COMPENSATION FOR UNJUSTIFIED IMPRISONMENT IN DANISH LAW

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ABBREVIATIONS USED EXCLUSIVELY IN THIS PAPER

CCP	Code of Criminal Procedure (Yugoslavia)
CPP	Code de procédure pénale (France)
EL	Lag 13/4 1945 om ersättning i vissa fall åt oskyldigt häktade eller dömda m. fl. (Sweden)
FT	Folketingstidende (Denmark)
Rpl.	Retsplejeloven (Denmark)
Stpl.	Straffeprosessloven (Norway)
StrEG	Gesetz über die Entschädigung für Strafverfolgungsmassnahmen (West Germany)
UfR	Ugeskrift for Retsvæsen (Danish reports and legal periodical)
UfR H	Supreme Court
UfR Ø	Eastern High Court
UfR V	Western High Court
VLT	Vestre Landsrets Tidende (Western High Court Reports, Denmark)

The following writings are cited by the names of the authors:

Bratholm	Anders Bratholm, *Erstatning til uskyldig fengslede* Oslo 1961
Gammeltoft-Hansen	Hans Gammeltoft-Hansen, *Fængslingsforudsætninger* Copenhagen 1973
Guradze	Heinz Guradze, *Die Europäische Menschenrechtskonvention. Kommentar,* Berlin 1968
Hjort	J. B. Hjort, in *Norsk Retstidende* 1957, pp. 1 ff.
Hoff	Helge Hoff, in *Ugeskrift for Retsvæsen* 1949 B, pp. 243 ff.
Huber	Barbara Huber, in *Die Untersuchungshaft,* pp. 133 ff.
Hurwitz II	Stephan Hurwitz, *Den danske Strafferetspleje*, 2nd ed. Copenhagen 1949
Hurwitz III	*op. cit.*, 3rd ed. Copenhagen 1959
Jeschek/Krümpelmann	Hans Heinrich Jeschek and Justus Krümpelmann, in *Die Untersuchungshaft*, pp. 929 ff.
Koktvedgaard	Mogens Koktvedgaard, *Lærebog i den danske Strafferetspleje,* Copenhagen 1968
Linckelmann	Wolfgang Linckelmann, *Entschädigung für ungerechtfertige Strafverfolgung,* Munich 1968
Moos	Reinhard Moos, in *Die Untersuchungshaft,* pp. 347 ff.
E. Munch-Petersen	Erwin Munch-Petersen, in *Festskrift til Henry Ussing,* Copenhagen 1951, pp. 399 ff.
	Hans Munch-Petersen, *Den danske Retspleje, Fem Del,* 2nd ed. Copenhagen 1926
	Zvonimir Separovic, in *Die Untersuchungshaft,* pp. 275 ff.
	Forhandlinger på tredie nordiske Juristmøde, Bilag V. Oslo 1879
	Die Untersuchungshaft im deutschen, ausländischen und internationalen Recht. Editors: Hans-Heinrich Jescheck and Justus Krümpelmann (Bonn 1971)

1. A COMPARATIVE INVESTIGATION

1.1. *Introduction*

Special provisions on compensation for unjustifiable imprisonment can be found in most European countries. In what follows, in addition to Denmark, regard will be paid to the laws of Norway, Sweden, West Germany, England, France, and Yugoslavia.[1]

Like Denmark, all these countries, with the exception of England, have special legislation on imprisonment compensation. However, the formulas used for expressing the basic principle differ from one country to another. While the prisoner in Denmark, Norway and Yugoslavia has—under certain conditions—a *legal claim* to compensation, the French CPP sec. 149 provides only for the discretionary awarding of claims.[2] In Sweden, equity is part of the basis for compensation, too, since compensation can generally be refused if the circumstances do not justify awarding it (EL sec. 1(2)).[3] A combination of the two systems is employed in Germany, depending upon what the result of the case is. Even though the formal difference between an equity system and a system which gives the accused a legal claim to compensation is pronounced, it may reasonably be asked whether the practical result does not in fact verge on relative uniformity in so far as compensation claims *ex lege* are contingent on assumptions of a markedly discretionary nature.

In all the countries concerned, an imprisoned person may institute an action for compensation on the basis of the ordinary rules on civil compensation, possibly in combination with a privately instigated criminal action. Because of the costs involved, however, this remedy is of real significance only in countries where no special provisions exist. As mentioned, this

[1] Cf. in this connection Gammeltoft-Hansen, pp. 16 f.

[2] A similar system exists in Holland and in certain Swiss cantons and is planned in Belgium; cf. Jeschek/Krümpelmann, p. 981.

[3] Cf. Bratholm, pp. 89 f.

is the case in England, where complaints and compensation claims can be raised on the basis of "false imprisonment" or "malicious prosecution".[4]

In what follows, the substantive and formal conditions for compensation will be discussed (1.2 and 1.3). In addition, the injuries which are covered by the compensation and the guidelines for assessment will be touched on (1.4). Finally, there will be a short discussion of reform attempts which are under way in the countries in question (1.5). The section ends with a rundown of the provisions for imprisonment compensation in the European Convention on Human Rights (1.6).

1.2 *Substantive conditions*

1.2.1. *The action justifying compensation.* In Danish law, a distinction is made between unlawful and unjustified imprisonment. *Unlawful* imprisonment is dealt with in Rpl. sec. 1018 a; it means imprisonment in a case where no such measure should have been taken, e.g. where a person has been held in custody for an act which is not a crime. *Unjustified* imprisonment means imprisonment in a situation where imprisonment as such can be justified but should not have taken place in the case at bar, e.g. where a person has been charged with a crime but is acquitted for lack of evidence. The provisions on unjustified imprisonment are found in Rpl. sec. 1018 b. This distinction, which will be discussed in detail later on,[5] does not occur in corresponding explicit provisions in the law of other countries.[6] In England, compensation for unlawful imprisonment is attached to charges of false imprisonment, while unjustified imprisonment can lead to charges of malicious prosecution. Since it is in practice extremely rare that complaints of the latter kind are entertained,[7] one can therefore speak of a certain practical limitation of the accessibility of compensation for unlawful imprisonment. No similar limitation is to be found in the other countries investigated.

[4] It is also possible to receive an equity compensation from the Home Office or from Parliament through a private act; cf. Linckelmann, pp. 7 f. The Norwegian Parliament has a similar facility; cf. Hjort, pp. 9 ff.; Bratholm, p. 62.

[5] See, *infra*, 2.1.1.

[6] The Austrian compensation law (from 1969) is, however, based on the differentiation, sec 2(1)(a); cf. Moos, p. 516.

[7] Cf. Huber, p. 181.

For a comparative legal evaluation, it is important to know whether the basis for compensation for imprisonment differs from that used for other coercive measures, including imprisonment surrogates.

In France and Yugoslavia, compensation cannot be obtained for measures other than imprisonment. In England such compensation claims are handled as complaints of malicious prosecution; they are seldom entertained.

In both Denmark and Sweden, arrest is on an equal footing with imprisonment, though in Sweden this is so only in so far as the arrest is later succeeded by imprisonment, or has lasted more than 24 hours. The same rule applies in Swedish law to travel bans, although compensation for the other measures taken in the course of criminal procedure is not permitted. In Denmark, such encroachments are liable to compensation "according to the circumstances" (Rpl. sec. 1018 c). In Norway, too, encroachments other than imprisonment[8] are included in a similar provision. According to Stpl. sec. 469(1), the accused may receive compensation for substantial loss of welfare brought about by prosecution.

West Germany has gone furthest: there, complete correspondence between imprisonment and other measures has been established (StrEG sec. 2(2)).

In most countries, there is greater accessibility to compensation for wholly or partially *served imprisonment* than to compensation for remand. This applies to Denmark (Rpl. sec. 1018 b(4), Sweden (EL secs. 2 and 3), Norway (Stpl. sec. 469(2)) and France (CPP sec. 626). In Germany, the basis for compensation is, by and large, uniformly regulated. The same is true of Yugoslavia (CCP sec. 507). English law does not contain special provisions for compensation for sentences served, and therefore in reality places punishment on an equal footing with imprisonment.

1.2.2. *The verdict.* None of the countries investigated limits the accessibility of compensation to cases where absolute acquittal has taken place. Dropping the case because of lack of evidence (possible rejection of the case by the court) is in this way equal to acquittal.

1.2.3. *Reasons for exclusion from compensation.* An imprisoned person may have brought about imprisonment

[8] Including arrest; cf. Bratholm, p. 16.

through his *own behaviour*, in two ways: he may—for example by offering a false confession or other untrue explanation—have incurred grave suspicion; or he may by attempting evasion, collusion, etc., have created the basis for the imprisonment itself.

In Norway, Sweden and Yugoslavia, such action on the part of the accused causes exclusion from compensation.[1] Initially, this was the case in Germany, too. However, in contracting suspicion there has to be intent or flagrant negligence on the part of the accused.[2] If the accused gives incorrect evidence on essential points or suppresses evidence even though he has declared himself willing to submit an explanation, disqualification is not a necessary effect. Reduction of compensation may take place.[3] In Denmark, such circumstances involving the accused are generally regarded as grounds for discretionary reduction or exclusion from compensation.[4]

In Denmark and Norway, compensation is excluded if there are still grounds for presuming the accused to be guilty of the crime charged.[5] The Norwegian provision even requires that the evidence presented shall be refuted; in practice, however, the accused is not required to produce positive evidence of his innocence, only a certain attenuation of the prosecution's evidence.[1]

Swedish law contains no express provision to the effect that the accused's guilt shall be taken into account. An assumption of this, however, is contained in the general rule about refusal of compensation where in the circumstances it does not seem reasonable to give compensation.[2] In Yugoslavia, it is unclear to what extent CCP sec. 507 must be understood to require invalidation of guilt.[3]

Among the countries investigated, only Germany has, with StrEG, given up the idea of establishing special conditions concerning the accused's guilt. Mere acquittal or withdrawal of charges for lack of evidence is sufficient.[4]

[1] Stpl. sec 470; EL sec. 1(2); CCP sec. 507, cf. sec. 500(3).
[2] StrEG sec. 5(2) and (3). Cf. about Danish law, pp. 46 ff.
[3] StrEG sec. 6(1)(1).
[4] Rpl. sec. 1018 b(3).
[5] Rpl. sec. 1018 b(2)(a); Stpl. sec. 469(3).
[1] Cf. Bratholm, pp. 96 ff.
[2] EL sec. 1(2); cf. *S.O.U.* 1972:73, pp. 25 f., 37 ff., and 197 ff.; compare with this Jeschek/Krümpelmann, p. 980.
[3] Cf. Separovic, pp. 305 f.
[4] A similar adjustment now also exists in East Germany, Czechoslovakia,

Table 1. Grounds for exclusion from or reduction of compensation and their effects

Presumption of the accused's guilt	The accused's own causation of imprisonment	Effects
Denmark, Norway, (Yugoslavia?)	Norway, Sweden, Germany (partially), Yugoslavia	Obligatory exclusion
Sweden	Denmark, Germany (partially)	Discretionary exclusion or reduction
Germany (Yugoslavia?)		No exclusion

The different systems of compensation are shown schematically in Table 1.

1.3. *Formal Conditions*

1.3.1. *Competence.* Ordinarily, the court which administers the case (or where the case would have been administered, had it been advanced to trial) also decides the question of compensation,[5] with the assistance of lay judges, according to the circumstances. In Germany, the court decides only the question whether compensation should be granted or not; later, assessment is carried out by the *Landesjustizverwaltung* (an administrative authority of the *Land*) under civil appeal.[6]

French and Yugoslavian law differ from this general model. In France, the question of compensation is decided by a commission made up of three judges from the Cour de Cassation.[7] In Yugoslavia, too, the decision is placed under the jurisdiction of a higher authority—the supreme court of the province—though it has to be prepared by the investigating judge who tried the case in the first instance.[8]

In two countries, the possibility of an administrative decision is held open. According to the Danish Rpl. sec. 1018 h(2), the Minister of Justice may, after consultation with the prosecution, the counsel for the defence, and the court, approve the com-

and in certain Swiss cantons; cf. Linckelmann, pp. 21 f.; Jeschek/Krümpelmann, p. 980.

[5] Cf. Rpl. sec. 1018 g (see also secs. 1018 i – 1018 l); Stpl. sec. 471; EL sec. 5; StrEG secs. 8 and 9.

[6] Cf. StrEG sec. 10.

[7] Cf. CPP sec. 149(1).

[8] Cf. CCP sec. 503.

pensation claim.[9] A similar system is prescribed under Yugoslavian law (CCP sec. 502): an administrative settlement has to be attempted in all cases before the question is brought to court.

1.3.2. *Procedural form.* Where the question of compensation is decided by a court, this is, as a rule, done according to criminal procedure. France is the only country where the question is tried under the rules of civil procedure;[1] the decision is not accompanied by an opinion.

1.3.3. *Time limits.* Ordinarily, the question is decided at the trial itself.[2] Possibilities have been opened everywhere, however, for examination and decision to take place later, subject to certain time limits.

The time limits are calculated from the pronouncement of the verdict (or possibly from the moment when the decision is to be considered final) or from the announcement of the prosecution's abandonment of prosecution. In Yugoslavia the time limit is one year,[3] in France six months,[4] in Sweden three months,[5] and in Norway one month.[6] Most rigorous of all is the Danish provision, according to which the compensation claim must normally be submitted in direct connection with the verdict—in jury trials even before submission for judgment.[7] Only when the court decides to put off the question until it can be treated under a separate case is there provision for a postponement, subject to a limit of 12 weeks. The same time limit applies where the case ends in a withdrawal of charges.[8] The various time limits can be exceeded, however, if new information of major significance is presented.[9]

1.3.4. *Petition.* In the countries discussed above, the question of compensation can only be taken up at the request of

[9] The provision has not only formal, but also substantive significance, since compensation claims are regularly met for equity reasons, for example where the time limit for the application has been exceeded, where the accused has caused imprisonment, or where a certain presumption of guilt is present.

[1] Cf. CPP sec. 149–2.

[2] The exceptions are—because of the division of competence—France and Yugoslavia.

[3] CCP sec. 501.

[4] CPP sec. 149(2).

[5] EL sec. 5.

[6] Stpl. sec. 471(2).

[7] Rpl. sec. 1018 g(1).

[8] Rpl. sec. 1018 g(2).

[9] Rpl. sec. 1018 g(3).

the accused. Germany, on the other hand, has a system of its own. Examination is undertaken *ex officio* by the court concerned in connection with the trial.[1] When the case ends in a suspension of prosecution, an application from the accused is still required; this has to be filed not later than one month after the prosecutor's announcement.[2] As for the assessment, the claim for it has to be presented to the *Landesjustizverwaltung* within six months (or where a further delay is deemed justifiable, within one year) after the court's decision on compensation responsibility became final.[3]

1.3.5. *Appeal.* The compensation decision can be challenged by appeal in all the countries discussed except France, where the decision lies in the hands of the Supreme Court.

1.4. *Damages*

In Norway and Yugoslavia, the enactments on compensation for unjustified imprisonment cover only economic loss.[4] Compensation is claimed in pursuance of the ordinary civil compensation rules.[5] In England, extensive compensation is given for non-material damage in connection with deprivation of liberty.[6]

In Denmark, Sweden, and Germany, compensation for loss of revenue as well as for non-material damage is allowed.[7] In Germany and Sweden, the rules for non-material damage, however, contain special limitations. According to StrEG sec. 7(3), a maximum of 10 DM per day can be granted in indemnity, even where the individual circumstances might indicate a higher amount.[8] In Sweden, indemnity for non-material damage can be granted only when there are special grounds for so doing.

[1] StrEG sec. 8.
[2] StrEG sec. 9(1).
[3] StrEG sec. 10(1) and sec. 12.
[4] Stpl. sec. 469(3); cf. Bratholm, pp. 62 f., where there is, however, one example of a court being so generous in the assessment that it must be assumed that there had been an attempt to compensate for the non-material damage also. CCP sec. 507, cf. sec. 500(1); cf. *Collection of Yugoslav Laws*, vol. XIX, p. 184, note 135. Ivancevic, *Haftung des Staates für rechtswidriges Verhalten seiner Organe*, 1967, p. 400.
[5] Cf. Bratholm, p. 62.
[6] Cf. Huber, pp. 179 ff.
[7] Rpl. secs. 1018 a and 1018 b(1); EL sec. 4(1); StrEG sec. 7(1) and (3).
[8] Cf. Kleinknecht, *Strafprozessordnung mit GVG und Nebengesetzen. Kommentar*, 30th ed. Munich 1971, p. 1382.

In France, compensation can be granted for economic as well as non-economic losses.[9] But an important limitation is inserted in CPP sec. 149, which excludes compensation unless there is "un préjudice manifestement anormal et d'une particulière gravité". This limitation differs from the corresponding rule in Swedish law, since it also applies to economic loss.

1.5. *Reforms*

The French and the West German statutes on imprisonment compensation are of recent origin, dating in France from 1970 and in West Germany from 1971. In Yugoslavia, the law is also relatively new (1965); it is reported that a new statute is under preparation which will provide for indemnity for non-economic losses too.[1]

In England, there do not seem to be any plans for introducing special provisions for liability for unjustified imprisonment.[2]

In Denmark, amendments are being prepared by a commission; no report, however, has yet been presented.

In Norway, the Criminal Procedure Law Committee in its Report of June 1969 (pp. 52–3, 362–7) proposed several amendments of the present rules from 1917. The changes would mean that it would not be required that evidence of guilt be refuted; it would be sufficient for the accused to make his innocence seem probable.[3] In addition, there would be access to the granting of equity-orientated compensation, even where the ordinary compensation conditions have not been fulfilled. Non-economic losses would be compensated where special circumstances indicate the need for such compensation. The committee considered[4] making it possible to meet compensation demands administratively, but finally rejected this idea.

In Sweden, new laws in this area are under preparation. In Legislative Commission Report 1972 no. 73 (*S.O.U.* 1972: 73) there is included a proposal for a new law which would cover compensation for all deprivation of liberty within as well

[9] Cf. Linckelmann, p. 31, note 3.
[1] Cf. Separovic, p. 308.
[2] Cf. Huber, p. 137.
[3] In all important aspects, however, this is only a codification of practice up to now, cf. p. 32.
[4] On a Danish model, see *supra*, 1.3.1.

as outside the limits of criminal procedure. Compensation for imprisonment surrogates (travel bans) would also be covered by this prospective law. In relation to the present rules for compensation for imprisonment (EL from 1945), the most important change is that presumption of guilt is eliminated as a ground for exclusion from compensation. If the criminal case ends in acquittal, withdrawal of charges, etc., the imprisoned person has a proper legal claim to compensation, unless he caused the imprisonment himself.

1.6. *The European Convention on Human Rights*

The European Human Rights Convention contains in art. 5, sec. 5, the following provision: "Everyone who has been a victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."[5]

It appears from the wording that only actually liberty-depriving measures (arrest and imprisonment) are covered by the rule.

The formulation of the article differs from the national rules discussed here in that it attaches compensation liability to violation of the conditions for imprisonment alone—that is, the so-called *unlawful* deprivation of liberty—without regard to the final result of the trial.[6] On the one hand, this limitation is substantially narrower than are the national provisions which make responsibility dependent on acquittal or withdrawal of charges. On the other hand, the term "unlawful imprisonment" is fundamentally broader, since it covers all cases where the conditions for imprisonment were not fulfilled, regardless of the subsequent conviction of the accused. Most conditions for imprisonment in the Convention as well as in national laws are discretionary in character (qualified suspicion, danger of escape, danger of collusion, etc.). The Court on Human Rights has explained, however, that it will not hesitate to examine how the national authority concerned exercised its

[5] Conversely, the compensation question is not mentioned in the Council of Europe resolution of April 19, 1965, on remand.

[6] The U.N. Convention on Civil and Political Rights (1966), art 9, is also based on the term unlawful imprisonment; cf. here Triffterer, *Die Untersuchungshaft*, p. 906, note 101.

discretion. The Court will do so even where a case has ended with a conviction (as for example in the Ringeisen case).[1]

One can question whether only violation of the Convention's conditions for imprisonment can form the basis for compensation claims, or whether infringement of the national conditions for imprisonment is sufficient to bring art. 5, sec. 5, into effect. A literal interpretation shows that the Convention's conditions are decisive. The Court, however, has severely sharpened the conditions for imprisonment laid down in art. 5 by taking into account the respective national rules when evaluating the legality of imprisonment.[2] With this in mind, one may characterize the basis for compensation in art. 5, sec. 5, as follows: It is sufficient that either the Convention's or the respondent state's conditions for imprisonment shall have been violated.

This only goes for violation of the substantive conditions for imprisonment. If a formal condition was disregarded, compensation would ordinarily not be considered justifiable unless it seemed probable that the violation had a practical effect on the imprisonment decision.[3]

It is not clear whether art. 5, sec. 5, also includes non-material damage. The English expression "compensation" and the French word "réparation" are not in full accord on this point, since the meaning of the English word is somewhat narrower than that of the French one.[4] Legal writers in general seem to assume that "compensation" includes non-material damage.[5] An argument in favour of this interpretation is to be found in the wording of art. 50—the general provision for compensation for actions contrary to the Convention—where the broad expression "satisfaction" is used.[6]

In the remedy offered by art. 5, sec. 5, there is a limitation inherent in the requirement that all domestic remedies must have been exhausted before the complaint can be submitted to

[1] Cf. Gammeltoft-Hansen, *Juristen* 1973, pp. 401 ff.; cf. Guradze, pp. 48 f.

[2] This is especially true of art. 5, sec. 3, on duration of imprisonment.

[3] Cf. Guradze, p. 86; also see *infra*, 3.2.1.

[4] Cf. Fawcett, *The Application of the European Convention on Human Rights*, Oxford 1969, p. 118.

[5] Cf. Linckelmann, p. 49, notes 5 and 6; cf. Brückler, *Deutsche Richterzeitung* 1965, pp. 256 f.

[6] Cf. Herzog, *Zeitschrift für Ausländisches und Öffentliches Recht* 1961, pp. 239 f.

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[6] Cf. Herzog, *Zeitschrift für Ausländisches und Öffentliches Recht* 1961, pp. 239 f.

the Commission of Human Rights (art. 26).[7] If the complaint is about remand and the Commission finds that a violation of art. 5, sec. 1(c), or sec. 3, has taken place, the Commission cannot make a decision on the compensation question until the claim for compensation has been presented to the national authorities and rejected by them. Another procedure applies when the Court has established a violation. According to the Convention's art. 50, the Court has the authority to award compensation when it has held that there has been a violation of the rights of the Convention. It has been established clearly in the Belgian Vagrancy cases that compensation, according to art. 50, does not presuppose that the domestic remedies were exhausted.[8] Even so, the Court has followed the practice of postponing the decision on the compensation question in order to give the respondent state an opportunity to settle the case itself.[9] If this does not happen, the plaintiff may—if the Commission brings the case before the Court—have the compensation question decided by the Court. This happened in the Ringeisen case.[1]

2. DANISH LAW

2.1. *Substantive conditions*[2]

2.1.1. *Unlawful and unjustified imprisonment.* Danish law is based on the distinction between unlawful and unjustified imprisonment.

Unlawful imprisonment, which is dealt with in Rpl. sec. 1018 a, means imprisonment where imprisonment should not have been resorted to. This can be understood to mean that the conditions enumerated in the Administration of Justice Act (and the Constitution) were not present at the time of the initiation or continuation of imprisonment.[3] An important

[7] Cf. *Digest of Case-Law relating to the European Convention on Human Rights* (1955–1967), p. 82; Collection of Decisions from the European Commission of Human Rights, no. 36, p. 68.

[8] Cf. Publications A, vol. 14, pp. 7 ff.

[9] Cf. Publications A, vol. 10, p. 45; vol. 13, p. 46; and especially vol. 15, p. 7.

[1] Cf. Gammeltoft-Hansen, *Juristen* 1973, pp. 405 ff.

[2] For the formal conditions see the Administration of Justice Act, secs. 1018 g – 1018 m (reproduced in Appendix) together with the remarks, *supra,* 1.3.

[3] Cf. H. Munch-Petersen V., p. 154; *Kommenteret Retsplejelov,* pp. 1017 f.

modification, however, is that only such legal errors as may influence the imprisonment question are covered by sec. 1018 a.[4] Thus the substantive conditions for imprisonment should have been disregarded, directly or indirectly.

Unjustified imprisonment, which is dealt with in Rpl. sec. 1018 b, implies that the criminal case ends in acquittal for reasons of lack of evidence or withdrawal of charges without there being any grounds for disqualification such as presumption of guilt or "contributory fault" (cf. Rpl. sec. 1018 b(2)(a) and (3)).

In order to evaluate the significance of this distinction in practice, a three-part grouping can be set up according to whether, on the one hand, the conditions in sec. 1018 a or sec. 1018 b alone are fulfilled or, on the other, both sets of conditions are present together.

Group 1. Unlawful imprisonment, sec. 1018 a (disregarding of substantive conditions for imprisonment—either later conviction, or acquittal, withdrawal of charge for lack of evidence with presumption of guilt, or the accused's own causation of the imprisonment).

In all of the published judicial decisions since the Administration of Justice Act (1919) came into force, there seems to be only one example in the area of remand where compensation was given for unlawful imprisonment without the conditions for compensation for unjustified imprisonment being present:

> *Ufr 1931. 638 Ø.* F. was imprisoned, charged with insurance fraud and incendiarism; as ground for imprisonment the lower court cited danger of collusion. Four days later the High Court lifted the imprisonment since neither danger of collusion nor other grounds for imprisonment were indicated to a sufficient degree. The High Court stated further: "Accordingly F. is found . . . regardless of whether according to information now available there is a reasonable presumption of his guilt in those crimes for which he was imprisoned, to have the right to compensation in pursuance of the conditions in Rpl. sec. 792 (1), last point."[5]

This isolated decision of the Eastern High Court must be termed in direct conflict with a Supreme Court decision, pronounced a week earlier:

[4] Cf. Hurwitz III, p. 530.
[5] The present sec. 1018 a.

UfR 1931. 462 H. In this case, too, the High Court (Western High Court) annulled the lower court's decision for imprisonment on the ground of danger of collusion. The accused was later convicted of the crimes cited (cf. UfR 1930. 945 H). Thereafter he applied for compensation for unlawful imprisonment, which was refused by the jury court. The Supreme Court rejected his claim.[6]

Group 2. Unjustified imprisonment, sec. 1018 b (withdrawal of charges for lack of evidence or acquittal without presumption of guilt or "contributory fault"—no disregarding of the material conditions for imprisonment).

This group is abundantly represented in the published collections of court decisions.

To mention a few: UfR 1921. 965 H; 1927. 319 H; 1928. 831 Ø; 1929. 1024 H; 1930. 898 V; 1931.398 Ø; 1935.1087 H; 1938.975 Ø; 1947.553 H; 1947.995 H; 1948.1080 H; 1950.996 Ø; 1955.352 Ø; 1961.914 H; 1966.337 Ø; 1966.801 Ø; 1969.794 Ø; 1970.862 Ø; 1971.827 V.

In all the cases listed above, the accused was acquitted or the charge dropped. In none of the cases, however, does it seem to have been discussed whether sec. 1018 a could have been invoked, because the conditions for qualified suspicion[7] had not been fulfilled at the initiation or continuation of imprisonment. The same applies to published verdicts where compensation was rejected on the grounds of presumption of guilt or the accused's own causation of imprisonment, and where it had therefore been natural to consider compensation under sec. 1018 a as a subsidiary possibility.[8]

Group 3. Imprisonment is both unlawful and unjustified, secs. 1018 a and 1018 b.

In this group there might possibly be listed a few published decisions.[9] Nor can it be denied on the basis of the court reports that a number of the cases mentioned under group 2 include a sequence of events which makes imprisonment unjustified as well as unlawful.

[6] Cf., on the question of the extent to which incorrect usage of the special grounds for imprisonment can form the basis for compensation for unlawful imprisonment, p. 54.

[7] See *supra*, 1.2.3.

[8] Exceptions are UfR 1927.915 H and 1932.330, note 2.

[9] UfR 1935.1087 H and 1950.996 Ø, and VLT 1949.54.

Judging from published practice it must be noted that the distinction in law and legal writing between unlawful and unjustified imprisonment hardly has a similar effect on judicial decisions. Rpl. sec. 1018 a has little or no independent significance as regards imprisonment. A closer analysis of the terms "unlawful" and "unjustified" seems to explain why this is the case.[1]

2.1.2. *Acquittal, withdrawal of charges, etc.*

2.1.2.1. *Acquittal*. Even though Rpl. sec. 1018 b(1) deals with acquittal in general, it is implied that its main concern is acquittal for reasons of evidence. This is clear from the grounds for disqualification laid down in subsec. (2)(a) (presumption of guilt).

If the acquittal is the result of *objective reasons for exemption from punishment* (self-defence, *jus necessitatis*, valid consent) or of reasons for remission of punishment (expiration, withdrawal from attempt), the question of compensation is doubtful. Hurwitz proposes that compensation be given according to the same guidelines as are used in evidence-based acquittals.[2] In support of his interpretation, there can be invoked sec. 1018 b(2)(b), which expressly cites subjective reasons for exemption from punishment (insanity) as a reason why compensation should be excluded. In other cases, too, it must be assumed that compensation can be denied in pursuance of the reasons for exclusion, e.g. where there is a presumption of guilt or of self-causation of imprisonment. In case of acquittal on the ground of valid consent to imprisonment, it can be argued, in certain circumstances, that the accused has caused imprisonment by his own conduct. The concept of the accused's contributory fault, interpreted extensively, also covers cases where he was on the borderline of criminal activity before being charged.[3] The same point of view can perhaps be applied to certain cases of withdrawal from attempt. When a person is acquitted on the basis of expiration, compensation will ordinarily be rejected in pursuance of sec. 1018 b(2)(a) because of presumption of guilt.[4]

In sec. 1018 b(2)(b) it is stated, concerning acquittal or omis-

[1] See *infra*, 3.2.1.
[2] Hurwitz III, p. 535, note 19; cp. Schlegel, pp. 178 f.
[3] For more on this, see *infra*, 2.1.3.
[4] Cf. UfR 1964.710 H. For that matter the provision in sec. 1018 b(3) could equally well have been quoted.

sion of charges because of *subjective reasons for exemption from punishment* such as the accused's insanity, that unjustified imprisonment cannot lead to compensation. But the other important subjective reason for acquittal in Danish law, minority (that is, being under 15 years of age), raises interpretation problems with regard to compensation provisions. It is a condition for criminal-procedure deprivation of liberty that a person shall have reached the criminal minimum age, Rpl. sec. 779 (2).[5] Consequently, should imprisonment of a child under 15 years take place, the imprisonment is unlawful and the state is therefore liable to compensation regardless of the ultimate result of the case.

The use of *grounds for annulment of punishment* implies that the accused has been found guilty of the crime charged and compensation is consequently excluded.[6]

Acquittal can also take place because the crime in question is *not considered punishable.* In these situations the accused will ordinarily have moved very close to the borderline of criminality; otherwise the case would hardly have been forwarded to indictment by the prosecuting authority. In such a case there is a strong tendency in practice to exclude compensation on the ground of the accused's own causation of imprisonment.[7] This practice flourished especially in traitorship and collaboration cases after the German occupation.[8]

Compensation after acquittal because of *technical* errors (for example the absence of the right to prosecute) may be solved along lines similar to those for rejection on the same basis.[9]

[5] Cf. Hurwitz, *Den danske Kriminalret. Almindelig Del,* Copenhagen 1971, p. 282.

[6] Cf. Hurwitz III, p. 535; *Kommenteret Retsplejelov,* p. 1018. Another point is that in these cases there can be grounds for granting compensation because the procedural deprivation of liberty has surpassed the penalty; for more on this, see *infra,* 3.2.3.2.

[7] See further *infra,* 2.1.3.

[8] Cf. as examples UfR 1950.485 H; 1950.705 H; 1950.723 H; 1951.692 H; VLT 1946.127; 1946.193; 1954.279. In these cases the parties settled for a reduction of the compensation; cf. UfR 1946.1249 H; 1947.553 H; 1947. 995 H. In an older decision—UfR 1935.1087 H—full compensation was granted; the accused had been imprisoned for violation of the Aliens Act, but during the case it was established that he should be considered to have acquired Danish citizenship in connection with the reunification of 1920. Also see Hurwitz III, pp. 538 f., which apparently overlooks traitorship cases in this context.

[9] On this, see *infra,* 2.1.2.2.

It cannot be required that the acquittal be final.[1] It should be mentioned that according to sec. 1018 m appeal against the compensation decision can take place separately as well as in connection with the appeal against the decision in the criminal case itself.[2]

2.1.2.2. *Release without trial.* The wording of sec. 1018 b(1)—"discharged without the case being brought to a verdict"—is very broad. The possible instances are withdrawal of charges for lack of evidence, the prosecutor's discretionary withdrawal of charges, and rejection.

Withdrawal of charges for lack of evidence can take place for the same reasons as those which can lead to acquittal.

Discretionary withdrawal of charges seems from the wording to be included in sec. 1018 b(1). But since the matter of guilt has usually been agreed on when withdrawal of charges is announced, compensation would be excluded in pursuance of sec. 1018 b(2)(a). The accused, naturally, is not prevented from bringing the question of compensation before the court, which thus must make an independent evaluation of the evidence in the case.

If the case is rejected because of a *technical error*, the question of compensation must depend on the nature of the defect. A temporary formal error (for example, presentation before the wrong court) cannot form a basis for compensation. If the rejection took place in a case where the public prosecutor lacked the right to prosecute because the crime was submitted to private prosecution, it will as a rule be permissible to grant compensation simply because the imprisonment was unlawful for that reason (Rpl. sec. 1018 a, cf. sec. 780).[3] The question of rejection on the ground that the crimes charged are not punishable must be resolved according to guidelines similar to those used in acquittal for the same reason.[4]

2.1.2.3. *Plurality.* A series of problems arise where the charge includes several crimes and only partial acquittal takes place.

[1] Cf. *Kommenteret Retsplejelov,* p. 1019; Bratholm, p. 27.

[2] On the re-opening of a case, sec. 1018 f(2) contains the provision that compensation granted must be paid back if the basis for the compensation disappears with the verdict of the re-opened case; cf. here VLT 1948.262.

[3] Cf. Gammeltoft-Hansen, pp. 32 f.

[4] See *supra,* 2.1.2.1.

Three situations can be distinguished:

Accused of	Imprisoned for	Acquitted of	Convicted of
(1) *a+b*	a+b	a	b
(2) *a+b*	a	a	b
(3) *a+b*	a	b	a

Situation no. 1. In this case there has to be an—often difficult—assessment of the extent to which imprisonment would have taken place even if the charges had only included crime b.[5] When the two crimes were of similar character, it will often be assumed that imprisonment would have taken place solely on the basis of the crime for which conviction took place,[6] and compensation must consequently be refused.

A special situation arises where the (possibly) unjustified imprisonment is compensated for by shortening the term to which the accused was sentenced. Here the need for compensation is slight. On the other hand, it cannot simply be assumed that full remission excludes compensation. Special economic loss can be suffered from the sudden imprisonment—loss which could have been avoided or at any rate reduced if sentence-serving had begun after ordinary notice. Often the person convicted has a not inconsiderable influence on the moment when service commences.[7] Remuneration for non-material damage, on the other hand, will hardly be granted, at any rate in the case of similar crimes.

Situation no. 2. It is clear that compensation must be given in these cases.[8]

Situation no. 3. This situation is without interest. The accused is here imprisoned for the crime for which he was convicted; thus imprisonment has not been unjustified.

Related to the cases mentioned above is the situation in which the accused is convicted for violation of a milder penal provision than that which brought about imprisonment.

As in situation no. 1, it is here necessary to assess the extent to which imprisonment would have taken place at all had the

[5] Cf. Bratholm, p. 30; Linckelmann, p. 67; *S.O.U.* 1972:73, pp. 34 f. and 178.

[6] Cf. as example UfR 1964.206 Ø.

[7] Cf. Bratholm, p. 29, note 2; see also Hurwitz III, p. 530; *S.O.U.* 1972:73, p. 38.

[8] Cf. UfR 1959.309 H; Hurwitz III, p. 535, note 20.

charges already at the moment of imprisonment only included the lesser offence for which conviction took place. Assessment will sometimes be easy, because the milder penal provision may not form the basis for imprisonment. In these cases there are grounds for an application of sec. 1018 b.[1]

Here, too, compensation can be excluded, if necessary, on the ground that the punishment was reduced by the period of imprisonment.[2]

2.1.3. *The accused's own causation of imprisonment.* The term "contributory fault" in connection with remand can be illustrated by three case-groups:

A. The conduct of the accused in connection with the charge casts a great deal of suspicion on him (for example, incorrect confession to the police or a third party, untruthful explanations on one or more points, etc.).
B. The accused indicates by his behaviour that one or more of the special imprisonment grounds are present (attempt to escape or collusion).[3]
C. The accused has, previously to being charged, exhibited behaviour which draws suspicion upon him.

The legislative history of the Administration of Justice Act indicates that only cases A and B were thought of as reasons for exclusion from compensation.[4]

In practice that limitation, however, has been ignored and cases falling under category C have also been brought in under the term "contributory fault". These have especially been cases of prosecution of traitors and collaborationists during the German occupation.

> *UfR 1950.324 H.* During the occupation until August 1943 four defendants had committed a number of acts which on the surface had to be assumed to be friendly towards the Germans. In reality they took place as cover for an operation which, in accordance with an agreement with Danish authorities, served the interests of the Danish secret service. In August 1943, the agreement with the

[1] Cf. Hurwitz III, p. 538, note 29; Bratholm, p. 33.
[2] Cf. UfR 1940.48 H.
[3] Often this will be suspicious as well and will consequently also come under group A; cf. E. Munch-Petersen, p. 401.
[4] Cf. H. Munch-Petersen I, pp. 155 f.; Hoff, p. 246.

Danish authorities expired. However, the defendants continued with their activities until in October 1943 the operation was stopped by the Germans, partially through the leader's arrest and deportation.

The lower court found the accused guilty of crimes against the state and sentenced them to long periods of imprisonment. The High Court reversed the decision of the lower court on the ground that the actions had throughout taken place in the Danish interest. The accused were acquitted and given substantial compensation for periods of remand which had extended over 2–4 years. The Supreme Court, to which the question of compensation was submitted, refused compensation, because the accused had been found to have brought about their imprisonment through their own behaviour.

UfR 1951.692 H. During the occupation, an entrepreneur had allowed two of his trucks to serve the occupying powers. Further, he had participated in a partnership which produced concrete products for the occupying powers. He was prosecuted as a collaborationist, but the behaviour in question was not considered to be punishable; compensation for imprisonment was, however, refused since the accused was found to have given rise to the imprisonment through his own activity.[5]

UfR 1959.309 H. A lawyer was imprisoned, accused of agency fraud. The High Court set aside the order for imprisonment four days later, because suspicion did not seem to be sufficient well-founded. Some months later, the lawyer was accused of a series of crimes (among others, misuse of his former position as deputy judge) together with the same agency fraud. The accused was acquitted of agency fraud, but convicted of the other crimes. The penalty was set at six months less the period of remand. Compensation for unjustified imprisonment was refused, as the lawyer himself was found to have given rise to the imprisonment.

UfR 1936.84 H. A person, F., was accused of incendiarism on three occasions. On the nights when the fires took place, F. had been drunk and away from his home. Later he tried to conceal his absence from home. After the charges were withdrawn, the High Court and Supreme Court refused compensation, referring to F.'s own causation of imprisonment.[6]

VLT 1949.74. A woman was accused of incendiarism, but the case closed without indictment. The rejection of compensation was explained, among other things, by the fact that before the fire she

[5] Cf. further, UfR 1946.1249 H; 1947.503 H; 1947.553 H; 1947.995 H; 1949.817 H; 1950.485 H; 1950.705 H; 1950.723 H; VLT 1946.127; 1946.193; 1954. 279.

[6] See on this Hoff, p. 245.

had given the impression that she was mulling over the idea of setting fire to the property in question.[7]

Among legal writers, this extended interpretation has the support of Hurwitz.[8]

It should be maintained that the term "contributory fault" is limited in other ways. Rpl. sec. 1018 b(3) is a provision concerning the injured party's own participation in the occurrence of the injury, and ordinary civil rules on contributory fault should to a certain degree be taken into consideration, in the first instance those regarding *culpa, causation,* and *foreseeability*. Responsibility for unjustified imprisonment is strict. However, this does not imply a more rigorous exclusion of compensation on the grounds of contributory fault than that which is applicable when responsibility is based on the ordinary rule of negligence.[1] There is an additional reason for this view, namely the fact that refusal of compensation for remand will ordinarily have more far-reaching consequences than does the dismissal of ordinary suits for civil torts.

Some authors point out that not every "imprisonment-causing" action on the part of the accused should exclude compensation. The accused's behaviour in this case must be of a somewhat questionable character.[2] The view must be accepted in so far as the accused's behaviour must have been neglect according to ordinary compensation rules.[3]

Contributory fault in the law of tort covers also responsibility for omissions in certain situations.[4] Applied to compensation for unjustified imprisonment, this has significance for the judgment of the accused's behaviour after the charge was presented and imprisonment possibly initiated. It must be stressed that the accused's refusal to speak with the aim of

[7] Cf. E. Munch-Petersen, pp. 411 f.

[8] Cf. Hurwitz III, pp. 536 f.; cf. further E. Munch-Petersen, pp. 408 ff.; FT 1960–61 A, col. 544; Koktvedgaard, p. 200. On the corresponding discussion in Norway, see Hjort, pp. 1 ff.; Bratholm, pp. 44 ff.

[1] Cf. A. Vinding Kruse, *Erstatningsretten,* 2nd ed. Copenhagen 1971, p. 401.

[2] Cf. Bratholm, pp. 47 f., who, as an example of the opposite, mentions a person penalized for incendiarism, who appears at the scene of a new fire and is arrested as a suspect.

[3] The accused, however, cannot escape from an alleged contributory fault by referring to his own insanity, cf. Rpl. sec. 1018 b(2)(b); Ussing, p. 191.

[4] Cf. Ussing, *Erstatningsret,* Copenhagen 1962, pp. 184 f.; A. Vinding Kruse, *op. cit.,* p. 393.

clearing himself of suspicion can, according to the circumstances, be understood as contributory fault.[5] Conversely, the accused's failure to appeal against an imprisonment decision can never in itself exclude compensation.[6]

The accused's behaviour must be causal to the imprisonment.[7] This condition will only seldom give rise to doubt, except in case of concurrent causes. Here the main idea must be that, as far as possible, an isolated evaluation of the separate crimes be made in reference to their significance for the imprisonment decision as well as to the accused's behaviour.[8]

The doctrine of *foreseeability* has greater practical significance. As appears from the judgments cited above, the accused's own way of acting before the charge can cause suspicion in two separate ways. Where it is clear that a crime was committed, but uncertain who was the offender, the accused may have brought himself under suspicion through previous statements to the effect that he would like to commit a crime of the kind in question.[9] The situation, however, may also be that there is doubt as to whether there has been a crime at all, but not as to who in that case was the offender. For a period of time the accused has moved close to the borderline of criminality,[1] and his situation now becomes the object of a closer criminal investigation.[2]

While in the last group exclusion from compensation can hardly be contested, compensation should not be refused in the first-mentioned case. For a person who has for some time frequented a border area of the criminal sector, it must be a clearly expected consequence that he may be charged and possibly imprisoned. The same is true of someone who behaves suspiciously after the crime has been committed. However, it is different for someone who expresses threats or the like before a crime.[3] He can only expect imprisonment if a crime

[5] Cf. UfR 1940.883 Ø; 1959.949 Ø. *Kommenteret Retsplejelov*, pp. 789 f.; Koktvedgaard, p. 97; Gammeltoft-Hansen, pp. 66 f.; cf. perhaps VLT 1954. 283. The same view is held by Bratholm, p. 50. On German law, see Linckelmann, pp. 105 ff.; StrEG sec. 5(2).

[6] Cf. Bratholm, p. 51.

[7] Cf. Bratholm, p. 46.

[8] See further Bratholm, p. 53; cf. UfR 1921.1026 H.

[9] Cf. VLT 1949.74 (referred to above); E. Munch-Petersen, pp. 411 f.; Bratholm, p. 47.

[1] H. Munch-Petersen V, p. 155.

[2] Cf., as examples, UfR 1950.324 H and 1951.692 H (referred to above).

[3] Cf. Bratholm, p. 47, who almost seems inclined to disregard the limitation of foreseeability in these cases; see also Hjort, p. 8.

of the same kind does actually take place. And this must ordinarily be considered unforeseeable, provided he does not commit the crime himself. Exclusion of compensation based on the accused's circumstances before a crime committed by unknown offenders should not, therefore, take place on the basis of the contributory-fault provision, but, at best, on the basis of a continuously maintained presumption that the accused was guilty of the crime in question. It is presumably sufficient that the charge be regarded as foreseeable. That the imprisonment itself should be foreseeable cannot be insisted upon.

An extensive interpretation of sec. 1018 b(3) would mean that in a number of cases it is difficult to decide whether compensation has been refused on the ground of the accused's own causation of imprisonment or on the ground of presumption of his guilt.[4]

The provision in Rpl. sec. 1018 h(5) also erases this differentiation; according to this, the Court is not allowed to note expressly in its opinion that compensation was refused because of presumption of guilt. The Court must restrict itself to a statement "that the legal conditions for compensation in regard to the evidence put forward in the case are not deemed to be present". The result of this—well-intentioned, though slightly hypocritical—provision is that it is very rarely possible for a student of court decisions to prove with certainty that compensation was refused on the basis of presumption of guilt.[5]

If the question of compensation is decided by a jury court, it is usually even more difficult to establish what were the true grounds for refusal. According to Rpl. sec. 1018 1, the jury may only be asked "whether the accused has a right to compensation".

It is too much to say that the ground for exclusion, "presumption of guilt", has been swallowed up by the ground "contributory fault". Certainly, however, presumption of guilt has lost most of its significance because of an extensive interpretation of the concept "contributory fault" and because the differentiation as a whole is unclear.

This situation is all the more unfortunate as the Supreme Court has conferred decisive importance on the differentiation

[4] Cf., e.g., VLT 1949.74 (referred to above); see also the case mentioned by Hoff, pp. 243 f.

[5] Cf. E. Munch-Petersen, pp. 413 f.

in regard to the question of appeal. Already in the decision UfR 1948.1080 H, the Supreme Court established that the Court considers itself to be competent to try the question whether the accused himself caused imprisonment by his behaviour.[6] But in a later decision, UfR 1971.49 H, the Supreme Court established that the question whether compensation was justly refused on the ground of presumption of guilt could not be decided without an investigation of the reliability of the evidence, and by doing this took the case out of the competence of the Supreme Court.

From now on it will be decisive for prisoners whether the High Court refuses compensation on one or the other of the grounds. In view of the obscurity of the differentiation, this legal state of affairs must be termed unsatisfactory.

2.2 *The practice of assessment*

The assessment of compensation for injury and loss is in principle governed by the ordinary compensation rules: among these are the rules of causation, the doctrine of foreseeability, and of the injured party's duty to limit the loss together with the maxim *compensatio lucri cum damno*[7] It cannot be denied that there is in practice a certain tendency to assess the amount of compensation slightly more generously than in civil lawsuits. Such a practice must in any case be considered justifiable in view of the tortfeasor's (the state's) greater ability to bear the loss. Furthermore, the point that criminal procedure (and through this, deprivation of liberty) must be carried through at the state's risk[8] must be emphasized.

Table 2. Compensation per day. Court decisions

	Number of cases	Compensation per day
1961–65	8	Dkr. 68
1966–70	7	Dkr. 87
1971–72	6	Dkr. 107

[6] Cf. UfR 1950.324 H and 1950.723 H; Victor Hansen, *Retsplejen ved Højesteret*, Copenhagen 1959, p. 151; Hurwitz III, p. 544.

[7] Cf. here FT 1964–65, col. 1775; UfR 1950.996 Ø.

[8] Cf. for details on this, Bratholm, pp. 62 ff.; Linckelmann, p. 61.

Table 3. Compensation for remand. Decisions of the Ministry of Justice

	Number of cases	Compensation per day
1966–67	10	Dkr. 81
1968–70	11	Dkr. 102
1971–72	13	Dkr. 81

The following statistics are based on decisions published in Danish law reports and certain internal accounting performed by the Attorney General, to which the present author has had access.

It is possible only in a few decisions to see which portion of the amount was given for non-material damage.

The assessment in those cases which are decided administratively (cf. Rpl. sec. 1018 h(2)) exhibits a quite significant variation. Of late the average level seems to have declined to less than that of the courts. This can no doubt be attributed to the accused's often being unacquainted with the assessment practice, and therefore claiming a lesser amount that he could actually be awarded.

In the years 1966–72 the Ministry of Justice approved 34 applications for compensation for periods of remand of more than three days. The total sum awarded was about Dkr 75,000.

In 29 of these cases a specific amount was given for non-material damage.

The figures listed can, at best, give only an impression of the level. The small number of cases does not allow of comparisons or conclusions.

Table 4. Compensation for non-material damage. Decisions of the Ministry of Justice

	Number of cases	Compensation per day[9]
1966–67	7	Dkr. 56
1968–70	10	Dkr. 35
1971–72	12	Dkr. 61

[9] See some similar figures from Sweden, *S.O.U.* 1972: 73, p. 210.

3. RECOMMENDATIONS ON THE LAW OF UNJUSTIFIED IMPRISONMENT

3.1. *General comment*

In formulating rules for compensation for remand, an attempt should be made to meet as far as possible the needs of those who have been imprisoned unjustly (or for an unjustly long term). The reason for this has often enough been emphasized in the centuries-long debate and needs no further elaboration here. Bentham's—often quoted, but nevertheless completely true—words are quite sufficient: "An error of justice is already, by itself, a subject of grief, but that this error once known, should not be repaired by proportional indemnification, is an overturning of the social order."

However, a reasonable assessment must also be made of other available possibilities of correcting or remedying an unjustified decision of procedural deprivation of liberty. It ought to be mentioned in this connection that a number of questions of significance for imprisonment in general would be suitable for re-examination by appeal. It is not, of course, to be assumed from this that appeal against the decision should be made a condition in such a way that the imprisoned person is prevented from claiming compensation where there was no appeal.[1] But it would seem reasonable to stress that discretionary questions in connection with the justifiability of imprisonment (for example, to what extent there is danger of escape) can often be evaluated better in a re-examination which follows instantly than in a later decision. It is also significant that appeal does in reality often take place in these cases, and that an obligatory assignment of defence counsel would probably strengthen the use of appeal further.[2]

Furthermore, there has to be a certain evaluation of the possibility of giving compensation through reduction of the punishment. Certainly, the area where compensation as well as reduction of the punishment appear as alternatives is very limited. Reduction presumes a sentence, compensation in general an acquittal or something comparable thereto. Overlapping can take place, however, where the charge includes several

[1] The German Act provides expressly that this shall not be the case: "Die Entschädigung wird nicht dadurch ausgeschlossen, dass der Beschuldigte . . . unterlassen hat, ein Rechtsmittel einzulegen." StrEG sec. 5(1)(3).

[2] Cf. on this Gammeltoft-Hansen, pp. 279 f. and p. 282.

crimes in respect of which there is acquittal for some and conviction for others,[3] and in the case of conviction for a less serious crime than that which led to the imprisonment.

3.2. *Substantive conditions*

3.2.1. *Unlawful imprisonment.* As noted above, *unlawful* imprisonment, which is dealt with in sec. 1018 a of the Danish Act, means imprisonment in cases where such measures should not have taken place. This means that one of the following conditions for imprisonment was not present:

(1) a crime subject to prosecution by the Prosecution Office (which as a general rule means that the penalty limit must include jail),[4] (2) concrete prospects of an imprisonment penalty, (3) qualified suspicion against the imprisoned person, and (4) special grounds for imprisonment (danger of escape, repetition, collusion or especially grave criminality).

The ascertainment of condition no. 1, whether the charge includes crimes which are subject to prosecution by the Prosecution Office, is very simple and is done almost automatically. Conversely, the other conditions contain considerations of a decidedly discretionary character.

As far as the special grounds for imprisonment are concerned (condition no. 4), Hurwitz[5] notes that the discretionary character of the conditions must mean that lack of legality can only be assumed where it is clear that the evaluation was incorrectly performed.[6] The same point of view must be applied as far as the condition of concrete prospects of imprisonment is concerned (condition no. 2).

In order for Rpl. sec. 1018 a to have independent significance in relation to conditions nos. 2 and 4, one must imagine the following situation:

- The court's evaluation of the concrete penalty prospects and the special grounds for imprisonment was *clearly incorrect.*

[3] See *supra*, 2.1.2.3.

[4] Minor offences are prosecuted by a police officer. The author's statement does not take into account the special provision in Rpl. sec. 780 (1)(1) on vagrancy, etc.

[5] Hurwitz III, p. 529, note t.

[6] Cf. here UfR 1931.462 H and 638 Ø, referred to above.

– This evaluation was possibly affirmed by a higher court upon appeal.
– The case did not end with a verdict of not guilty.

However, even though theoretically there is no reason why these conditions should not be fulfilled, it would be difficult to imagine them arising in practice. Subsequent proof of clear disregard (possibly in several instances) for clearly arbitrary conditions would hardly take place when, in addition, there has been a conviction and there is a possibility of a reduction of the penalty.[1]

The demonstration of qualified suspicion (condition no. 3) also often involves factors which are clearly discretionary. If sec. 1018 a were to have independent significance for this condition, this would presuppose that an originally unqualified suspicion was in the course of the case enlarged at least sufficiently to exclude compensation as a result of a reasonable presumption of the accused's guilt (sec. 1018 b(2)(a)). If presumption of guilt is rejected as a ground for exclusion, it is still necessary that suspicion reach the proportions needed for the pronouncement of a final verdict. In those—rare—cases where the accused is imprisoned on a vague suspicion which, however, is later strengthened to such a degree that a conviction can be made, reduction of the term of imprisonment is the adequate remedy.[2] From this it should not be understood that waiving the claim for qualified suspicion is acceptable: quite the contrary. In by far the greater number of cases such waiving would lead to later withdrawal of charges or acquittal, in which case compensation can be claimed according to sec. 1018 b.

Thus sec. 1018 a can be understood to have independent significance only in cases where the prosecuting authority did not have the power to order imprisonment (condition no. 1).

To maintain a special compensation provision for this situation alone seems superfluous. First, it would probably happen but rarely that there would be incorrect imprisonment in conflict with this distinct condition. And secondly, the basis for liability in these cases would be so clear that it could be dealt with administratively without difficulty.

That art. 1018 a is without substantial independent signifi-

[1] Cf. Guradze, p. 86; cf. Linckelmann, pp. 48 f.
[2] Cf. here UfR 1959.309 H.

cance in practice is clearly confirmed by the fact that it is seldom used.[3]

On the whole it seems right, therefore, to let the term "unlawful imprisonment" drop out of compensation provisions. Here it should be remembered, however, that the preceding analysis rests to a certain extent on two prerequisites:

- abolition of presumption of guilt as ground for exclusion;
- establishment of the possibility of giving economic compensation instead of a reduction where this is impossible because of the type of penalty (for example fines) or the length of imprisonment.[4]

3.2.2. *Presumption of guilt as a ground for exclusion.* A weighty and often-stated criticism of compensation exclusion on the ground of presumption of guilt is that this creates two classes of acquittal: real acquittals and artificial acquittals with presumption of guilt.[5]

A group of people is hereby brought into an intolerable situation where the criminal-court acquittal seems diminutive compared with the defamation which accompanies the presumption of guilt expressed in the decision to refuse compensation.[6] A provision like that in Rpl. sec. 1018 h(5) is of course quite insufficient to remedy this problem.

The argument becomes even more weighty when one considers that fear of a stigmatizing rejection often causes the acquitted party completely to forgo submitting a compensation claim.[7]

In favour of the author's proposition there can also be adduced another, more technical reason, namely the above-mentioned[8] terminological confusion between presumption of

[3] See *supra*, 2.1.1.

[4] See *infra*, 3.2.3.

[5] Cf. Koktvedgaard, p. 200; Axel Petersen, *UfR* 1921 B, pp. 286 f.; Troels G. Jørgensen, *UfR* 1923 B, pp. 50 f.; E Munch-Petersen, p. 403; Hjort, p. 9, who quotes the special intermediate form used in Scotland: "guilty but not proven"; Bratholm, pp. 85 f.; Linckelmann, p. 76; *S.O.U.* 1972: 73, p. 133.

[6] The Norwegian proposal of 1969 looks upon the situation differently. It states that, where the acquittal is accompanied by continued presumption of the accused's guilt, this will, as a rule, appear in the premises of the decision; p. 364; cf. Bratholm, p. 38. The argument has limitations. Statements of the type mentioned are usually formulated so indirectly that they are far from containing the same taint as the simple and tangible fact that compensation was refused.

[7] Cf. Hurwitz II, p. 782.

[8] See *supra*, 2.1.1.

guilt and contributory fault. As mentioned, it was not just out of a desire for analytical stringency that the author claimed that the distinction should be clarified; the question is decisive for the handling of appeals in the Supreme Court. If presumption of guilt is dropped as a ground for exclusion, this will have the satisfactory result that the Supreme Court can always try compensation questions.

In addition, there is the basic tenet that the accused must always be regarded as innocent until a final verdict of guilty is pronounced. If no such verdict is pronounced, the presumption of innocence should be maintained.[9] The weight of this abstract argument may perhaps be discussed. It must be noted that a great number of countries, all of which profess to follow the principle of the accused's innocence, in fact practise compensation exclusion on the basis of presumption of guilt. And the European Convention on Human Rights, where, as mentioned, the presumption of innocence is expressly stated (art. 6, sec. 2), cannot be referred to as a fixed point in the criticism cited.

The formal basis for putting into practice and maintaining two grades of acquittal can be found in the difference between the burden-of-proof rules in civil and criminal procedure, respectively. For the decision or the penalty question itself, the sentence *in dubio pro reo* is conclusive; but in a tort suit it is—unless something else is expressly decided—the injured party who usually bears the burden of proof for the compensation conditions. For one who is familiar with this situation, it comes as no surprise that, if there is a lack of evidence, the two burden-of-proof rules may lead to divergent results.[1] However, this should not be decisive where questions of compensation for unjustified imprisonment are concerned. The accused is not bound according to the present provisions to establish his innocence positively through a disproval of the prosecuting attorney's evidence.[2] Sec. 1018 b contains a compromise, as compensation can only be refused in so far as there is still a reasonable presumption of the accused's guilt. Thus, a special standard has been inserted in the probability scale for evidence assessment—a standard which at any rate

[9] Cf. further Hurwitz II, p. 782.

[1] Cf. Bratholm, pp. 85 f.

[2] Cf. as example the Norwegian provision, see *supra*, 1.2.3.

must be the same as that of "reasonable cause" (qualified suspicion) in Rpl. sec. 780, since otherwise imprisonment would have been unlawful (provided that important new remedial factors do not appear in the period between the initiation or continuation of imprisonment and the verdict).

Furthermore, it must be emphasized that when formulating the burden-of-proof rules regard should be paid to the fact that the consequences of a refusal of compensation for remand will often be far more severe than in a civil-court context. This special defamation, connected with the refusal, which, according to the circumstances, can be a far greater burden than a plain economic loss, is a powerful argument for placing the person who has been imprisoned in a more favourable position than injured parties in ordinary tort claims.[3]

For many, the decisive argument against repeal of the present rule on exclusion from compensation because of presumption of guilt is that a number of persons who are in fact guilty will thereby receive economic gains from the state for their crimes.[4]

On this point it must be emphasized that there is no question of profit, but only of *compensation*. In principle, compensation places the persons involved on an equal footing with the group whose crimes are never discovered, or who are never revealed to be the perpetrators; in addition, the group which is not imprisoned during the case and which is later acquitted. In step with the expanding recognition of the significant dimensions of hidden criminality, there disappears the basis for the feeling of intolerability in that a number of guilty persons are not sentenced although prosecution is initiated against them.[5] The same is true of compensation for deprivation of liberty during trial. It must be added that the increase in the number of guilty persons receiving compensation is hardly likely to be large. First, the absolute increase will be of small dimensions. Secondly, the extended interpretation of the term "contributory fault" actually applied has the effect that a number of cases where the exclusion of compensation probably rests, deep down, on a presumption that the accused is actually

[3] Cf. Bratholm, p. 86.
[4] See as example Getz, *5. Nordiska Juristmötet 1884*, p. 161.
[5] Cf. Greve, *Kriminalitet som normalitet*, Copenhagen 1972, pp. 153 f.

guilty of the crime charged are already subject to exclusion under the contributory-fault provision.[6]

Finally, one should not forget that the present procedure involves a risk that a number of innocent persons will not receive compensation.[7]

Two authors have contended that the proposed amendment would have an unfortunate influence on the general preventive effect of crime prosecution.[8] Even apart from the fact that general prevention as a whole must be considered to have an undefined effect, the view seems far-fetched. In part, it is hard to believe that anyone would refrain from criminal activity because of the possibility that he would not receive compensation for possible imprisonment when later acquitted. Incidentally, this view assumes that remand itself must bear the general preventive effect, a point which is elsewhere rejected convincingly by one of the two authors referred to.[9]

The argument that compensation payment is thought by the general public to represent a defeat for the courts, thus undermining the confidence felt in the authorities,[1] must also be regarded as extraordinarily weak. Compensation has been paid for decades without any such effect being noticed. It is more probable that a lack of confidence is entertained precisely for the kind of judicial system which feels that it is necessary to reject otherwise reasonable compensation claims in order to maintain confidence.

Greater emphasis must be given to the argument that compensation liability paid independently of the judging parties' presumption of guilt can lead to more convictions in cases where the evidence narrowly falls short of the necessary level.[2] Some legal practitioners say that this risk often exists in cases where lay judges take part. If an acquittal in fact means that the accused will be granted money out of the state treasury, courts may prefer to convict, possibly with a substantially reduced sentence.

[6] See *supra*, 2.1.3. See also Koktvedgaard, p. 200.
[7] Cf. Schlegel, p. 179; Hurwitz II, p. 782.
[8] Cf. Rump, *5. Nordiska Juristmötet 1884*, p. 151; Bratholm, pp. 86 f.; Linckelmann, p. 84.
[9] Cf. Bratholm, *Pågripelse og varetektsfengsel*, Oslo 1957, pp. 321 f.
[1] Cf. *Retsplejeudvalget*, *Rigsdagstidende* 1930–31 A, col. 5188; Linckelmann, p. 84.
[2] Cf. Bratholm, p. 86; Linckelmann, p. 84.

It is understandably difficult to evaluate the practical significance of this argument. In some ways the risk mentioned could perhaps be obviated if there were greater clarity in the deliberation of the judges. Support is lent to this view by the fact that it is especially the lay judges who tend to adopt a rigorous attitude.[3]

Of the arguments mentioned, those against repeal seem on the whole to be less weighty than those in favour of repeal. And, in favour of repeal, there is another, very important observation to be added.

To the extent that different material conditions are maintained for compensation for remand and for served sentences respectively, in the present circumstances an irrational and arbitrary discrimination is brought about. In many cases a not insignificant portion of the sentence is served in remand. The duration of remand is far from always dependent on the accused's crime: it is connected rather with the character of the case (for example, complicated crimes of gain, cases with mental investigations) and with whether or not there is an appeal. The acquitted party, after having been relegated to remand, is in reality placed in exactly the same position as one who has served a term of imprisonment of similar length. The former could be refused compensation on the ground of presumption of guilt, the latter could not.[4]

It cannot be regarded as a relevant difference, in this connection, that the prisoner's acquittal may possibly take place after the re-opening of the case. An acquittal in a re-opened case cannot have greater significance than acquittal in the course of the first prosecution.

The accidental element appears to be evident especially where compensation is given under sec. 1018 b(4) and the penalty is partially regarded as having been served through remand. Here, there is a continuing, established custom that the period of imprisonment must be decided according to the narrower

[3] See further the proposal for dispensing with the participation of lay judges when the compensation question is decided, *infra*, 3.3.

[4] E. Munch-Petersen, for that matter, also points out the unreasonableness of making a difference between the two categories, but comes close to concluding that the range of compensation for penalties served ought to be narrowed correspondingly; cf. pp. 416 ff. This view was also followed to a certain extent in an amendment of 1961 whereby compensation for penalties served can be denied to the same degree as in remand, if the accused himself has caused the conviction; Rpl. sec. 1018 b(4) *in fine*.

rules concerning remand, regardless of whether remand makes up a larger or smaller portion of the combined confinement period.[5]

The viewpoints mentioned lead to a proposal for complete repeal of exclusion of compensation on the basis of continuing presumption of the accused's guilt. No compromise seems possible. A general equity rule[6] would be subject to the same criticism as the present system, perhaps with the modification that the defamation connected with the rejection would be somewhat reduced.

A further limitation of the grounds for exclusion—for example, to "apparent reasonable presumption of the accused's guilt"—would hardly offer a practicable solution.[7] And even if such a solution could be devised in practice, the two most important arguments for total repeal—defamation in case of rejection and the difference between the conditions for compensation for a served sentence and for remand—would remain undiminished in strength; the first would even gain added weight.

That total repeal would not necessarily be a catastrophe for the administration of criminal justice is indicated by the facts that West Germany has decided to do without this limitation of compensation liability and that a similar proposal has been put forward in Sweden.[8]

3.2.3. *Conviction.*

3.2.3.1. *The structure of the problem.* The real need for compensation diminishes greatly when prosecution ends in a conviction. The main reasons for this are:

(1) the possibility of compensation through reduction;
(2) a need to deal with defamation caused by imprisonment does not arise.

The first point is weakened decisively, however, if the penalty imposed is a term of imprisonment shorter than remand (3.2.3.2.) or consists of a fine (3.2.3.3.).

The second argument is weakened somewhat if the accused

[5] Cf. Hurwitz II, p. 776; E. Munch-Petersen, pp. 418 ff.; *Kommenteret Retsplejelov,* p. 1022; UfR 1943.109 H; 1950.723 H; 1951.990 H; 1961. 914 H; 1964.710 H. See also Bratholm, pp. 36 and 45; *Innstilling* 1969, p. 365.

[6] Cf. Hurwitz II, p. 782 with note 35.

[7] See, for an attempt along these lines, Troels G. Jørgensen, *TfR* 1923, p. 51.

[8] See *supra,* 1.5.

is convicted of a crime which is much less serious than the one forming the basis for imprisonment. If the conviction leads to imprisonment of at least the same length as remand under the milder penal provision, then full reduction can take place.[9] If the application of a milder provision would lead to a shorter period of detention or a fine, then compensation can be granted according to the special rules for this.[1]

3.2.3.2. *About duration in particular.* The main condition in this area of a special compensation provision must be that the sentence of imprisonment shall be for a shorter duration than remand.[2]

Special problems arise in the case of conditional sentences. If, however, the point of view is accepted that imprisonment should not take place where a conditional sentence can be expected,[3] it is reasonable to give compensation in these cases also. The special situation where the conditional sentence comes about, among other reasons, because a certain period of remand has been served,[4] reaches a fully logical and reasonable solution through a combination of conditional and unconditional sentences.

It can be discussed whether compensation for "excess remand" should be paid according to obligatory or discretionary rules.[5] The objection may be made to an obligatory provision that it could perhaps serve as an incentive, in certain cases, for the Court to circumvent the rule by imposing a penalty just covering the duration of the remand. Such a tendency is, of course, undesirable in itself. But in relation to the question of a choice between a discretionary or an obligatory rule of compensation the argument has, in a sense, no bearing. Let us compare the following two patterns:

(*a*) 6 months remand—4 months imprisonment—compensation for the two extra months refused discretionarily;
(*b*) 6 months remand—6 months imprisonment (in order

[9] Cf. UfR 1940.48 H.
[1] Cf. UfR 1963.819 V.
[2] The provision will thus also be applicable in annulments of punishments. See *supra*, 2.1.2.1.
[3] See here Gammeltoft-Hansen, pp. 40 ff.
[4] And where remand is therefore not in conflict with the provision, an unconditional imprisonment penalty must be counted on as a concrete prospect, cf. Gammeltoft-Hansen, p. 42.
[5] Bratholm implies that the rule ought to be discretionary, p. 33.

to avoid paying compensation according to an obligatory rule).

It can be seen that there is no real difference between (a) and (b) apart from the appearance of the police record. In both situations the accused has been deprived of liberty for six months; and in both he receives no economic compensation.

It can be said in favour of the obligatory rule for compensation that if remand is in excess of the punishment sentenced the basic principle for the duration of imprisonment—the principle of proportionality[6]—is *ipso facto* set aside.

A difficult problem arises in the implementation of the exclusion grounds, "contributory fault", in case of "excess remand". With the new, extended interpretation of the concept contributory negligence[7] it will in a sense always be possible to contend that the accused has through his behaviour (which here the verdict has established as criminal) caused the imprisonment. Something can be said, therefore, for disregarding this ground for exclusion in the case in question. However, this would lead to unreasonable results. A person who has come close to criminality, though without entering into it, would ordinarily be denied compensation. If, on the other hand, he has entered into it and has been sentenced to a short term (possibly conditional), he would be able to receive compensation according to the circumstances.

Exclusion on the basis of the accused's contributory fault must therefore also be upheld in the case of "excess remand". Unlimited use of this ground for exclusion—whereby compensation will in reality rest on a discretionary basis—should not be allowed. Compensation cannot be refused simply because the accused has caused his imprisonment by his own behaviour; it can only be withheld where he has directly caused the imprisonment to be *extended* beyond the period which was comparable to the penalty sentenced.[8]

3.2.3.3. *Fines.* If the penalty imposed is a fine, there is a definite need for compensation for unjustified imprisonment. This can come about in two different ways.

Either a number of days comparable to the fine (or sentence)

[6] See, for further details, Gammeltoft-Hansen, pp. 180 ff.
[7] See *supra*, 2.1.3.
[8] Cf. here UfR 1951.990 H (dissent).

can be subtracted from the remand period in such a way that compensation can only be claimed for the excessive portion (the deduction method). Or the total compensation sum for the whole remand period can be estimated, but reduced by the amount of the fine (set-off method).

In practice the deduction method is likely to be used.[9] An unfavourable aspect of this is that the person sentenced is thereby compelled to pay the fine and thus is placed, in principle, in a far worse position than someone who, without previous imprisonment, is sentenced to the same penalty for a similar offence. In addition, the deduction method includes a possibility that the person sentenced will not receive compensation for his actual loss through imprisonment.[1]

> *Example.* A. has been imprisoned for 22 days; he is sentenced to a fine of Dkr. 600 with an alternative sentence of 12 days. A.'s daily documentable loss is set at Dkr. 120. His loss through imprisonment is thus Dkr. 2,640 minus the fine of Dkr. 600, which is assumed to have been paid through imprisonment, in other words about Dkr. 2,000. Computation according to the deducation method leads to a smaller amount: (22−12)×Dkr. 1,200.

If the alternative penalty is decided on the basis of daily earnings, there would be no difference between the two methods. But since this is hardly ever the case, the set-off method is preferable.[2]

3.2.4. *Imprisonment surrogates.* The present system, whereby compensation for unjustifiable employment of measures which replace custody is subject to a discretionary provision (Rpl. sec. 1018 c), is not satisfactory. Admittedly this is not important in practice, since imprisonment surrogates are on the whole very seldom employed. If, however, the use of surrogates becomes frequent, the question of compensation must be solved.

Among substitute measures which might be considered,[3] some will be characterized by actual deprivation of liberty, as

[9] Cf. UfR 1950.485 H; 1963.819 V.

[1] Cf. Bratholm, pp. 30 f.

[2] The set-off method also has the advantage that it is immediately viable. It would be preferable even if the present rigid system of alternative penalties were to be made more tractable; cf. Hurwitz, *Den danske Kriminalret. Almindelig Del,* Copenhagen 1971, pp. 404 f.

[3] See, for further details, Gammeltoft-Hansen, pp. 226 ff.

for example surveillance at home. The same compensation possibilities must apply for such measures as for ordinary remand. For that matter, it would be natural to establish a distinction between these measures and the less restrictive ones, so that only the first group would be subject to compensation rules.[4] Such a rule would seem unobjectionable, since compensation can ordinarily be refused or at any rate reduced in the case of less restrictive measures, as no substantial economic loss has been suffered.[5] Remuneration for non-material loss can hardly be considered within the context of this group, where possible defamation is probably attached to the charge itself rather than to the measure employed.[6]

3.3. *Formal conditions*

If the proposal for repeal of presumption of guilt as a ground for exclusion is followed, the court which tries the criminal charge must not be made the forum for the adjudication of the compensation claim. We are free to discuss the following questions: (1) Should lay judges take part in the decision? (2) What time limits should apply to the submission of the application?

If presumption of guilt is dropped as a principle, the lay-judge element must be said to be somewhat superfluous. This view is also supported by the practice of the Supreme Court, under which the question of the accused's own causation of imprisonment (in contrast to his presumed guilt) has been decided.[7] The compensation question will then on the whole be related to a civil suit.

The provision which states that compensation claims must normally be submitted in direct connection with the verdict—in jury trials even before the submission of the case for judgment[8]—seems questionable. Often it will be difficult for the accused to evaluate his situation at this point. As a minimum it must be required that the individual shall have the oppor-

[4] Cf. here the Norwegian proposal of 1969, p. 365.

[5] If release takes place with bail (cf. Rpl. secs. 786–8), compensation can be cut off without further ado.

[6] According to the present provision in sec. 1018 c, remuneration for suffering and pain can never be paid, not even for strict imprisonment surrogates.

[7] See *supra*, 2.1.3.

[8] Cf. sec. 1018 g(1); this provision is interpreted very rigorously in practice, see UfR 1958.972 Ø.

tunity of a relaxed study of the opinions of the judges on the bench before he decides whether compensation should be claimed.

On the other hand, there is no reason to cut off the possibility of deciding the compensation claim at the trial of the crime, if the accused clearly wishes this. A system which allows both possibilities is desirable.

The observations made above lead the author to present the following proposals:

(1) It should be made possible for the compensation claim to be lodged in connection with the trial (i.e. at the latest in connection with the verdict). The claim should be decided by a panel composed of the non-lay judges of the court.
(2) The accused should be allowed to choose to submit the claim within 12 weeks after the verdict (or the announcement by the prosecution that charges will be dropped). The claim in this case is to be decided by the court which first conducted the trial, without the participation of its lay judges.
(3) The provisions in secs. 1018 g(3), 1018 h(1)–(4), 1018 k, and (partially) 1018 m, should be retained.

APPENDIX

Administration of Justice Act

Chapter 93 a.
Satisfaction on account of prosecution

Sec. 1018 a.

An accused person who has been arrested or imprisoned has the right, where such measures should not have been employed, to compensation for economic injury, pain, and suffering caused by the deprivation of liberty.

Sec. 1018 b.

(1) A person who has been arrested or imprisoned and subsequently is acquitted or discharged without the case being brought to a verdict has a right to compensation for economic injury, pain, and suffering.

(2) This does not apply, however, when

(*a*) the information provided gives reason to believe that he is guilty of the charge which caused the arrest or imprisonment, or

(*b*) the acquittal or the withdrawal of charge is due to his insanity.

(3) Compensation can be refused or reduced if the said person has caused the imprisonment himself.

(4) A person who has served a penalty or any other sentence containing deprivation of liberty has, to the extent described in subsec. (1), a right to compensation, when the sentence is annulled after appeal or re-opening of the case. Compensation can be refused or reduced if the convicted person has caused the conviction himself through his behaviour during the case.

Sec. 1018 c.

The court can, in addition to this, according to the circumstances, award the accused compensation for economic injury caused by a measure as described in sec. 137(1), chapters 67–69, sec. 777(3); sec. 785, or chapter 73, when prosecution does not lead to a verdict, or when the trial ends with acquittal. The provision in sec. 1018 b(2) is employed correspondingly.

Sec. 1018 d.

(1) In the situations mentioned in secs. 1018 a–1018 c the accused, instead of claiming compensation, can demand a statement from the chief of police that it has been proved that the said measure lacked any basis and was not deserved in the accused's circumstances. If the chief of police finds that such a statement can be issued, it is to be prepared as quickly as possible. If during the case the court, in pursuance of sec. 137(2), chapters 67–69 and 71–73, has decided on certain measures against the accused, then the consent of the court must be obtained. The decision of the chief of police cannot be brought before a higher administrative authority or before the courts.

(2) In other cases, also, the person against whom prosecution has been initiated can demand a statement from the chief of police that it has been proved that the prosecution lacked any basis and was not deserved in the accused's circumstances. The decision of the chief of police cannot be brought before the courts.

Sec. 1018 e.

The rights mentioned in secs. 1018 a–1018 c in respect of economic injury after the death of the said person accrue to his spouse and heirs.

Sec. 1018 f.

(1) Compensation according to secs. 1018 a–1018 c is paid by the state treasury, but there can be recourse against the civil servant involved in so far as he is guilty of misuse of authority, negligence, or other unjustifiable conduct.

(2) When a case is re-opened and prosecution leads to a verdict involving the accused who has received compensation on the occasion of an earlier prosecution in the same case, it will be for the court to decide whether the basis for compensation has disappeared because of this, and whether compensation must be paid back to the state treasury.

Sec. 1018 g.

(1) A person who wishes to claim compensation according to secs. 1018 a–1018 c must, if the case is to be carried through to a verdict, present this in the court before the submission for judgment. In cases brought before the lower court or appealed to the High Court, the claim can also be presented in direct continuation of the verdict. The claim is decided upon during or in direct continuation of the trial, unless the court in carrying out its office or after a request from one of the parties decides that the question of right to compensation or of the amount of this should be deferred for special decision. The court's decision cannot be appealed.

(2) If the case has not been followed through to a verdict, the petition for compensation must be submitted within 12 weeks after the accused has been informed that prosecution has been withdrawn.

(3) After expiry of the above-mentioned time limits, compensation may only be paid when new information is provided which the court considers to be of substantial significance for the decision of the compensation question. Petition for compensation must be submitted within four weeks after the said person has acquired knowledge of the new information.

Sec. 1018 h.

(1) The compensation actions referred to in this chapter are to be handled under the forms of criminal procedure with such modification as are suited to the differences in circumstances.

(2) A petition for compensation action is to be submitted to the district attorney, who shall cause it to be brought to court. The compensation claim can be met by the Minister of Justice after statements have been received from the prosecutor, defence counsel, and the court.

(3) The case is to be set down for trial when the court has received the application of the district attorney. The person in ques-

tion is to be given the opportunity to make his claim for compensation.

(4) Where the claimant so requests, an attorney will be assigned to him.

(5) Where compensation is refused on the ground mentioned in sec. 1018 b(2)(a), the court opinion must be confined to noting that the legal conditions for compensation in regard to the evidence put forward in the case are not deemed to be present.

Sec. 1018 i.

The case is to be handled and decided in the ordinary lower court with the participation of lay judges.

Sec. 1018 k.

The case is to be presented in the court where the criminal case has been set down for trial, or, where the criminal case has been a jury trial or has not been followed through to verdict, in the court in the district where the acts on which the claim for compensation rests have been executed. The provisions in chapter 63 (venue) are hereby given similar application.

Sec. 1018 l.

If the compensation claim is to be decided at a jury trial, the jury is to be asked whether the accused has a right to compensation. An affirmative answer is deemed to be given where at least eight members of the jury have voted in favour of the claim. The amount of the compensation is decided by the court.

Sec. 1018 m.

(1) Appeal can take place according to the ordinary rules in this book.

(2) If the compensation claim is decided at the end of the trial, appeal against it can take place either in connection with the appeal of the verdict or by special appeal of the compensation question. In the latter case, as well as when appeal takes place for cases which have to do exclusively with compensation, the time limit for appeal shall always be 12 weeks. Where the compensation claim is decided at a jury trial, appeal cannot be based on the objection that the decision of the jury is wrong, unless this is asserted to be due to an incorrect charge to the jury from the presiding judge, or errors in the questions to the jury resulting from an incorrect understanding of the law.

(3) Under appeal for the High Court, an award of compensation shall be made if at least four of the members of the court have voted in favour of the claim.

(4) Re-opening of a case in which compensation has been re-

fused can take place under conditions which correspond to those laid down in sec. 977. The petition is to be presented before the Special Complaints Court.

(5) After the death of the person in question, appeal and application for re-opening of a case with regard to compensation for economic injury can be initiated by his spouse or heirs.