "civil claims"; this can be explained by reference to the fact that other civil claims than claims for damages are very seldom adjudicated in connection with criminal cases.

Within the framework in which civil claims may be considered in connection with criminal cases, several rules are disregarded which are otherwise applied within the field of civil procedure. This is the case with the rules on summons application (how to bring the action), on the court's jurisdiction as based upon the subject-matter or the territorial venue of the suit, on the power to represent a person in court (power of attorney), on the rights of the litigants, on pretrial conference, on joinder of third parties as plaintiffs or defendants, on the possibility of adjudicating counter-claims, on default judgment, on permission for the court to refuse to take jurisdiction, on litigation costs, on the conditions under which appeals may be lodged, as well as on provisional remedies. In return, to a great degree, the rules on the administration of criminal law cannot be used to their full extent in these respects. It is therefore only possible within a limited scope to decide with complete certainty which rules shall be applied.

On the present basis, it may therefore seem appropriate to propose a change in the adhesion system. However, in order to be able to document the need for an amendment and the justification of the proposal's further content, it is necessary to give a short account of the present state of affairs and to make a few comments thereupon.

III. THE MAIN CHARACTERISTICS OF THE PRESENT DANISH ADHESION SYSTEM

According to AJA, sec. 991, subsecs. 1 and 2, only the *injured party's* compensation claims can be adjudicated in a criminal case. It is doubtful how the term "the injured party" is to be understood. In certain cases, Danish courts have applied a very narrow construction and required that the party in question should be the *directly injured party*; other decisions, however, have chosen the opposite solution and adjudicated claims brought by insurance companies and other third parties who have indemnified the injured party for his loss.

In addition, Danish courts have up to now made it a condition, with the support of the cited statutory provisions, that the compensation claim shall arise out of the circumstances which led to the charge being brought. However, this issue is so closely related to the question of who can be regarded as the injured

party that these two questions should not reasonably be considered separately.

According to the words of the statute (sec. 991, subsecs. 1 and 2) civil claims can only be adjudicated *against the accused.* This condition has not always been observed in litigation practice as it has happened that compensation claims against the accused's employer and against his liability insurance company have been adjudicated as adhesion claims; the accused's counterclaims against the injured party have also been adjudicated. RTA, sec. 67, permits insurance companies, underwriting motor-vehicle compulsory liability, to bring their claims for joint adjudication with a pending criminal action. The same holds true for the owner or user of the vehicle when he is someone other than the driver (and the charge has been brought against the latter). Such instances of joinder of third parties do not seem to have given rise to difficulties, and this, within the area of the traffic law, is primarily the result of the fact that the court has, as mentioned below, authority to consider compensation questions after having adjudicated penal questions.

In adhesion cases, claims are brought sometimes by the injured party himself, sometimes by the prosecuting authorities on behalf of the injured party. In the latter instance, however, it is the injured person himself who must be regarded as the litigant, while the position of the prosecuting authorities may be compared to that which exists in civil procedure under a power of attorney.

According to both AJA, ch. 89, and RTA, sec. 67, the injured party is free to withdraw his compensation claims until the case has been taken under deliberation (AJA, sec. 991, subsec. 5).

If the case ends without a judgment on the *penal* issues, an adjudication on the compensation issues, in accordance with the customary interpretation of the rules in AJA, ch. 89, should not be given. In spite of this, judgments have several times been handed down in situations of this kind. With respect to RTA, sec. 67, compensation claims which have been presented may[4] be adjudicated upon, even if the accused has not been sentenced.

Within the area of AJA, ch. 89, the court may at its discretion avoid reaching a decision on compensation claims—i.e. refuse to take jurisdiction or, as it is often stated, refer the compensation claim to civil proceedings—if it finds that adjudication of the

[4] As a rule "must", cf. below.

adhesion claim could not take place without *substantial inconvenience,* or when the *evidence* supporting the compensation claim *is incomplete* (AJA, sec. 991, subsec. 4, and sec. 992, subsec. 1, para. 1). In addition, the court *must,* in accordance with sec. 992, subsec. 1, para. 2, avoid reaching decisions when the verdict of guilty or not guilty which has been handed down in regard to the penal issues would not lead to a corresponding judgment on the compensation claims. The precise scope of the latter principle, which we may call the *principle of uniformity,* is unclear; but no matter which of the possible interpretations is chosen the fact nevertheless remains that the Danish courts have, time after time, disregarded this rule.

In comparison with these rules, RTA, sec. 67, goes far in prescribing that the court shall adjudicate compensation claims. Only in special instances, as when the compensation claim concerns damage to property (in contrast to personal injury) and is of a complicated nature, may the court refuse to try the claim in a criminal case (RTA, sec. 67, subsec. 8). From the legislator's point of view, it was the intention[5] to impose upon the court such a far-reaching duty as to take compensation claims under adjudication, while at the same time granting *leave to adjudge compensation claims after the decision on the penal issues.*[6] This interpretation proved true in the sense that the adhesion procedure of the RTA, as a result of the possibility it gives to adjudicate successively two essentially different kinds of issues, the prosecutor's action and the compensation claim, has become not only a useful form of legal procedure but also a method whereby probably the majority (both quantitatively and qualitatively) of compensation cases are decided in Denmark.

IV. THE MAIN CHARACTERISTICS OF THE ISSUES OF LEGAL POLICY

It will appear from the foregoing remarks that we may regard it as an anomaly to consider civil claims under the rules of criminal procedure. The future justification of the adhesion system

[5] Act No. 144, July 1, 1927; cf. *Rigsdagstidende* (official report of parliamentary proceedings) 1926–27, appendix A, cols. 4741–2 and 4804.

[6] The civil side of the trial can in this case appropriately be referred to as the "continuation trial".

will probably depend upon the extent to which it will be possible to take a different approach and consider compensation claims under the rules of civil procedure.

It is not certain beforehand that a country's system of procedure will provide for the consideration of civil claims in criminal cases. This may be illustrated by referring in particular to Anglo-American law, which does not recognize this type of institution. A system such as the Anglo-American one is perhaps to be preferred to the system of the AJA. This is so because the system of the AJA is in conflict with other recognized trial principles, it is difficult to apply in a uniform way in different jurisdictions, and further it is—perhaps for this very reason—not used very much in practice.

It has been a pervading characteristic of foreign legal writing that criticism has been directed against the courts for the restrictive way in which adhesion procedure has been applied. This has been the case particularly in Austria, Germany and France, but also—especially in regard to the pretrial—in Sweden. It may therefore be appropriate to direct the criticism to some other point than the courts, namely to the contents of the legislation. In this respect the objections need not be directed at the adhesion system's justification as such, but rather at the drafters of the statutory provisions.

With regard to Danish law, it must be granted that the courts have displayed courage in their efforts to free themselves from the narrow confines of the present system. Particularly with respect to German law, it is reasonable to conclude that it is the fact that civil claims in criminal cases are being considered as far as possible according to the rules of criminal procedure (in order to safeguard the injured party's interests in the best possible way) that is the explanation why the adhesion procedure has not regained the practical significance which it had before 1877 (cf. *supra* I). This state of affairs can be regarded as a substantiation of the unsuitability of considering penal claims and civil claims according to the same form of legal procedure.

The problem is to find an easily practicable system containing the advantages which are connected with the consolidation of penal and civil claims, while at the same time avoiding the above-mentioned inconveniences. This objective can be realized, even if it should become necessary to develop more detailed rules in order to fulfil the practical need without simultaneously getting into conflict with generally recognized principles of procedure.

The rules in the Road Traffic Act point in the right direction (cf. *supra* III *in fine*). We should not, however, content ourselves with introducing the procedure contained in the Road Traffic Act as a general system; the present author submits that one may proceed *further in the same direction.*

As noted before, it seems evident that the wide scope of the practical applicability of the Road Traffic Act depends upon the possibility of adjudicating compensation issues after judgment on the accused's criminal responsibility has been reached. Even in such a situation, i.e. upon consideration of a civil claim in a "continuation trial" (see footnote 6), it will be possible to derive advantage from the claim's consolidation with the criminal issues. Thus the claim can still be *presented* in a less strict manner than in ordinary civil cases[7] and *the fact finding* will to a great extent be the same for both types of issues. In addition, when the parties appear before the judge in a criminal case, there is a greater possibility of deciding the compensation issues *by settlement* at a time when the costs and inconveniences are still reasonably small.

Nevertheless there is a series of issues where RTA, sec. 67, has not been able to follow the rules of civil procedure completely —even if compensation issues are considered after adjudication of the penal issues. This is the case with respect to the prosecuting authorities' power of attorney, the preparation of the claim for trial (pretrial conference), the joinder of third parties, the possibility of adjudicating counterclaims, the rules of judgment by default, and the possibility for the court to refuse to try complicated claims concerning damage to property.

On the basis of Danish court practice, it can be stated that there is no connection between (the individual elements in) a criminal decision and (the individual elements in) a decision on compensation issues of such a sort that conclusions can be drawn from the first decision to the second. Therefore, the *raison d'être* of adhesion procedure does not rest on such a connection. Nor does the prevailing opinion on criminal policy seem inclined to support adhesion procedure.

On the whole there does not appear to be in Danish law any justifiable basis for giving the injured party a preferential *procedural* position at the expense of the accused's position by allowing the choice of the penal decisional form to depend upon the compensation claims of the injured party. Legal practice seems

[7] Oral or written request instead of customary summons application.

to show clearly that the institution of adhesion procedure is primarily supported by *practical procedural considerations*—namely that the *fact finding should by and large be the same in regard to penal and compensation issues.* One could also describe the situation by stating that the institution of adhesion procedure in Danish law is not supported by an intrinsic connection between penal and compensation claims, but by something which could be referred to as *the functional-procedural connection* between the two claims. It should therefore also be functional-procedural (so-called practical) considerations—in conjunction with generally recognized principles of procedure—that determine the contents of these rules.

The basic principle for a future adhesion system should therefore be as follows: penal questions are to be dealt with, as hitherto, in criminal procedural forms, while *compensation claims* are to be considered in *civil procedural forms.* However, this should not be an obstacle to making both types of questions subject, to a great extent, to joint consideration or, with this end in view, to making certain modifications of the main principle. Such modifications will primarily concern the method of considering civil claims, since divergences from the basic tenets of the administration of penal law for the sake of civil claims—especially as a result of the principle of material truth in criminal cases—will be permitted less than will divergences from the rules of civil procedure for the sake of the penal issues.

Where to draw the line for permissible divergences in the procedural forms concerned depends on a difficult question of estimation which must be based on weighing the advantages which the joint consideration brings about. Such estimation will—within certain limits—best be exercised in connection with a concrete present situation, as it is impossible beforehand to survey the further course of a trial. The task is thus to develop such a broad system that penal and compensation issues can be considered in the same manner till the advantages connected with such joinder are outweighed by its drawbacks or by fundamental inconveniences.

Thus the legal position *can in a way* be said to follow the rules in AJA, ch. 89: under sec. 991, subsec. 4, the court can at any stage of the criminal case refuse to consider the civil claims if such consideration cannot take place without substantial inconvenience; and, in accordance with sec. 992, subsec. 1, the civil claim will not be adjudicated, where the evidence supporting the

claim is insufficient. These rules have, however, the distinct disadvantage that compensation cases must now begin all over again, since they must be instituted according to general civil-trial methods. The efforts which were made in order to get the claim decided in connection with a criminal case will thus often prove to be wasted.

Instead, the rule should be that the joint consideration of the proceedings can be dispensed with, but only in such a way *that each of the two branches of the action will continue at the same court independently.*

RTA, sec. 67, approaches such a system, but has not applied it consistently. The rules under AJA, on the other hand, can only be characterized as a kind of *attempt* to reach decisions concerning civil claims. In this respect, it is not sufficient to point out that the injured party—in so far as a decision is not reached—can achieve everything that he reasonably expects by virtue of the fact that he can pursue his claim in civil proceedings, cf. AJA, sec. 992, subsec. 2. In the first place, regard must also be paid to the defendant; but it is especially unfortunate that the adhesion system has, as mentioned, developed into an unnecessary trap; if no decision is reached on the penal issues or if the court, for one reason or another, refuses to adjudicate the civil claim at a late stage in the trial, then not only will the expected saving of an additional trial in regard to the claim's consideration in the criminal case be lost, but the injured party as well as the accused may also be burdened with extra costs and inconveniences. We should therefore drop the idea that the criminal action is the main issue and that only this—and not the claim of compensation—should continue to be considered by the court when joint trial of different claims can no longer take place.

With this background in mind, we should go one step further and regard criminal and civil law issues separately as *independent trials* which—under certain more specified conditions—can be *joined* according to AJA, sec. 286, subsec. 1, point 2. (In accordance with this rule, the court can decide that several of the pending trials among different parties shall be taken under consideration jointly; it is required, however, that the same form of legal procedure can be used in the trials and that—where one of the parties objects to the consolidation—either the claims presented have a common origin or special legislation provides for their joinder.)

In this way, one would achieve a *greater formal severance* of

the two types of issues, while the possibility of considering the trials jointly would be limited to the degree to which it would be *practical* and not entail fundamental inconveniences. The trials can thus be severed and joined again, depending on the need.

After this two independent judgments (at least) should be reached: one in the criminal case and one in the civil case. In regard to this point, the proposal presented here differs from the adhesion rules of the Road Traffic Act. The judgments should thus be *worded* as a judgment in a criminal and a civil case respectively, thereby ensuring that each decision has its independent grounds and ultimate order.

Several cases have shown—that both in the court of first instance and on the appellate level—there has been a need for such joinder of claims and that this has been a practical arrangement.

The deviations from the rules of civil procedure which the proposed use of joinder would have when civil cases are concerned —the present author has in mind in particular jurisdictional rules, the rules on summons application and, to a certain extent, the rules on pretrial conference—will not be greater than those which occur in accordance with the present adhesion system. Indeed, the opposite is true. Criticism of the system has up till now primarily been a result of other factors, cf. *supra*.

In order not to defy the general civil procedure rules of the Administration of Justice Act (book 3) completely, it is important to set *a reasonable limitation on the civil claims which can be brought in a criminal case* (so that a joinder of the trials may be regarded as feasible). And to the extent—contrary to the adhesion procedure in force—to which the possibility of involving third parties and to adjudicate counterclaims in the civil case connected with the criminal case is expanded, it will become necessary to draw the line of demarcation more narrowly in order to prevent joinder of actions which have no connection at all with the criminal issues at bar.

The present adhesion system in accordance with AJA, ch. 89, is in its current state dominated, to a large extent, by the idea that this form of proceedings can only be to the *injured party's advantage*. Instead, one should, as mentioned above, take another criterion into consideration: namely the possibility of *saving time and costs, both for the parties and the court*. Thus the principal idea should be that civil cases may be conducted in this special way and possibly in a different court if it can be *presumed that*

the joint consideration of the criminal and civil case will result in the above-noted advantages.

It is difficult to decide beforehand when the circumstances have reached that point. On the one hand, we should hardly aim at permitting a joint consideration in *all cases* where it could conceivably be practical; on the other hand, one should not overlook the procedural and economic advantages of the adhesion system, just as one should not exaggerate the importance of rules on jurisdictional matters. The possibility of considering civil claims in criminal cases should undoubtedly be expanded in Denmark in relation to the law presently in force. Where the line should be drawn is, however, more doubtful. On the one hand, a rule should be chosen which as far as possible avoids legal uncertainty. On the other hand, it is undoubtedly necessary to give the courts a certain amount of discretion, since it is hardly possible to establish a definite standard for the application of joinder.

We must therefore content ourselves with a rule which contains the correct solution in *typical situations*. The criterion for granting leave to present civil claims in criminal cases should surely be *that the claims arise substantially out of the same factual circumstances* as those which gave rise to the charge, even if adjudication of the civil claim requires the presentation of further factual and legal material. The important point is that the material presented in court (evidence) is at least, to a certain extent, the same in both cases. Therefore one should not create a rule which is too precise, as it might be difficult to state its content in detail. The possibility of saving the time and trouble of another trial will undoubtedly be lost in some concrete situations. But this cannot be the decisive point when we are concerned with drawing up rules of far-reaching importance and when the introduction of such rules does not bring about harmful effects on the litigants or the court (as is the case with the present adhesion procedure).