PROTECTED INTEREST THEORIES IN PENAL PROCEDURE

BY

JO HOV

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1. INTRODUCTION

a. *The significance of the protected interest in determining who is to receive special injured party status*

In Norwegian penal procedure, the interest or interests presumably protected by a particular penal provision are often considered relevant and important.

First of all, the matter of interest may be important when deciding whether or not a private person is to be regarded as the *injured party* if a penal provision has been violated. It should be emphasized at once, however, that the issue arises only when the solution does not follow from the provision itself or other sources. Where no guidance is given on this point, it has been generally assumed in legal theory that the decision must be made on the basis of what *interests* the particular penal provision is supposed to protect. If the provision is mainly designed to protect private interests, the private person affected by the violation will be regarded as the injured party during the criminal proceedings. This will, on the other hand, not be the case where the primary aim of the penal provision is presumably the protection of public interests.[1] This has, *inter alia*, been expressed by the Supreme Court in 1911 NRt 637:

> As for the question of who has power to prosecute, the decisive factor must be which interest the penal provision in question is intended to protect, and sec. 325, para. 4, clearly aims at exclusive protection of public interests (p. 638).

A similar statement is found in a relatively recent decision (1965 NRt 821) concerning sec. 350, para. 1, of the Penal Code. A unanimous Supreme Court stated:

[1] Cf. J. Andenæs, *Norsk straffeprosess I* (Norwegian Criminal Procedure), Oslo 1984, p. 83, F. Hagerup, *Den norske straffeproces I* (Norwegian Criminal Procedure I), Oslo 1904, pp. 101-71, O. Salomonsen, *Den norske straffeproceslov I* (The Norwegian Act on Procedure in Criminal Cases), Oslo 1925, p. 73, J. Skeie, *Den norske strafferett I* (Norwegian Penal Law I), Oslo 1946, pp. 461 f., E. Stang, *Rettergangsmåten i straffesaker* (Procedure in Criminal Cases), Oslo 1951, p. 56, E. Alten, "Saker om lovstridige byggverk" (Cases on Illegal Building), *NRt* 1930, p. 961, on pp. 967-9, P. Kjerschow, *Almindelig borgerlig straffelov* (General Civil Penal Law), Oslo 1930, pp. 461-3. *Straffeprosesslovkomiteens innstilling* (Report by the Commission on the law on procedure in criminal cases), 1969, p. 356. *Straffelovrådets innstilling om endringer i de strafferettslige regler om drukkenskapsforseelser og alkoholmisbruk* (Report by the Penal Law Commission on amendments to the penal law provisions on offences in connection with drunkenness and abuse of alcohol), 1964, p. 51. In Sweden—where the Penal Code, ch. 20, sec. 8, para. 4, contains a definition of the concept of "injured"—plaintiff—similar views have been presented by legal writers, see L. Heuman, *Målsägande*, Stockholm 1973, pp. 35 ff. and pp. 46 ff.

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However, according to its contents this penal provision is mainly designed to protect *public* interests, therefore a private individual cannot be considered the injured party in relation to this penal provision, irrespective of whether he sustains injuries from the acts which led to the conviction. One must therefore accept the convicted person's view that the judgment for violation of sec. 350, para 1, of the Penal Code does not give N.N. (the victim) the right to have his tort claim decided during the criminal proceedings.

b. *The significance of the protected interest allowing deviation from the law applied in the charge*

The interests which a penal provision is presumed to protect have been considered significant also in connection with an entirely different question, namely the extent to which the court is free to adjudicate according to penal provisions other than those stated in the charge—either *instead* of, or *in addition* to, them, i.e. overlapping offences.

The court's freedom to base its decision in a case on provisions other than those stated in the charge, is in part a consequence of the court's ability to pass judgment on the basis of *factual* circumstances other than those described in the charge. The court's power to do this is based on another fundamental principle of Norwegian court procedure, i.e. the principle that the facts shall be ascertained, with binding effect, at the main hearing. The description of the facts contained in the charge is only an expression of what the prosecutor *assumes* has happened.[2]

With regard to the court's freedom to apply the law, the wording of both sec. 342 of the former Norwegian Act on criminal procedure and of sec. 38, para. 2, of the new Act on criminal procedure may indicate that the court has the discretion to adjudicate on the basis of penal provisions other han those referred to in the charge.

[2] The extent to which the court may base its findings on facts other than those described in the charge, is in itself uncertain. According to both the old Penal Code, sec. 342, and the new one sec. 38, para. 1, the starting point is that the decision shall be based on "the same circumstances" as described in the charge. When a deviation from the actual description in the charge may imply that the course of events can be said to be "different", will depend on the criteria of identity applied. It is hardly possible to find a clear distinction, cf. 1931 NRt 409, 1954 NRt 653, 1967 NRt 964, 1968 NRt 1336 and 1975 NRt 472. Cf. J. Andenæs, *op.cit.*, pp. 298 f., H.K. Bjerke, "Forholdet mellom tiltalebeslutning og dom" (The Relationship between Charge and Judgment), *Jussens Venner* 1981, pp. 79 f., O. Salomonsen, *op.cit.*, pp. 426-9, F. Hagerup, *Den norske strafeproces II* (Norwegian Criminal Procedure II), Oslo 1905, pp. 116-22. It seems that N.K. Sundby's view (see *Om normer* (On Norms), Oslo 1977, pp. 220 f.) on procedural concepts like "the same punishable circumstances", "the same claim", "the same cause for appeal", etc., as "balancing markers" represents a fruitful starting point: According to this view, the decision as to whether a judgment can be said to be based on the "same facts" as those cited in the charge, must depend on a total assessment of the similarities and dissimilarities between the description of facts in the charge and the facts on which the judgment is based.

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In legal theory, however, it has often been maintained that the court can only reach a decision based on penal provisions protecting the *same* interest as the charge represents. This limitation is presumed to apply both where there is a question of applying another penal provision *instead* of the one stated in the charge, and where there is a question of applying one or more penal provisions *in addition* to those stated in the charge, i.e. overlapping offences.

If the penal provision which is considered applicable is supposed to protect interests *other* than those stated in the charge, then according to this point of view the court is barred from applying it. However, it has been generally assumed that the injured party may bring a subsequent suit later on the basis of such penal provisions.[3]

To the extent the court is allowed to go beyond the charge, it is also assumed to have an obligation to do so, as well as to investigate whether there are circumstances making other provisions applicable, cf. the new Act on criminal procedure, sec. 38, para. 1, second sentence.[4] Nor can the prosecuting authority bind the court to apply only a certain penal provision by expressly declaring that the accused is to be convicted pursuant to a particular provision.[5]

This point of view has not, however, been universally accepted in legal theory. Some commentators have also maintained that the court must be bound by the application of the law stated in the charge,[6] while others have maintained that the court has complete freedom with regard to the application of law.[7]

In a relatively recent court decision, 1980 NRt 361, the Supreme Court clearly maintained that the court may deviate from the application of the law stated in the charge, but only as long as it uses legal provisions that protect the same interests as those which the prosecutor sought to apply. The circumstances of the case were briefly: A car accident resulted in a fatality, and the driver was charged with violation of sec. 3, cf. sec. 31, of the Highway Code

[3] J. Andenæs, *op.cit.*, pp. 302 f. and p. 420, J. Skeie, *Den norske straffeprosess*, Oslo 1939, pp. 103-10, T. Eckhoff, *Rettskraft* (Legal Force), Oslo 1945, pp. 313-15, and J. Øvergaard, *Lagrettens oppgave etter norsk straffeprosess* (The Jurisdiction of the Jury according to Norwegian Criminal Procedure), Oslo 1942, pp. 61 f.

[4] J. Andenæs, *op.cit.*, p. 303 and pp. 305 f., and the decisions in 1913 NRt 314, 1917 NRt 222, 1929 NRt 1067 and 1953 NRt 934. See also H.K. Bjerke, *op.cit.*, pp. 81 f., O. Salomonsen, *op.cit.*, p. 432, J. Skeie, *Den norske straffeprosess I*, p. 352, and to the contrary, F. Hagerup, *Den norske straffeproces II*, p. 122. See also 1918 NRt 716, 1927 NRt 784, 1971 NRt 350 and 1980 NRt 437.

[5] J. Andenæs, *op.cit.*, p. 305, J. Skeie, *Den norske straffeprosess I*, p. 359, and O. Salomonsen, op.cit., pp. 433 f., see, however, 1905 NRt 570 (The National Theatre judgment).

[6] H. Scheel, "Om ideel konkurrens av straffbare handlinger efter gjældende norsk ret" (On Overlapping Offences of Punishable Acts according to Current Norwegian Law), *TfR* 1935, pp. 11-28.

[7] F. Hagerup, *Den norske straffeproces II*, p. 115, cf. pp. 119 f., and pp. 21 f., O. Salomonsen, *op.cit.*, p. 429, cf. pp. 433-5.

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(Act of June 18, 1965, No. 4), which requests road users "to show consideration, be alert and careful so as not to cause danger or injury and not to obstruct or disturb other traffic unnecessarily". The prosecutor had considered bringing a charge according to sec. 239 of the Penal Code on manslaughter, but decided that "considering the circumstances" such a charge should not be brought. Nothing was said about the reason for this decision.

Yet the district court convicted the person of manslaughter, but the conviction was overturned by the Supreme Court. The majority considered it procedurally incorrect to adjudicate on the basis of sec. 239 of the Penal Code, when the charge concerned violation of sec. 3 of the Highway Code, *because* the provision of sec. 239 of the Penal Code could not be considered as protecting the same interest as the legal provision stated in the charge. In the opinion of the Justice voting first, sec. 239 of the Penal Code was primarily designed to protect life, body and health. He also stated that this might be said about sec. 3 of the Highway Code, but in his opinion protection of private interests was not the *primary* aim of this provision. And the majority held that, as long as the prosecutor had stated which interest he wanted to protect through the charge, the court must be bound.

The Justice voting second, however, had a different view of which interests the two provisions were designed to protect. In his opinion the substance of the provision of sec. 3 of the Highway Code was so similar to the provisions of the general Penal Code covering injurious or hazardous acts, that it must be said to protect private interests in the same way as the general penal code provisions.

c. *The significance of the protected interests for the legal effect of the conviction*

The question of the courts' latitude in applying other penal provisions than those stated in the charge has in legal theory been closely linked to the questions of the legal effect of convictions. If the court is not able to apply a specific penal provision—because it supposedly protects an interest different from the one stated in the charge—it is nonetheless possible to bring another suit on the basis of the inapplicable penal provision.[8]

If, however, a penal provision protects the same interest as the one stated in the charge, so that the court may adjudicate on that basis, another suit cannot be brought even when the provision in question has not actually been applied.[9]

[8] J. Andenæs, *op.cit.*, p. 420, T. Eckhoff, *op.cit.*, p. 314, 1911 NRt 527, 1929 NRt 117.
[9] The presupposition is, however, that the court has had the procedural opportunity of applying the rule, J. Andenæs, *op.cit.*, pp. 306 f., and T. Eckhoff, *op.cit.*, pp. 310-12.

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There is no necessary logical connection between the penal provisions the court may apply in a pending case and the provisions which may warrant a new suit. One could also imagine a system where it is not even possible to initiate a new court case based on penal provisions found inapplicable in the pending case,[10] while at the same time allowing the initiation of new proceedings on the basis of provisions that might have been applicable in an earlier court case. Provisions involving the legal effect of the first situation might, for instance, stem from a wish to have the public prosecutor ensure that a complete investigation of the offence is undertaken before the case is brought to court, and from a wish to protect the accused against surprises both during the proceedings and later. Provisions of the latter kind might, on the other hand, be based on the view that, having the accused convicted is so important that it justifies allowing a new court case on the basis of penal provisions which the court might have applied in the previous case, even if this was not done.[11]

However, in the opinion of the present author, this linkage of the question of the legal effect of the judgment and the court's freedom to adjudicate on the basis of provisions other than those stated in the charge, is well-founded. Even if the prosecuting authority ought to undertake as thorough an investigation as possible, one cannot exclude the possibility of new facts coming to light during the proceedings, facts which will require that the accused be convicted according to provisions other than those stated in the charge. Problems arising from the emergence of such new facts may to some extent be remedied by altering the charge and by postponing the case to enable the accused to prepare his defence further, for instance if the change necessitates further defence preparation. However, if this way out is closed, so that the application of a particular penal provision in a pending criminal case is not considered justified, even if the conditions for a conviction according to that rule probably are satisfied, it would be unfortunate to base this decision on the inavailability of a new court case. The reason for limiting the court's power to depart from the application of the law stated in the charge must be that the accused in a pending case shall not risk being convicted of something substantially different from what he, according to the charge, is prepared to defend himself against. But there is no reason to interpret this principle so that the accused is completely immune from being sentenced on the basis of such provisions. Even if a rule of such content might possibly induce the prosecuting authority to ensure that the investigation of the offence is complete before going to court, this is in the

[10] Cf. J. Skeie, *Den norske straffeprosess I*, pp. 104 f., and pp. 137 f., who holds that the court must keep to the penal provisions which protect the same interests as those cited in the charge, while it nevertheless is not possible to bring a new action on the basis of the provisions that could not be taken into account in the first court case.

[11] Cf. H. Scheel, *op.cit.*, pp. 28-32.

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present author's opinion not an adequate basis by any means for affording the accused full protection against prosecution for violation of such penal provisions.

2. FUNDAMENTAL OBJECTIONS TO PROTECTED INTEREST THEORIES

In all the three situations mentioned, it will be necessary to determine which interests, or categories of interests, the particular penal provision presumably protects. When determining whether a private individual has special injuried party status due to a criminal violation, one must find out whether the provision protects public or private interests. And when a decision has to be made whether the court has a right to adjudicate on the basis of penal provisions other than those stated in the charge—either in a pending case or a later case—one must determine whether the penal provisions concerned can be regarded as protecting the same or different interests.

There are, however, several objections to the solution of these questions based on the interest the penal provision concerned presumably protects.

a. *Is there a genuine contradiction between public and private interests?*

First, it can be maintained that the distinction between protection of public and protection of private interests is basically untenable. Since society is made up of individuals, rules provided for the protection of seemingly typical societal interests will also protect the interests of individuals. After all, this is the reason such rules are made. One example is the provision of ch. 8 of the Penal Code on crimes against national autonomy and security. The reason why autonomy and security of the *state* is considered worthy of protection is of course that the independence and security of the state is also presumed to protect the independence and security of the individual. In contrast, rules that apparently are given to protect the interests of the individual citizen will also take care of more general societal interests—just because society is composed of individuals. Thus, rules protecting life and property will also protect the general public interest in a safe and peaceful society.[12]

However, even if one assumes that in the long run there is no genuine conflict between public and private interests, this does not prevent the use of such a distinction in practice. It is not difficult to see that some penal provisions are designed to protect interests that generally may be characterized

[12] K. Olivecrona, *Rättegången i brottmål enligt RB* (Criminal Procedure according to the Procedure Act), Stockholm 1968, pp. 78 f., P.O. Ekelöf, *Rättegång II* (Procedure) Stockholm 1977, p. 64.

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as public—as for instance the rules of ch. 8 of the Penal Code—whereas others will be looked upon as primarily protecting private interests—such as the rules on crimes against property or on crimes against life, body or health. However, if one chooses to accept such a distinction, situations will often appear where it is difficult to determine which interest a penal provision is supposed to protect.

b. *Does a penal provision only protect one type of interest?*

This raises another objection against overemphasizing which interest a penal provision is supposed to protect: Very often it is difficult to maintain that a penal provision protects one interest *or* another, and solely that interest. On the contrary, quite often it must be admitted that a penal provision is supposed to protect *several* different interests, for instance public and private interests alike, or different public or different private interests.

The rules on forgery may be a relevant example—they may be presumed to protect both the public interest in retaining public confidence in the reliability of documents and the individual's interest in not being deceived by having his reputation harmed.[13] Another example is found in sec. 152 of the Penal Code on pollution of "waterways", which must be assumed to protect public health in general as well as the health of individuals. The provision is contained in ch. 14 on "crimes causing general danger", but it also mentions a factor which may increase the punishment, namely "that the infliction of death or considerable injury on someone's body or health has resulted".

However, the predominant view in legal theory has been that the solution of the three problems we are confronted with—whether a private person has special injured party status; the question of the right to deviate from the application of the law stated in the charge; and the question of the legal effect of the judgment/sentence—must depend on whether the penal provisions concerned can be presumed to protect the same or different interests, or *types* of interests. This reason—the same or different interests—will more or less presuppose that a penal provision protects one, and only one, interest, or type of interest—for instance either private *or* public interests. The result may in turn be that the person making such decisions may easily feel tempted to overlook the fact that many penal provisions must be said to protect several interests, and instead emphasize one interest, or one *type* of interest as the one(s) being protected, or at any rate primarily protected, by the rule.

In the opinion of the present author, the decision in 1980 NRt 361 serves as an example of an attempt to solve the question of the court's power to depart

[13] J. Andenæs, *op.cit.*, p. 84.

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from the application of the law stated in the charge based on a rather futile discussion of whether two penal provisions could be assumed to protect one interest or the other. The majority maintained, as stated before, that the rules in the Highway Code, sec. 3, and the Penal Code, sec. 239, were designed to protect different interests. The primary purpose of sec. 239 of the Penal Code was to protect life, body and health. Sec. 3 of the Highway Code was also to protect against personal injury, but in the opinion of the Justice voting first the provision was not primarily designed to protect private interests.[14]

The Justice voting second, however, held that the provision in sec. 3 of the Highway Code was so similar to the offences cited in the Penal Code that it must to the same extent be assumed to afford protection of private interests.

In the present author's view, the decision does reveal some of the unfortunate effects of holdings based on protected interests. Actually, it may prove rather difficult to maintain that the Highway Code does not protect private interests. After all, when people are ordered to behave so as not to cause danger or damage it is not easy to understand why persons in fact harmed should not also be considered protected. If this were categorically denied, it would be very easy to criticize the decision. To avoid this, and at the same time save the "protected interest" point of view, it would seem necessary to resort to deception, that is, to maintain that it is not these interests the provision *primarily* protects.

The Justice voting third in this case also raised the relationship between the general penal legislation concerning damage and danger and other statutes such as the Act on fire prevention and the Act on the working environment, which in his opinion also must be considered as protecting general societal interests. In the opinion of the present author, such a viewpoint seems strained. After all, the purpose of both the fire and the working environment legislation is to safeguard the individual.

The reasons of the majority also contained a reference to the *principle of accusation*—when the prosecutor had stated which interest was allegedly infringed and what protection was sought, the court would have to be bound. It is clear that a reference to the principle of accusation is relevant in this context. However, the extent to which the court should feel bound by the prosecutor's standpoint regarding the application of law, should not necessarily be linked to which *interest* the penal provision is presumed to protect.

[14] As part of the argumentation for adopting the view that sec. 3 of the Highway Code does not primarily protect private interests, one judge maintained that no private person had been injured by the act. However, this does not hold good as an argument that the provision protects public interests only. The reason why private persons are not considered to have been injured, is actually that the provision is regarded as protecting public interests.

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c. *Is there any certain basis for determining the protected interest?*

A third problem involved in decisions based on the protected interest point of view is that opinions are divided as to the *basis per se* for deciding which interests are protected by a penal provision. This will be the case even if it is assumed that the ultimate purpose of all penal legislation is to protect specific interests. There can be no doubt that penal legislation to some extent illustrates the validity of such an assumption, for instance by the headings of chapters in the Penal Code.[15] Ch. 13 bears the heading: "Crimes against general law and order", and the heading of ch. 21 is: "Crimes against personal freedom". There are also other indicators as to which interests the legislator has had in mind when formulating the provisions. There may for instance be statements in purpose clauses, in the *travaux préparatoires*, etc. Where no such indicators are found, it may be possible to conclude from the penal provision itself which interest the legislator has wished to protect.

However, even if it is often possible to demonstrate that a wish to protect certain interests probably is behind certain penal provisions, it cannot be presumed that this is the only interest protected by that penal provision. Normally, there will be no grounds for assuming anything other than that the one particular interest has appeared as the most significant to the legislator, but one cannot for that reason conclude that the provision does not protect other interests as well.

In this context, however, it is necessary to bear in mind that protection of specific interests seldom will be the main reason for introducing new penal provisions. On the contrary, for the legislator the situation will be that certain *acts* will appear as punishable and must, therefore, lead to sanctions.[16] Where, for instance, the infliction of harm is criminally punishable, the intention of the penal provision is primarily to prevent such acts. Of course, one might say that the intention also is to protect the private right of ownership, but this is an interest which does not enjoy the same protection in all situations.

And even when it is possible to demonstrate that a desire to protect certain interests has been in the foreground for the legislator during the drafting of specific provisions, this has not been regarded as decisive when it comes to determining which interests the provision is presumed to protect. Ch. 13 of the Penal Code has the heading: "Crimes against general law and order". However, in this chapter we also find sec. 147 on burglary, and it has been established by court practice that the victims will receive special status as injured parties. Inasmuch as the intentions of the legislator, for instance as manifested in the division of the Penal Code into chapters, are not considered of special signifi-

[15] L. Heuman, *op.cit.*, p. 47.
[16] J. Andenæs, *op.cit.*, pp. 83 f., K. Olivecrona, *op.cit.*, p. 79, L. Heuman, *op.cit.*, p. 46.

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cance, the decision as to which interests a penal provision is supposed to protect will be markedly subjective. Even though every application of law will in itself be characterized by a certain subjectivity, there is reason to believe that, where the settlement of the question of interests is concerned, this subjectivity will be greater than it would otherwise be, considering that the available standards for determining the intentions of the legislator have been more or less disregarded in court practice. Therefore, when in practice it is maintained that a penal provision protects one specific interest, this will probably very often be exactly the interest which the person who *construes the provision in question* assumes to be protected, and not the interest which the legislator meant to protect. The discretion available to the person applying the law therefore often entails that, objectively, it will not be possible to say whether the decision is right or wrong.

d. *How does one distinguish between one and several interests?*

It is not possible to demonstrate any clear distinction between what one would call one interest, and what one would call several interests. Therefore, the question of whether one is dealing with the same or with different interests will often depend on the degree of *itemization* that has been undertaken. One legal writer[17] is, for instance, apt to consider an "attack on the person" as attacking *one* interest, regardless of whether the interference involves life and health, honour or privacy. In the opinion of this writer, therefore, the court will e.g. in the case of a person charged with assault also be able to convict the person for violation of honour (the offender has for instance spat in the other's face). In the opinion of the present author, life and health and honour should be regarded as two separate interests. However, if it is difficult to substantiate the assertion that this is one interest, it is equally difficult to substantiate the opinion that there are two interests in any other way than that it is "felt" they are essentially different.

Because the degree of specification will often determine whether one is dealing with the "same" interest or with "different" interests, the person who is to make the decision will himself have considerable ability to decide the result himself, while at the same time there will be an opportunity to camouflage the fact that discretion has been determinant.

One may, for instance, say that both sec. 182 of the Penal Code on forgery and sec. 189 on false information in documents protect the same interest, i.e. the interest in documents generally being trustworthy. However, by way of

[17] H.K. Bjerke, *op.cit.*, p. 76, cf., to the contrary, J. Skeie, *Den norske straffeprosess I*, pp. 106 f., cf. p. 355.

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specification it is also possible to make it appear that the provision protects different interests: One may, for instance, say that sec. 182 protects the interest of ensuring that documents that appear genuine actually *are* genuine, in other words, that the document actually originates from the issuer, whereas sec. 189 protects the interest in having document statements actually being *correct*.

Another example of how the interest one or more penal provisions presumably protect can be specified in different ways is found in the relationship between sec. 192 of the Penal Code on rape and sec. 195 also of the Penal Code on illicit sexual relations with minors. In this instance one may say that both provisions protect the same interest, namely sexual integrity. However, one may also say that the provision on rape protects the individual's *freedom of choice* in sexual relations, whereas sec. 195 protects society's general interest in preventing sexual exploitation of minors or exposure of minors to the detrimental effects presumed to follow from sexual practice involving minors.

Thus itemization offers considerable freedom when it comes to stating which interest a penal provision is meant to protect. This freedom implies again that the interests allegedly protected by a penal provision may easily appear as after the fact constructions, adjusted to achieve the desired results. Moreover, because a statement that a penal provision protects one definite interest cannot be substantiated further, such substantiations may also easily appear postulates.

3. SOLUTIONS BASED ON GENUINE CONSIDERATIONS

If we conclude that the procedural questions dealt with here cannot be properly resolved on the basis of the interests the penal provisions presumably protect, the next question is: What guidelines shall be used for solving these questions?

It is hardly possible to use the same views as a basis for deciding, first the question of who is to be considered to have special injured party status, second the question of the court's power to deviate from the law applied in the charge and also the significance of a change of subsumption as regards the right to bring a new action.

In the present author's opinion, however, there are so many links between the last two questions that the solution ought to be arrived at according to the same guidelines.

a. *Who has a need to exercise the procedural rights afforded persons with special injured party status?*

As stated above, the question of whether a private person is to have *special injured party status* might be solved in the statute, directly or indirectly. The view

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of protected interests—i.e. that the person affected by the offence receives the special injured party status if the penal provision in question must primarily be considered as protecting private interests—will therefore be regarded as significant only where the law itself offers no guidance.

If, on the other hand, the distinction between public and private interests is regarded as not well suited as a basis for deciding this question, the question arises whether there are other and better ways of reaching the decision. In the opinion of the present author there is a better way and the issue should then be resolved on the basis of the factors which Professor Johannes Andenæs recommends as applicable where the protected interest view provides *no* guidance, namely where a person affected by an offence "is so directly harmed by the violation that there is reason for giving him the procedural rights associated with special injured party status".[18]

This seems also to be a far more favourable basis for decisionmaking than the protected interest view, and also as a procedural *starting point.*

A possible objection to such a view, however, might be that the legal effects which legislation links to special injured party status are so different that it may prove difficult to arrive at a solution based on an assessment of the involved person's need for obtaining the special injured party status—it is easy to imagine that in a specific case it might be reasonable for an affected party to be awarded *some* but not *all* of the procedural rights involved.

One possibility might of course be to define the concept "special injured party status" in various ways in relation to the different legal effects. The general view, however, has been that this concept should be defined in the same way, regardless of which legal effects are involved.[19]

It would, however, seem that the rights afforded to special status injured parties are not so dissimilar as to make it impossible to decide whether to give this special status to a person, based on his actual need for exercising such rights.

Among the rights that are afforded special status injured parties one might first mention the right to pursue civil claims in the criminal case. According to the former Norwegian law, this right was only available to persons considered special status injured parties under criminal procedure. According to the new legislation, this right will be available not only to the injured person, but to anyone having suffered damage due to a punishable act, cf. the new Act on criminal procedure, sec. 3.

Under the new legislation, the need to invoke civil claims will not be a

[18] J. Andenæs, *op.cit.*, pp. 84, I. Agge, "Ett par spörsmål angående målsäganderätt vid konkursförbrytelser" (A Couple of Questions regarding the Right to Sue in Connection with Bankruptcy Crimes), *FJFT* 1937, pp. 265 ff., on pp. 272 f.

[19] J. Andenæs, *op.cit.*, pp. 84 f.

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decisive factor when defining special injured party status. A person having sustained damage may of course submit claims even if he does not acquire special status.

Next, the injured party has certain rights with respect to the decision to prosecute: First, he can more or less influence the decision as to whether there is going to be public prosecution—sometimes a prosecution demand from the injured person is an indispensable condition for public prosecution, sometimes public prosecution depends either on the request by the injured person or on whether public prosecution is warranted by general considerations.[20] Moreover, the injured person himself also has some right to pursue private prosecution (new Act on Criminal Procedure, sec. 402 No. 3, cf. sec. 406). In some cases the injured person may also "join the public prosecution" as far as the demand for prosecution is concerned.[21]

Furthermore, special injured party status has some effects of a purely procedural nature:

First, the person with this status will be disqualified from acting as judge in the case, cf. the Act on the Courts of Law, sec. 106 No. 1, and he will not be able to appear as a representative of the public prosecutor, cf. the new Act on Criminal Procedure, sec. 60. The person with special status also has the same right of discovery in the case as the parties (new Act on Criminal Procedure, sec. 242). At the first questioning of the person with special status he is to be asked whether he demands prosecution (new Act on Criminal Procedure, sec. 236), and also whether he wants adjudication with regard to civil claims (new Act on Criminal Procedure, secs. 236 and 426).

The procedural rights mentioned here must be regarded somewhat as a supplement to the rights of the special status injured party with respect to the demand for prosecution and the civil claims.

Finally, in pursuance of a relatively recent amendment to the Act on Criminal Procedure, the person with special injured party status is entitled to representation by counsel in certain cases of sexual offences (the new Act on Criminal Procedure, sec. 9). This is a special rule applying to specific kinds of offences and has no bearing on the general definition of the term "special injured party status".

If we leave aside the effect of incapacity and the competence of the person

[20] Also where the injured person's request formally is no condition for public prosecution, his attitude in relation to the offence may nevertheless have considerable impact on the question of charging—and probably also as regards the possible reaction on the part of the courts, cf. J. Andenæs, *op.cit*, pp. 79 f.

[21] The rules on this point vary a bit in our former law as compared to the new Act on Criminal Procedure, see, on the one hand, the old Act on Criminal Procedure, sec. 95, para. 2, and sec. 438, and, on the other hand, the new Act on Criminal Procedure, sec. 404, cf. sec. 402, para. 1. Cf. the Report by the Law Commission on Procedure in Criminal Cases, pp. 347 f.

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with special injured party status as regards civil claims in the case, which, according to the new Act, is not a specific right for the party with this status only, the central aspect of the special injured party status will be a certain competence as regards the *claim for punishment* in itself.

When, therefore, it comes to deciding who shall have such competence, weight must—it would seem—be attached, not to whether the penal provision affords a purely abstract protection of private or public interests, but to the need of the affected person for this competence. One may use civil procedure terminology and say that the decisive factor must be whether the affected person has the necessary "legal interest" in claiming public prosecution, in agreeing to the prosecution or to undertake prosecution himself.

One factor that may be taken into account in this connection will be *in which way* a person is affected by an offence. If the offence results in injuries on person or property, it seems that as a rule it would be reasonable to consider him as special injured party—also where it is a case of breaking laws that traditionally have been conceived as protecting public interests only.[22]

On the other hand, it does not seem natural to consider a person as special injured party only because he has been exposed to *danger*.[23] As mentioned above, the general opinion has been that the provisions of the Highway Code and road traffic rules do not protect private interests, so that for that reason there is no private person with special injured party status.[24] This seems a trifle far-fetched—since even if it is maintained that these rules do protect public interests, such as road safety and traffic handling, it seems obvious that the fundamental purpose of such rules is to protect the individual. After all, the efficient and safe handling of traffic has no intrinsic value—the desire to make road traffic safe is of course founded on the need to protect those who use the roads. And for some of the provisions of the Highway Code this purpose is quite obvious. Sec. 3 of the Highway Code has been mentioned already as an example. Another one is sec. 12 on the duty to render assistance in case of accident.

It is on the other hand quite clear that a breach of rules of this kind does not affect everybody to the same extent. Normally, it must thus be assumed that there will be no question of offence against a private person, for instance by violations of the directions of traffic signs. No one, for instance, should consider himself a special injured party if he cannot find a parking space and the reason is that somebody else has taken no notice of the time limits for parking. But even to such a principle there might be exceptions. If, for instance, in a

[22] Cf. J. Andenæs, *op.cit.*, p. 87.
[23] K. Olivecrona, *op.cit.*, p. 77.
[24] H.K. Bjerke, *op.cit.*, p. 78.

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residential area there is a "No Motor Vehicles Allowed" sign which nobody pays any attention to, it would not be unreasonable to assume that the people who lived there would have such "legal interest" in the traffic regulations being obeyed, and that they should have the right to bring a private penal action if no steps were taken by the authorities. Non-residents, on the other hand, would not be affected in such a way that they should have the right to bring an action.

Another factor to be counted when deciding whether a private person shall be regarded as a special injured party by a breach of the law, is the existence of other means of reaction.

One could argue that it would be unrealistic to maintain that, for instance, price and rationing legislation, in the same way as traffic legislation, protects public interests only, even if it is generally assumed that no private persons have been affected by such breaches of the law.[25]

In the majority of cases, a person who is affected by violations of the price regulations will, however, benefit by the rules on refund of an illegal excess price, so that normally he will not need to bring a subsidiary private court action. The violation may be so grave, however—an exorbitant price, exploitation of an emergency situation, etc.—that it cannot be denied that in certain circumstances it would be right to allow the individual to enforce his claim for penal sanctions in this way.

There is also reason to believe that, all things considered, there could be a basis for defining the term "special injured party status" in relation to the effects of incapacity and the other procedural rights due to the offended person.

When a person is so interested in the outcome of a criminal court case that he has a "legal interest" in demanding public prosecution, in adhering to the public prosecution or in following up the matter by a private law suit, it must at any rate be quite clear that he cannot act as a judge or appear as a representative of the prosecutor.

One cannot, of course, exclude the possibility that he is *not* considered as having the necessary "legal interest" when it comes to enforcing the claim for penal sanctions, but that he nevertheless is so interested in the outcome of the court case that he should not be allowed to act as judge or to appear as a representative of the prosecutor in the case. Then, however, the grounds for the effects of incapacity may be, not that he has special injured party status, but that there are "other special circumstances that might give rise to doubt as to whether he is unbiased", cf. the Act on the Courts of Law, sec. 108.

Defining the concept "special injured party status" in this manner—follow-

[25] J. Andenæs, *op.cit.*, pp. 88 f., and in the Act on Procedure concerning Price Controls and Rationing (Act of July 9, 1948 No. 3), sec. 14.

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ing an assessment of whether the offended person is so directly affected as to warrant giving him the procedural rights due to a special injured party—is therefore, in the opinion of Johannes Andenæs, something to fall back upon where the interest point of view offers no guidance—in other words, where it is not possible to say whether the penal provision concerned protects public or private interests. Andenæs believes, however, that also this way of defining the concept "special injured party status" is not very tangible, and this is an acceptable point of view, since according to such guidelines definition of a concept refers to discretion. However, deciding legal issues according to discretion is something that can hardly be avoided, nor, probably, is it desirable to avoid it at any cost.

It would seem that a definition of the concept of "special injured party status" according to these guidelines will be far more realistic than the one on which the theory of interests is based. If one relinquishes the idea that a penal provision protects either private or public interests, one will probably avoid the somewhat fictitious arguments that may easily come forth in connection with the views concerning interests, and instead find that the arguments set forth express the factors to which weight actually has been attached.

b. *The court's power to deviate from the law applied in the charge, and the prosecutor's right to bring a new action on the basis of new penal provisions*

The fact that, where the question of the court's power to depart from the application of law stated in the charge is concerned, one has emphasized which interest a penal provision supposedly protects, is probably connected with the principle of charging (new Act on Criminal Procedure, sec. 63). Since it is up to the prosecuting authority to decide whether to prosecute in case of a penal action, while at the same time a court necessarily must have a *certain* right to adjudicate pursuant to penal provisions other than those on the basis of which the prosecutor has demanded conviction, a natural middle course might be to allow the court to adjudicate on the basis of other penal provisions, but only as long as these protected the same interests as those of the charge. This has been comparatively clearly expressed in a vote in the case 1980 NRt 360. It says here that the issue to be decided in that case was whether the *court* could choose between two subsumptions "when the prosecutor has clearly indicated which interest he considers has been violated and of which he claims protection" (p. 367).

It we leave aside the principal difficulties involved in ascertaining which interests a penal provision shall protect, applying the view of interests will in many cases provide results that may be considered compatible with the principle of charging. In a case where somebody has been charged with issuing

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threats, the court must—with the limitations following from the new Act on Criminal Procedure, sec. 342—be able to pass a sentence for robbery, if, during the hearing of evidence, it appears that the threats were issued with the intention of obtaining unjustified gains. On the other hand, it would be unreasonable to sentence him for violating the small arms Act, even if it was a case of armed threats.

But is it not difficult to find examples where the view of interests leads to results which immediately seem virtually incompatible with the principle of charging. Andenæs mentions, for instance, that in a case of drunken driving it would be incorrect to sentence a person for having driven a car with defective brakes and vice versa, even if the provisions of the Highway Code and traffic regulations may be said to protect the same interest, namely road safety.[26]

The situation is therefore that the view of interests involves considerable problems of principle when it comes to finding out which interests are protected by a penal provision, while at the same time application of the principles does not always produce equitable results.

However, once this fact is recognized, there will be no reason to stick to the protected interest theory as the predominant view. One should instead fall back upon a total assessment of the similarities and dissimilarities that exist between the penal provision named in the charge and the penal provision to be applied in the sentencing. This will probably imply a tendency towards a more discretionary decision. However, the same will apply in this connection as when it has to be decided who shall be regarded as special injured party, that is, one does not have to decide which interests a penal provision is presumed to protect, whether it protects the same or different interests—types of arguments that may often appear unrealistic.

That it will often be necessary to undertake such a total assessment of the various kinds of offences was also presupposed as early as in the report of the Jury Commission.[27] It says here that a charge may be looked upon as applying, not only to the offence which has been mentioned explicitly, but also to offences where the nature of the act is *approximately* the same, and which appear as having violated *approximately* the same right, such as "robbery" and theft, perjury and fraudulent transactions, severe and less severe assault, etc. On the other hand, however, it would not, according to the *travaux préparatoires*, be appropriate if a person, after having been charged with murder during a hunt, also were to be charged with illegal hunting or vice versa.

Thus, relinquishing the protected interest theory as the predominant view

[26] J. Andenæs, *op.cit.*, p. 304.

[27] Statements of legislative intent pertaining to the Report by the Jury Commission, Document No. 1 1885, p. 390.

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does not imply a breach with the intentions of the legislator. On the contrary, it is the legal theory which, through presentation of the view of interests as the decisive factor as regards the freedom of the court concerning application of law in relation to the charge, has established a *narrower* and it seems less appropriate criterion than that at which the legislator once aimed.

If we are to assess this question on the basis of the principle of charging, it seems natural to distinguish between the court's power to *change* the subsumption, that is, to adjudicate according to another penal provision *instead* of the one cited in the charge, and the right to apply other penal provisions *besides* those stated in the charge.

With respect to changes of subsumption, the basic view is that as long as the penal provision to be applied protects the same interests as those cited in the charge, the court has the power to adjudicate according to both more lenient and stricter penal provisions.

It can be argued that this is not entirely in accordance with the principle of charging when it comes to applying a *more lenient* penal provision. If, for instance, the charge is burglary whereas the court regards it only as violation of the right of possession, it may well be that the prosecuting authority, if the facts of the case were quite clear, would not have prosecuted at all.[28]

On the other hand, it will as a rule be in keeping with the principle of charging to sentence a person for a more *severe offence* than that cited in the charge. After all, if the prosecutor is of the opinion that a case of burglary should be brought before the court, it must be presumed that the prosecutor would have held that court proceedings should be initiated even if it proves not to be a case of burglary, but of robbery. Yet the difference in severity may be so considerable that the offence to be adjudicated must be regarded as being of a substantially different character compared to the one cited in the charge. Suppose, for instance, that the charge is one of assault. Then it emerges during the main hearing that it is far more serious, actually attempted murder. On the basis of the interest point of view, the court should in this case have the possibility of also sentencing for attempted murder, because the provisions must be said to protect the same interest. But this is hardly reconcilable with the principle of charging, because the crime that is to be adjudged is so much more severe; it is of an entirely different character compared to the crime stated in the charge. There are good reasons to hold, therefore, that the case should be returned to the prosecutor for review—for instance to find whether there was a need for examining the mental state of the accused or to claim a security sentence. Also, it would probably often be natural for such a case to be

[28] M. Koktvedgaard and H. Gammeltoft Hansen, *Textbook on Procedure in Criminal Cases*, Copenhagen 1978, p. 121.

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brought before the court of appeal, even if, according to the Act on the Courts of Law, sec. 34, the district court would have the necessary jurisdiction. In such case one might thus find that a difference in degree may become so large that it ought to be considered as a difference in substance.

If it is a question of applying other provisions *in addition* to those with which the charge is concerned, it seems that it would be most in conformity with the principle of charging for the court to omit sentencing for such offences, and this even if it is a question of provisions which one can see protect the same interest as that stated in the charge.

It is, of course, possible to apply the same viewpoint as where it is a question of sentencing a person for a more severe offence than the one cited in the charge, i.e. that when the prosecutor has decided that an offence ought to be brought before the court, his standpoint should not be altered by the fact that the person charged proves to have committed several offences by his act.

The situations are not parallel, however. The prosecutor might conceivably have waived prosecution of the charge concerning the additional offences, if only out of regard to the litigation costs. It may also happen that the additional act for which the person should be convicted is of such a different character that it would be both unnatural and unreasonable to pass sentence without allowing the prosecutor to re-assess the question. Such a difference may very well occur even if the penal provision may be said to protect the same interest as that cited in the charge. The charge may for instance be forgery, whereupon it appears during the main hearing that the accused has also behaved fraudulently.[29] Although the conditions for passing a sentence for fraud do exist, this offence seems to be of such a different character—among other things the operative facts are very different—that it would be most in accordance with the principle of charging that the prosecutor be allowed to evaluate the circumstances and then decide what kind of reaction ought to be applied.

4. CONCLUSION

The fact that the view of interests cannot provide an indisputable solution in the cases looked at here has in many ways been recognized in legal theory for some time.[30] For instance, Andenæs has underlined that, both as regards the question of defining who is to have special injured party status, and the relationship between charge and sentence, the view must be supplemented by

[29] The present author presumes that these provisions may be said to protect the same interest—since the rules on forgery must be regarded as protecting the individual's interest in not being cheated, cf. J. Andenæs, *op.cit.*, p. 84.

[30] J. Andenæs, *op.cit.*, p. 84 and p. 304.

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other arguments, primarily real considerations. However, it could be argued that the protected interest theory so far applied will allow such a degree of subjectivity and produce so many challenging decisions that it does not even deserve a place as a leading view. Instead the questions ought to be solved on the basis of entirely different views, primarily real considerations.

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