

Summer 1961

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Recommended Citation

G. Arthur Martin, Police Interrogation Privileges and Limitations under Foreign Law, 52 J. Crim. L. Criminology & Police Sci. 47 (1961)

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POLICE INTERROGATION PRIVILEGES AND LIMITATIONS UNDER FOREIGN LAW

A. Canada

G. ARTHUR MARTIN*

It is trite law that a policeman whose duty it is to inquire into alleged offences has the right to question persons likely to be able to give him information. The earlier English cases however made a sharp distinction between the right of a police officer to question a person when he was merely conducting an investigation and his right to question a person whom he had already taken into custody or had decided to charge.

In *R. v. Knight and Thayer*,¹ Channel, J., said:

"It is, I think, clear that a police officer or anyone whose duty it is to inquire into alleged offences as this witness here, may question persons likely to be able to give him information, and that, whether he suspects them or not, provided he has not already made up his mind to take them into custody. When he has taken anyone into custody and also before doing so when he has already decided to make a charge, he ought not to question the prisoner. A magistrate or judge cannot do it and a police officer certainly has no more right to do so. I am not aware of any distinct rule of evidence, that if such improper questions are asked the answers to them are inadmissible, but there is clear authority for saying that the Judge at the trial may in his discretion refuse to allow the answer to be given in evidence and in my opinion that is the right course to pursue."

The person questioned however had a common law right to keep silent and not incriminate himself.² The Canadian courts however from a very early time have uniformly held that a statement made by an accused, if made voluntarily, is ad-

missible notwithstanding that it is made while in custody in answer to questions put by the police.³

The Supreme Court of Canada in *Boudreau v. The King*⁴ held that such statements are admissible if made voluntarily in the sense that that term is used by Lord Sumner in *Ibrahim v. The King*⁵ where the principle is stated as follows:

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

There was however a considerable body of authority prior to the judgment of the Supreme Court of Canada in *Boudreau v. The King*, *supra*, that as a matter of law a statement made by an accused in answer to questions by the police in circumstances where he was either in actual custody or where the police had made up their mind to charge him was not admissible unless the statement was preceded by a warning that he was not obliged to answer.

In *Gach v. The King*⁶, Taschereau, J., speaking for the majority of the court said:

"There is no doubt that when a person had been arrested, all confessions made to a person in authority, as a result of questioning, are inadmissible in evidence unless proper caution

³ *R. v. Elliott*, 3 Can. C.C. 95 (1899); *R. v. Day*, 20 O.R. 209 (1890).

⁴ 94 Can. C.C. 1 (1949).

⁵ [1914] A.C. 599, 609.

⁶ [1943] S.C.R. 250, 254, 79 Can. C.C. 221, 225. See also *Sankey v. The King*, 48 Can. C.C. 97: "It should always be borne in mind that while, on the one hand questioning of the accused by the police, if properly conducted and after warning duly given, will not *per se* render his statement inadmissible, on the other hand, the burden of establishing to the satisfaction of the Court that anything in the nature of a confession procured from the accused while under arrest was voluntary always rests with the Crown." Per Anglin, C. J. C., at p. 101.

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¹ 20 Cox C.C. 713 (1905).

² "Section 110 is clearly an invasion of the common law right of a subject to remain silent lest he incriminate himself." Stewart, J., in *Greathead v. Newcastle*, 107 Can. C.C. 363, 366 (1954).

has been given. This rule which is found in Canadian and British law is based on the sound principle that confessions must be free from fear, and not inspired by a hope of advantage which an accused may expect from a person in authority."

The present position is authoritatively stated in the judgment of Kerwin, J. (now C. J. C.), in the *Boudreau* case as follows:⁷

"The mere fact that a warning was given is not necessarily decisive in favour of admissibility but, on the other hand, the absence of a warning should not bind the hands of the Court so as to *compel* it to rule out a statement. All the surrounding circumstances must be investigated and, if upon their review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Accordingly, the presence or absence of a warning will be a factor and, in many cases an important one."

Mr. Justice Rand, in his judgment in the *Boudreau* case, recognizes the competing interests of effective police investigation of crime on the one hand and the protection from abuse of power on the other:

"No doubt arrest and the presence of officers tend to arouse apprehension which a warning may or may not suffice to remove, and the rule is directed against the danger of improperly instigated or induced or coerced admissions. It is the doubt cast on the truth of the statement arising from the circumstances in which it is made that gives rise to the rule. What the statement should be is that of a man free in volition from the compulsions or inducements of authority and what is sought is assurance that that is the case. The underlying and controlling question that remains: Is the statement freely and voluntarily made? Here the trial judge has found that it was. It would be a serious error to place the ordinary modes of investigation of crime in a straight-jacket of artificial rules; and the true protection against improper interrogation or any kind of pressure or inducement is to leave the broad question to the Court. Rigid formulas can be both meaningless to the weakling and absurd to the sophisticated or hardened criminal; and to introduce a new rite as an inflexible preliminary condition would serve no genuine interest of the accused and but add an unreal

formalism to that vital branch of the administration of justice.

"I do not mean to imply any right on the part of the officers to interrogate or to give countenance of approval to the practice; I leave it as it is, a circumstance frequently presented to Courts which is balanced between a virtually inevitable tendency and the danger of abuse."⁸

The burden of proving to the satisfaction of the trial judge that a statement made by the accused was voluntarily made in the above sense is upon the Crown.⁹ When a statement is tendered the trial judge holds a "trial within a trial" or as it is commonly called a *voire dire* in the absence of the jury. If the prosecution discharges the onus of proving that it was made voluntarily the statement is admitted in evidence. The weight to be attached to a statement admitted as voluntary is for the jury. If the Crown does not discharge the onus of proving it was made voluntarily the statement is ruled inadmissible and no more is heard of it.

The length of time over which questioning is conducted and the manner in which it is carried out are relevant factors in the subsequent determination of the voluntary nature of a confession. In *R. v. Howlett*¹⁰ the Ontario Court of Appeal quashed the conviction of the accused because the only evidence consisted of a statement which the Court held had been obtained by police interrogation of a coercive nature over a three hour period. In the more recent case of *R. v. Nye*¹¹ the same court held that a statement made by appellant was made voluntarily although appellant had been questioned at intervals by the police over a period of about twelve hours while in custody. The court held that throughout this period no improper inducement had been held out to the accused to make a statement nor was she threatened in any way. In *R. v. Filton*¹² the Supreme Court of Canada on appeal by the Crown reversed the judgment of the Ontario Court of Appeal ruling inadmissible a statement made by the accused because in the opinion of that court it was obtained by questions put by police officers that were in the nature of cross-examination in that the questions of the police had suggested that several items in an earlier statement made by accused were false.

⁸ *Id.* at 8.

⁹ *R. v. Thompson*, [1893] 2 Q.B. 12, 17 Cox C.C. 641. [1950] O.R. 181, 96 Can. C.C. 182.

¹¹ 122 Can. C.C. 1 (1958).

¹² [1956] S.C.R. 958, 116 Can. C.C. 1.

⁷ *Boudreau v. The King*, 94 Can. C.C. 1, 3 (1949).

Rand, J., said:

"Questions without intimidating or suggestive overtones are inescapable from police enquiry; and put as they were here, they cannot by themselves be taken to invalidate the response given. The question still remains: was the statement made through fear or hope induced by authority?"¹³

It would appear from the recent decisions that the courts are taking a more liberal attitude than heretofore with respect to lengthy police interrogation providing that the questions are not such as to imply a threat.¹⁴ The Canadian courts have not adopted a hard and fast rule that a statement made during a period of detention that is illegal is necessarily inadmissible. It is a circumstance and a cogent circumstance to be considered, and no doubt illegal detention of the accused, unless satisfactorily explained by the prosecution, would raise a strong presumption that a statement made during that period was obtained by duress.

In *Chapdelaine v. The King*¹⁵ the Quebec Court of Appeal rejected a statement made by accused where the circumstances were such as to indicate that the police had held the accused incommunicado for the purpose of inducing her to make a confession of guilt. The Court said:

"The duty of the officers was to bring this woman to Court within a reasonable delay. They had no authority to keep her *incommunicata*, whether she asked for a lawyer or not. It is obvious that the purpose of this incarceration was to create suspense in the mind of the accused, which could undermine a stronger mind than hers. It is true that she was not otherwise ill-treated but a display of kindness with, at times, a show of authority and usurped power, in such an environment, which amounted part of the time to solitary confinement was not without its effect—and this was sought.

"It is a remarkable coincidence that the accused was allowed to see a solicitor the day she signed a confession. Before that, she was not seen by friends or relatives, though they had come to headquarters."

An accused who has been arrested on a criminal charge has the right to retain counsel immediately, and any interference with this right by the police would suggest an improper purpose in so doing

which would cast doubt on the voluntary nature of a statement subsequently made by the prisoner.¹⁶

The prisoner should not be denied his right to communicate with his relatives.¹⁷

'It must be borne in mind that in Canada prosecuting counsel does not take part in the investigation of crime except in an advisory capacity to the police. The courts have laid it down on more than one occasion that it is the duty of prosecuting counsel to present fairly and dispassionately all the credible evidence that is available to the Court whether the evidence is for or against the accused.¹⁸ In *R. v. Chamandy*¹⁹ Mr. Justice Riddell, speaking for the Ontario Court of Appeal, said:

"It cannot be made too clear, that in our law, a criminal prosecution is not a contest between individuals, nor is it a contest between the Crown endeavouring to convict and the accused endeavouring to be acquitted; but it is an investigation that should be conducted without feeling or animus on the part of the prosecution, with the single view of determining the truth."

¹⁶ *R. v. Dick*, 87 Can. C.C. 101, 112 (1947).

"The suggestion that any detective or other police officer is justified in preventing or attempting to prevent a prisoner from conferring with his counsel is a most shocking one. The suggestion that counsel, if he is permitted to confer with his client who is in custody, might thereby obstruct the police in the discharge of their duties is even more shocking. The prisoner is not obliged to say anything and the lawyer is entitled to advise him of that right. The lawyer is an officer of the Court and it is the function of the courts to administer justice according to the law. To prevent an officer of the Court from conferring with the prisoner who in due course may appear before it, violates a right of the prisoner which is fundamental to our system for the administration of justice." (Per the report of the Honourable Mr. Justice Roach of the Ontario Court of Appeal sitting as a Commissioner appointed by the Attorney-General under §46 of the *POLICE ACT*, R.S.O. 1950, c. 279, to investigate a complaint made against the conduct of the police.)

¹⁷ "There is one further matter that deserves comment. A person who has been arrested should not be held incommunicado. We do not find it necessary to find as a fact that the infant plaintiff was denied his right to communicate with his father at the first reasonable opportunity. If, however, the father of the infant plaintiff was refused permission by the Sergeant of Police to see his son at any time before the charge came on for hearing in Court, such practice cannot be justified in this or in any other case. A person in custody should never be denied his right to communicate with his relatives at the earliest reasonable opportunity so that he may avail himself of their advice and assistance. That right ought to be recognized and given effect in all cases, and care should be exercised by police authorities to see that it is not wholly disregarded." *Koechlin v. Waugh & Hamilton*, [1957] O.W.N. 245, 249.

¹⁸ *Lemay v. The King*, [1952] S.C.R. 232, 102 Can. C.C. 263; *Boucher v. The King*, [1957] S.C.R. 16, 110 Can. C.C. 263.

¹⁹ 61 Can. C.C. 224, 227 (1934).

¹³ 116 Can. C.C. at 6.

¹⁴ *But cf.*, the judgment of the British Columbia Court of Appeal in *R. v. Eaton*, 117 Can. C.C. 375 (1957).

¹⁵ 72 Can. C.C. 209, 211-12 (1933).

B. England

GLANVILLE L. WILLIAMS*

THE JUDGES' RULES

Americans who feel dissatisfaction with certain methods of police questioning sometimes look at the English Judges' Rules to see if there is any lesson to be learned from them. Perhaps there is a lesson, though not one that appears on the surface.

The Judges' Rules were originally formulated in 1912, with additions in 1915, and an important interpretation in 1930. Although the Rules are nine in number, the gist of them may be stated in two propositions.

1. When a police officer has made up his mind to charge a person with a crime, he should caution him in the usual words: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence."

2. A person in custody must not be questioned.

Violation of these rules confers a discretion on the judge to exclude from evidence a statement made by the accused.

The Caution

The first rule is not a serious impediment to the police. When the police question a suspect, he is usually ready to answer their questions in order to try to assuage their suspicions. They need not administer the caution until they have obtained sufficiently incriminating statements to satisfy them of guilt. But even if the caution is uttered before this point, it will not usually inhibit replies. When the police officer has persistently questioned a suspect, thus bringing him to the point where he is ready to make a statement, the utterance of the caution is unlikely to alter matters.

The requirement of the caution pays lip service to the doctrine that an accused person has a right to silence, while not effectively safeguarding that right. Let us imagine what form of words would be needed if criminals were really to be advised of the best mode of exercise of their privilege. A policeman would have to say to every possible

culprit (not merely to a person who had already doomed himself by replies to questions): "You need not reply to my enquiries, and in your own interest you should consult a lawyer before answering any of them." This warning has only to be phrased to make apparent its incompatibility with the successful performance of the functions of the police.

The Rule Against Questioning in Custody

The other rule, against questioning in custody, does not clearly appear from the Judges' Rules as they were formulated in 1915. Indeed, Rule 3 states that "persons in custody should not be questioned without the usual caution being administered" which seems to imply that if the caution is administered, questioning is permissible. However, some judges even before 1915 had excluded statements obtained by interrogation in custody, whether upon caution or not. The true intent of the Judges' Rules was finally settled by a police circular issued by the Home Secretary with the approval of the judges in 1930. The circular states:

"His Majesty's Judges have advised as follows:—Rule (3) was never intended to encourage or authorise the questioning or cross-examination of a person in custody after he has been cautioned, on the subject of the crime for which he is in custody, and long before this Rule was formulated, and since, it has been the practice of the Judge not to allow any answer to a question so improperly put to be given in evidence."

The Practice of the Police

This interpretation may now be said to be a dead letter. Notwithstanding the circular, the police still interrogate persons in custody, and the judges admit the resulting confessions in evidence.

These facts are not generally acknowledged in England, and need to be demonstrated in slightly more detail. As an illustration, take the incident related by Mr. G. H. Hatherill in an address to the Royal Empire Society. Since Mr. Hatherill bore the impressive title "Commander (Crime)" at Scotland Yard, and told the story with some

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pride as an example of police practices, it may be taken as a confession by the police of what they do. Early on Christmas Day, 1944, a young woman was found murdered at Dagenham. Mr. Hatherill sent out his detectives to bring in to the police station the dead girl's young men—six or seven—with orders not to tell them why they were to go there but to note their behaviour. "Having all been torn away from their Christmas dinners, all but one of them wanted to pull down the police station. The odd man raised no difficulties, and when asked to get into the car said: 'I shall have a ride, anyway.' He eventually confessed to the murder."

Action of this type could be accounted efficient and proper police work if each suspect were given to understand that he was accompanying the police freely. However, it was doubtless part of the ruse in this instance, as in sundry others, to give each suspect the impression that he was under compulsion, in order to frighten him into confessing if he were the real culprit. Such action undoubtedly constitutes a false imprisonment.

Sir Ronald Howe, who was formerly a Deputy Commissioner at Scotland Yard, wrote that "the Judges' Rules are so much a part of the detective's training that it is a very rare thing for him to disregard them." But Sir Ronald had just stated his opinion that according to the Rules "a man taken into custody may not be questioned at all until [a] caution has been administered."¹ This is the wording of Rule 3, but it has long been known to contain a misleading implication. As was pointed out before, according to the interpretation adopted by the judges in 1930, Rule 3 was never intended to encourage or authorise the questioning or cross-examination of a person in custody after he had been cautioned.

Later in his article, the author gave details of the methods used by the police in questioning those whom they had "pulled in" on suspicion of crime. They will give the suspect a nice, strong cup of tea with plenty of sugar in it, express sympathy for his plight, and try by every means to get his confidence. "Most suspects, especially those new to the game or being questioned about a serious crime like murder, are only too eager to confide in somebody, and if the questioning policeman shows himself a decent chap, anxious to be fair, he will quite often be the confidant." It

seems evident from the reference to the "questioning policeman" that the Home Secretary's circular of 1930 is regarded as a dead letter.

The way in which the police behave when they think the circumstances require it is illustrated by the case of Rowland in 1946. Rowland was suspected of murder, and was awakened at 11 p.m. by two police officers who told him to get up and dress. He was told that an inspector wanted to see him at the police station. He was taken to the police station and arrived there at 11:30 p.m. According to the evidence of the police themselves, he was questioned for two hours, and then had his statement taken down and signed, which took forty minutes; this would have meant that Rowland got to bed, in the police station, at ten minutes past two in the morning. Only after he had made his statement was he charged with anything. According to Rowland's own evidence, the period of questioning was substantially longer.

There can be no doubt that this action by the police was illegal. English law knows no "detention for questioning" short of arrest, and the act of taking Rowland to the police station without his consent was an illegal arrest because the reason for it was not stated at the time. It is surprising that, when Rowland was put on trial, his statement made in answer to the improper questioning was admitted in evidence without comment from the presiding judge or even protest from his own counsel.

The Attitude of the Judges

These and other instances indicate that detention for questioning, and questioning after arrest, are still practised by some police forces, without serious check. To add to the anomaly, it seems from the reported cases that the judges have given up enforcing their own rules, for it is no longer the practice to exclude evidence obtained by questioning in custody. In 1930, when the judges' opinions were reported in the Home Secretary's circular, it was broadly true that the custom of the judges was not to allow any answer to questions addressed to a person in custody to be given in evidence. Earlier, in *Voisin*, the Court of Criminal Appeal had laid it down as a general principle that the confession was admissible though obtained as a result of questioning in custody; but a judge might exclude it in the particular case on grounds of unfairness. Thereafter the judicial attitude toughened, and between

¹ See Sir Ronald Howe's article in *John Bull*, March 8, 1958.

the wars the general practice was to exclude the confession; but since about 1950 they have almost uniformly been admitted.²

Our toleration of this situation in England raises serious doubts of our *bona fides* in prohibiting police interrogation of persons seriously suspected of crime. Thurman Arnold showed, in a penetrating and amusing study, that the criminal process embodies conflicting values, and he concluded that "the public administration of criminal justice is not a method of controlling crime. It is rather one of those problems which must be faced by those who desire to control crime."³ So likewise with the ban on interrogation by the police. A traditional principle of "fairness" to criminals, which has quite possibly lost some of the reason for its existence, is maintained in words while it is disregarded in fact. When judges both assert that the police should discipline themselves, and yet admit evidence that has been obtained by lack of the judicially-imposed discipline, the stultification of our professions becomes patent.

ARGUMENTS IN FAVOUR OF ALLOWING THE POLICE TO DETAIN FOR QUESTIONING

The reader may be expecting at this point, from the pen of an English lawyer, a vigorous denunciation of the police and of the judges, and a plea for a return to the Judges' Rules as interpreted in 1930. What ought to be considered, however, is whether these Rules are a workable part of the machinery of justice. Perhaps the truth is that the Rules have been abandoned, by tacit consent, just because they are an unreasonable restriction upon activities of the police in bringing criminals to book.

Take the facts in *Voisin*,⁴ one of the first cases after the formulation of the Judges' Rules where the Rules were in effect ignored by both the police and the judges. The accused had been detained for questioning by the police on suspicion of murder, but the police had not at that time decided to charge him with the crime. (Indeed, others were detained on the same suspicion, though subsequently released.) As part of the questioning, the police asked the accused if he would have any objection to writing down the two

words "Bloody Belgian." He replied, "Not at all," and then wrote down "Bladie Belgiam." These words were his death-warrant, for the body of the murdered woman had had a label attached to it with the two words spelt in the same way as the accused now spelt them. The trial judge admitted the evidence, notwithstanding that the accused had not been cautioned and was in custody at the time; and the Court of Criminal Appeal affirmed the conviction.

From every point of view except the legal one, the action of the police in this case was perfectly proper. It is true that a number of innocent persons were subjected to the inconvenience of detention in the police station for questioning, but this was surely a lesser evil than that a dangerous murderer should be left at large in society. The request addressed to Voisin was not likely to entrap an innocent man; on the contrary, it gave the accused an opportunity of convincing the police of his innocence, if he were innocent, for then his handwriting and spelling would have been different from the writing on the label.

In the same way, the action of the police in the case related by Mr. Hatherill was socially justified. It may be, in retrospect, a source of mortification that one has missed one's Christmas dinner, and an even greater misfortune that six men should have missed their Christmas dinners. But the evil is infinitely less than that a murderer should go free.

This same incident seems to show the need for some power of detention for evidentiary purposes on reasonable suspicion, distinct from the power of arrest. It is true that, in many cases, the police are able to act effectively without powers of detention. They may interrogate a suspect in his house, with his reluctant consent, or they may prevail upon him to attend for questioning in the police station. But these methods are not always adequate. A common method of solving crime is to use the *modus operandi* index and compile a list of all criminals who are known to use the methods employed in committing the crime under investigation; the list is then narrowed by excluding all those who for one reason or another could not have been responsible—as where they do not correspond with the description given by witnesses, or can produce a satisfactory alibi. The process frequently leaves a number of suspects. A witness may be shown photographs of these suspects, and he may pick out one, who is then

² See May, 36 Cr. App. R. 91 (1952); Wattam, 36 Cr. App. R. 72 (1952); Bass, [1953] 1 Q.B. 680; Joyce, [1957] 1 W.L.R. 140; and compare Mills, [1947] K.B. 297.

³ THE SYMBOLS OF GOVERNMENT c.6 (1935).

⁴ [1918] 1 K.B. 531.

put in an identification parade; if he is identified as the criminal, there may be sufficient evidence to charge him. Suppose, however, that the witness cannot make up his mind between two photographs? The police may wish to bring in the two suspects to stand in identification parades, but it seems clear that the law of arrest is unsuitable to achieve this end. An arrest supposes that a charge is made and that the accused will be brought before a magistrate as the first step in legal proceedings. But it would be improper to bring a man before a magistrate merely with the evidence that either he or someone else committed the crime. The machinery of arrest is inappropriate until suspicion has been focussed on a single person.

It may be conceded that hardship may be caused to persons who have previously been convicted of crime if they are subject to detention and police interrogation merely because some one else has committed a crime by a similar method. A former criminal who is now trying to lead an honest life may have his new career gravely jeopardised by such action on the part of the police. Thus a power of detention for questioning would certainly need to be used with wisdom and restraint. But this is not necessarily a reason for withholding the power from the police altogether. It should, of course, be limited to crimes of some gravity, and also subject to a limit of duration, and other safeguards to be suggested presently.

OTHER CONSIDERATIONS OF POLICY

English lawyers tend to regard it as axiomatic that the police should not interrogate persons in custody, and they rarely enquire into the reason for the prohibition. Historically, it seems to have owed its origin to the indignation caused by judicial inquisition in political cases.

The King's Council of the seventeenth century provided a striking parallel with the secret police of modern tyrannies. It had its spies in every locality; it arrested and imprisoned persons on the slightest suspicion; and it issued orders to justices of the peace who interrogated suspects under torture.⁵ These excesses of governmental power burnt into the racial memory of the Anglo-American peoples. It was by way of reaction against them, as well as against the general severity of the criminal law, that the opinion came

to be accepted in the early years of the nineteenth century that a magistrate should not interrogate an accused person. In 1848, this self-restraint was translated into law.

During the course of the nineteenth century, judges assumed that what was forbidden to the magistrate as a judicial officer was also forbidden to the police, and occasionally they excluded evidence obtained by the questioning of suspects in custody. But there is no compulsion about this logic, for the considerations of policy are different. It may be indecorous for a judge to question an accused person, and it may offend our sense of fairness to send an accused person to prison for refusing to answer incriminating questions; but neither of these issues is involved in questioning by the police.

The rule against police questioning cannot be explained by saying that such questioning may result in untrue confessions, for it can sometimes be demonstrated that the confession is true. Where the confession discloses details of the crime which only the criminal could have known, its authenticity is beyond doubt; yet some judges have excluded such a confession if it was the result of questioning by the police.

A possible argument against the questioning of prisoners is that the possession of this power tempts the police to do their job in an unsatisfactory way. One of the remarkable features of police practice in England, which impresses Continental observers, is the short space of time that is allowed to elapse between the arrest of an offender and his appearance in court and subsequent trial. Whereas, in many European countries, a defendant may languish in prison for as much as a year without trial,⁶ this would be unheard of in England. The

⁶ See, for France and Belgium, the instances given by ENSOR, *COURTS AND JUDGES* 35 (1933); DENNING, *FREEDOM UNDER THE LAW* 10 (1949). Dr. Otto John was kept in custody in West Germany for nearly eleven months before the opening of his trial on November 12, 1956. These prolonged detentions are especially significant when combined with police interrogation. Cardinal Mindszenty, who was tried before the People's Court in Budapest in 1949, put in a formal plea which stated that he had been interrogated in custody and in court for 40 days. Pastor Dinov, who was eventually acquitted by a People's Court in Sofia in 1949, was questioned for two months in prison, sometimes by a single questioner, sometimes by teams. Torture is not necessary to procure confessions if unlimited and practically unceasing questioning is permitted, for no ordinary person can stand it, especially when the prisoner has his resistance lowered by lack of warmth, lack of food, and lack of sleep, and is compelled to remain standing during the questioning. Mr. Stypulkowski, who wrote his

⁵ NICHOLAS, *PROCEEDINGS AND ORDINANCES OF THE PRIVY COUNCIL* xlvii-xlviii, 129 (1837).

reason sometimes suggested is that the English police generally build up their evidence before making the arrest, so that very shortly after making the arrest they are ready with their evidence in court. On the Continent, the tendency is to arrest the suspect as the first step, in order to interrogate him; and the interrogation may be continued for weeks or months. Nevertheless, the abuses of Continental procedure are not a necessary element in police questioning. Under English law, the police only have a few hours in which to question the arrested suspect before bringing him before a magistrate. Even if the principle were conceded that the police may properly question a person in custody, a short time-limit would obviously be placed upon such questioning in order to avoid prolonged detention without trial.

Perhaps the real reason why we in England are afraid to allow the police to question persons accused of crime is that we fear the very efficiency of the proceeding. Few criminals can remain completely silent under persistent questioning; and if they answer, they are likely to give themselves away, if only by making statements which can be disproved, or statements which are inconsistent with a defence afterwards set up for them at the trial. A considerable number will confess. Sir Patrick Devlin in his Sherrill Lectures pointed to the remarkable proportion of confessions among those convicted of homosexuality between consenting adults—94 percent—where apart from the confession it would often have been extremely difficult to convict. He pointed out that in Scotland, where the judges are more active in preventing police questioning, only one person out of nine convicted of homosexuality made a written admission.⁷ One may well feel that the practice of prosecuting homosexual acts between adults is mistaken, but that has nothing to do with the general question whether the police should be allowed to use efficient methods for enforcing the law.

A strict ban on interrogating persons in custody would place a strain upon the self-restraint of the police. The duty of the police is to detect criminals, and they are generally allowed to address questions

to every quarter where they hope to obtain information. It may seem strange that they should be supposed not to ask questions of the one person who is central to the whole investigation. To tie the hands of the police on a "sporting theory of justice" has a debilitating effect upon morale. As Sir Ronald Howe has said, "it is essential to effective police action that the police should be convinced that, when they have spent many hard days and nights tracking a suspect down, he should be properly dealt with." This consideration would seem to suggest a modification of the Judges' Rules, or of their interpretation, to allow some questioning in custody.

It must also be remembered that when the preliminary enquiry comes to be held, the prosecution will be forced to come out into the open with the details of its case against the accused. This is as it should be, for it would not be right for the accused to be taken by surprise at the trial. Yet there is no apparent unfairness in trying to obtain certain information from the accused before the preliminary enquiry, while he is still in the dark about the details of the prosecution's case. After the enquiry, the accused will be able to adjust his tale to fit the known facts.

For these important reasons, a complete prohibition of the questioning of those who are strongly suspected is difficult to enforce against the police, and, if it were strictly enforced, might breed a dangerous attitude of cynicism. The police may well ask themselves whether society can be so interested in the conviction of offenders, if it withholds from the officers of the law one of the most potent means (and often the only means) of obtaining the evidence necessary for a conviction.

But, it may be said, the arguments for allowing the police to question a suspect do not justify them in taking him to the police station, where he feels himself to be isolated and at their mercy. Why should not the police do their questioning in the suspect's own home, before arresting him? This would certainly be the better practice wherever possible, even though it may not be so likely a way of securing a confession. Yet there are occasions when questioning, if it is to be done at all, must be done in custody. Where the crime is a grave one, and the suspicion already strong it may not be safe to leave the suspect unarrested. Or the matter on which the accused is questioned may not have come to the knowledge of the police until after he has been arrested. Or, again, the

experiences in his book *INVITATION TO MOSCOW* (1951), had to endure 141 examinations, of which some lasted for fourteen hours at a time. See also BECK & GODIN, *RUSSIAN PURGE AND THE EXTRACTION OF CONFESSION* (1951).

⁷DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 58-59 (1958).

accused may be in custody on one charge, when it is desired to interview him on another.

THE MECHANICAL RECORDING OF CONFESSIONS

The trend of the foregoing argument is that questioning in custody is an essential part of police investigation where the author of a crime cannot otherwise be detected, and, consequently, that it should be legalised and at the same time controlled. At the moment, English Judges maintain in theory an idealist rule, while conniving at police practices which set it at defiance.

One point needing attention is the possibility of providing for the mechanical recording of confessions. The present practice is for a statement to be written out either by the accused or by the police officer and signed by the accused. But a confession is admissible in evidence even though it has not been reduced to writing, or even though the accused withholds his signature, provided that the judge holds that it was properly obtained. In such circumstances there is likely to be a collision of evidence between the accused and the police as to what exactly the accused said. Often there will have been no shorthand note of an interview with the defendant in which he is alleged to have admitted guilt, and the court will have to make up its mind between the two versions of what passed. Where two police officers have interrogated the accused, the practice, approved both judicially and by the Home Office, is for the two officers to consult together after the interview when preparing their notes of what was said.⁸ They may even prepare a joint note.⁹ But it is strongly argued that this is unfair to the accused, since, instead of possibly three versions of the actual words used, the two police officers are ranged solidly upon one side of the fence, and the accused upon the other.¹⁰

Even where the statement is reduced to writing and signed by the defendant, the position is by no means satisfactory, because the statement does not show the questions by which particular answers were prompted. When an answer is obtained to a question, the question is not recorded separately in the written statement, but is embodied in the answer, though the wording was that of the interrogating officer and not that of the accused. If a

leading question elicits a monosyllabic answer, it may be subtly misleading to write the result as though the statement implied in the question emanated from the accused.

These difficulties could be obviated if the interview were tape-recorded, so that the court of trial could, in case of challenge, ascertain precisely what the accused said. It is true that tapes can be tampered with, but this danger could be met by requiring the tape to be sealed by the accused person and deposited for transcription with an officer of the court.

Probably the most serious difficulty in the way of the proposal is that the police may fear that the presence or suspected presence of a recording instrument will inhibit the answers of suspected persons. A similar fear explains why the police, in interviewing a suspected person, do not write down his answers at the time; they do not want to let the suspect realise that he is dictating evidence against himself. Perhaps the difficulty would be met if it were standard practice for the police, in interviewing any witness in connection with suspected crime, to carry a little attaché case which, placed in an inconspicuous position, would record the conversation without drawing too much attention to itself. If this were a generally known and accepted part of police practice, it might not exercise too damping an effect upon investigations, and it would add greatly to the reliability of any evidence that results. At any rate, when the accused person is ready to make a statement there would seem to be little difficulty in recording his voice; and this is already done in Israel in the case of all major crimes.

SAFEGUARDING AGAINST ABUSES

The practice of interrogation by the police is certainly open to the possibility of abuse. The police, convinced that they have got the right man, may sometimes regard themselves as morally justified in extorting a confession in order to keep an evil-doer under lock and key. The interrogation may be accompanied by promises or threats which would render the confession inadmissible if they could be proved in court, but which are afterwards denied by the officers concerned. A defendant is in a peculiarly weak position when he makes allegations of this kind against the police. The word of two officers, whose character appears to be above suspicion, will almost always be preferred to that of a person accused of crime. Yet it is

⁸ Bass, [1953] 1 Q.B. 680; Home Secretary's circular to Chief Constables, No. 172/54, dated August 30, 1954.

⁹ DEVLIN, *op. cit.* *supra* note 7, at 50.

¹⁰ R. Kenneth Cooke in [1954] CRIM. L. REV. 833.

known that some policemen are dishonourable, and policemen are occasionally found in the courts to have given false evidence.

It is sometimes suggested that an accused person should be entitled to see his lawyer before answering any questions by the police, and indeed that he should have a right to the presence of his lawyer during questioning. This would certainly operate as a substantial safeguard against illegality, but there is one fact that makes it impracticable. As soon as a lawyer is introduced on the scene, he advises his client to answer no questions. Thus if a lawyer were admitted the whole proceeding would be stultified. In *Voisin*, for example, it would quite possibly have resulted in the acquittal of a dangerous murderer, for a legal adviser would not have allowed Voisin to write the fatal words.

From the lawyer's point of view, the advice he gives his client to refuse a statement is reasonable. Not knowing the evidence in the hands of the police, it would be highly dangerous to the defence to allow the accused to be questioned.

The defending lawyer's job is to befriend his client and (subject to a few overriding restrictions imposed by professional ethics) to give him the best advice in his own interest. The lawyer is entitled to assume the innocence of his client when all appearances are against him. It has been the experience of centuries that this arrangement is necessary to protect the innocent and to redress the lack of balance between the power of the State and that of the subject. As part of his function, the defending counsel will make full use of the rule that an accused person need not answer until a *prima facie* case has been established against him—and even then is obliged to answer only in the sense that he is put under the practical necessity of defending himself. We look upon this rule as an important part of the protection given by law to the liberty, dignity and privacy of the subject, notwithstanding that this sometimes makes the task of the prosecution harder. Still, considerations of liberty, dignity, and privacy must give way to some extent to the practical necessities of law enforcement, and for this reason it is necessary to maintain the present position under which a person who is in the custody of the police has no legal right to have his lawyer present while he is making a statement. The Royal Commission on Police Powers and Procedure recommended that in cases where the attendance of friends and legal advisers is open to no objection,

the deponent should always be offered the option of having them present. But it seems that in practice the police invariably take the view that the presence of an outsider is open to objection.

For the same reason, it would be impracticable to require that the questioning of a person in custody should take place in the presence of a magistrate. Such a proceeding would be regarded as judicial, and there would be an irresistible demand that the accused should be given the right to legal representation and advice. Besides, the English police technique of friendliness and cups of tea could hardly be used to produce confessions if there had to be a formal hearing before a magistrate. From the point of view of the police, the most effective interrogation is one conducted in privacy.

It would, however, be a step towards preventing possible abuses if the accused were removed from the custody of the police. Only long familiarity causes us to accept without surprise the arrangement under which a suspect is placed in the absolute power of those whose duty it is to obtain evidence against him. Consider: we employ police to investigate crime, and expect them to attain a measure of success in the apprehension and conviction of criminals; at the same time, we allow those who are arrested to remain for a time in the custody of the police themselves. The result can be seen in cases like *Rowland*, which was discussed above, where interrogation of the suspect went on far into the night. The situation is a particularly dangerous one where the crime charged is that of an attack on a policeman, for here the *esprit de corps* of the Force is aroused, and the police are tempted to exceed proper limits.

The conclusion is that where a local jail is available, it should be made a rule that persons arrested should be lodged forthwith in this jail rather than in a police cell. This would mean that the physical safety of the accused person would be the responsibility of a different set of officials from the police. The police could be given a reasonable opportunity to question the accused in private in the prison, but the door would have the usual grid through which a prison warder might occasionally look. Thus the accused person would have some feeling of security against possible illegal violence on the part of the police, and the trustworthiness of confessions would be increased. The arrangement would also be to the advantage of the police

because they could more easily refute charges of impropriety.

Whatever may be thought of these particular suggestions, there can hardly be any doubt that the general subject of questioning by the police

needs to be reconsidered in the light of present needs and present practices. So long as there is pressure upon the police to keep down the rate of crime, they are likely to ignore restrictions which they feel to be unreasonable.

C. France

ROBERT VOUIN*

According to the French penal procedure, the police may interrogate an *arrested* person, in the case of a crime or a flagrant delict, prior to taking him before the Public Prosecutor.¹

Apart from the case of a flagrant delict, a preparatory inquiry may be opened on request of either the Public Prosecutor or the victim of the offence. In this case, the examining magistrate can issue against the *accused* person: (1) a summons or mere invitation to appear freely before the judge; (2) a warrant or an order given to the public forces to bring the accused person before a judge; (3) a committal order for the head-watchman of the jail to receive the accused person; or (4) a warrant for arrest, an order given to the public forces to identify and arrest an escaped accused, in order to take him to jail.² Irrespective of the nature of the warrant delivered against the accused, he cannot be interrogated by the police. But the examining magistrate, in the process of the preliminary investigation, may give rogatory commissions to the police ("*commissions rogatoires*"), that is to say, may entrust a judicial police officer with the responsibility of assuming a certain part of the inquiry; however, the interrogation of the accused cannot be included in such commissions.³ By virtue of this situation, a person may be heard by a judicial police officer as a *witness*, before being brought before the judge to be indicted.

Thus, in France, a person may be heard or interrogated by a judicial police officer before being brought before a magistrate ("*Procureur de la République*" or "*Juge d'Instruction*") in two situations: (1) in the case of a person who has been

heard first as a witness by a judicial police officer, on a rogatory commission from a judge; (2) in the case of a person arrested in a case of a crime or a flagrant delict. In both cases, the French law grants an effective guarantee to the person who has been heard or interrogated in this manner by the judicial police officer, but this guarantee is not always the same.

In France, the suspected person enjoys an effective protection as soon as he is brought before the examining magistrate as an accused. From that time, actually, he is not only excused from taking an oath to tell the truth, but also he may require the help of a barrister. The latter must be convoked by the judge to every interrogatory, permitted to study the briefing, and allowed to communicate freely with his client any time he desires.⁴ As these protections do not facilitate their task, the examining magistrate and the police might be tempted to put off their application, delaying as long as possible the time when the suspected person is the object of a formal inculpation. But the jurisprudence has reacted against this trend by formulating a rule that the Penal Procedure Code has just adopted.

According to Article 105 of this Code, "the examining magistrate in charge of a preliminary investigation, as well as the magistrates and the judicial police officers acting upon a rogatory commission, cannot (otherwise it would not be valid) hear as witnesses persons against whom serious and concordant incriminating evidences exist, when this hearing would result in eluding the defence guarantees."

Thus, when a judicial police officer hears a person as a witness, upon a rogatory commission, and when serious and concordant incriminating evidence appear against this person, he must immediately put an end to this person's interroga-

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¹ CODE OF PENAL PROCEDURE (hereinafter C.P.P.), arts. 63, 64.

² C.P.P., art. 122.

³ C.P.P., arts. 81, 151, 152.

⁴ C.P.P., arts. 114, 118.

tory, because the latter, liable to be incriminated, cannot be interrogated from then on but by the magistrate, and must be brought before him at once.

Actually the whole difficulty lies in knowing what must be understood by "serious and concordant incriminating indicia," and the policemen affirm that this difficulty is not unsubstantial. But it is always possible for the judicial police officer, when he has discovered incriminating indicia which seem to him "serious and concordant" to bring the matter to the judge. Besides, the jurisprudence specifies what we must understand by these indicia by stating, for instance, that the inculpation could sometimes be delayed, as in the *Dominici* case,⁵ even though, in the *Fesch* case, the preliminary investigation procedure was declared null and void because it was delayed too long.⁶

Several kinds of persons may be delayed for 24 hours at the disposal of the judicial police officer who is in charge of the inquiry, in case of a crime or a flagrant delict. But only the persons against whom serious and concordant incriminating indicia exist may be kept on a close watch for 24 additional hours, upon the decision of the "Procureur de la République." Now, any person kept on a close watch, in case of a crime or a flagrant delict, may be interrogated by the judicial police officer within the 24 hours allowed. At the end of the time allowed, the person must be discharged or brought before the "Procureur de la République."

The result is that, in the *preliminary* investigation for a crime or a flagrant delict, a person may be interrogated by the judicial police officer during two periods of 24 hours each, even if serious and concordant incriminating indicia exist against him. This solution, opposed to the solution of the Article 105 of the same Code, may be explained by the special nature of the crime or the flagrant delict, which allows and even demands a specially fast procedure, in which the certainty of guiltiness makes possible a restriction of the guarantees granted to the defence.

Thus, if it is asked what limitation may be supplied to the right of the police to interrogate an arrested person before bringing him before the competent magistrate, the French law supplies the question with two different answers. It does not limit the delay for this interrogatory to a reasonable time; it does not prescribe to reduce it in order to help any useless slowness. The French law, depending on the cases, prescribes to put an

end to the police interrogatory, either when serious and concordant incriminating indicia are disclosed against the interrogated person, or when this person has been delayed against his will for 24 or 48 hours. And these two different solutions seem equally justified.

Because of certain abuses of the police investigation, the question had been raised in France whether the assistance of a barrister should be permitted to a suspected person as early as his police interrogatory and prior to any actual judicial procedure. The new Penal Procedure Code has admitted this assistance to the suspected person by a defence counsel during the prehearing period only under very strict conditions.

According to the Code, in the case of a flagrant crime, the "Procureur de la République" may summon a warrant against any person suspected of having participated in the offence. He interrogates at once the person who is thus brought before him, and this person "if he reports himself, accompanied by a defence counsel, . . . may be interrogated only in the presence of the latter."⁷

This procedure, according to the text, applies only "if the matter has not been referred to the examining magistrate yet." But it concerns an interrogatory by the "Procureur de la République" and not by a judicial police officer. The assistance of a defence counsel during the interrogatory is a privilege granted to the suspected person who spontaneously reports himself before the magistrate. But this privilege is granted to this person only if his spontaneous appearance is the consequence of a warrant summoned against him.

We can see that this assistance is very limited. Defence counsel (barristers) do not ask for it to be extended, because they don't care to assist their clients during the police phase of the procedure. Actually, it is still too early, the Code being in force only since March 2, 1959, to say what an institution which has not had a chance to prove itself yet is worth.

If a person suspected of having committed a crime was delayed by the police during an illegal extended period and if, during the illegal extension of the delay, he confessed he was the author of the crime, it is certain his confession could not be considered as a proof of the crime and should be set aside in the proceedings in court. As a matter of fact, the proof is free in France, on the understanding it has been legally secured and legally brought forward in court.

⁵ Cass. Crim., Sem. Jurid. 1954.11.8351 (1954).

⁶ Cass. Crim., Sem. Jurid. 1955.11.8851 (1955).

⁷ C.P.P., art. 70.

D. Germany

WALTER R. CLEMENS*

INTERROGATION OF THE SUSPECT BY THE POLICE
SUBSEQUENT TO HIS PRELIMINARY
ARREST

Under Section 163 of the German Code of Criminal Procedure (hereinafter called CCP), the police are bound to investigate criminal offenses and take all measures that permit of no delay, with a view to preventing collusion in the case. Within the scope of this duty they are authorized to make a preliminary arrest of suspects, provided requirements of Section 127(i) or (ii), CCP,¹ are complied with.

However, the right to a deprivation of liberty effected by the police is subject to limitations, as well as a review by the judge, according to the provisions of Article 104 of the Basic Law for the Federal Republic dated May 23, 1949,² and Section 128, CCP, supplementing and implementing the provisions of the Basic Law.³

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¹ This provision is set forth in full in Clemens, *Police Detention and Arrest Privileges (Germany)*, 51 J. CRIM. L., C. & P.S. 421, 422 (1960).

² It reads as follows:

"(i) The freedom of the individual may be restricted only on the basis of a formal law and only with due regard to the forms prescribed therein. Detained persons may be subjected neither to mental nor physical ill-treatment.

"(ii) Only a judge is entitled to decide on the admissibility and extension of a deprivation of liberty. In the case of any such deprivation which is not based on the order of a judge, a judicial decision must be obtained without delay. The police may, on their own authority, hold no one in their own custody beyond the end of the day following the arrest. Further details are to be regulated by the law.

"(iii) Any person temporarily arrested on the suspicion of having committed a punishable act must, at the latest on the day following the apprehension, be brought before a judge who shall inform him of the reason for the arrest, interrogate him, and give him an opportunity to raise objections. The judge must, without delay, either issue a warrant of arrest, setting out the reasons therefor, or order the release.

"(iv) A relative of the person arrested or a person enjoying his confidence must be notified without delay of any judicial decision ordering or extending the deprivation of liberty."

³ The latter provision reads as follows:

"(i) The preliminarily arrested person, unless set free at once, shall without delay, at the latest on the day following the apprehension, be brought before the judge (Amtsrichter) who has jurisdiction in the district where the apprehension took place; he shall inform him about

Within the time-limit between the arrest by the police of the suspect and the date when he must be brought before the judge under Section 128, CCP, the police may collect evidence of every description and, in particular, interrogate him. This authorization stems from their duty, imposed upon them under Section 163, CCP, to investigate offenses. Naturally, such questioning of the preliminarily detained person can turn out to be detrimental to him. On the other hand, it can be advantageous, because under Section 128(i), CCP, the police are authorized to release him, which they are always bound and prepared to do, if the evidence gleaned by them, and in particular the interrogation of the arrestee, has rebutted the strong suspicion prevailing against him.

The suspect can defeat his interrogation by the police (as well as by the prosecutor or judge) by taking advantage of his privilege of silence, conceded to him under Section 136, CCP.⁴

To begin with, the right of the police to interrogate the suspect subsequent to his preliminary arrest is subject to certain restrictions as regards the mode of interrogation. Section 136a, CCP,⁵ which is binding on the judge, the district attorney, and the police at all stages of the proceedings, prohibits certain methods of interrogation determined to be immoral.

This provision—which incidentally applies also to the hearing of witnesses according to Section

the reasons for the arrest, examine him and give him an opportunity to raise objections.

"(ii) If the judge holds the arrest not to be justified or its reasons no longer existent, then he orders the release. Otherwise he will issue a warrant of arrest."

⁴ See Clemens, *The Privilege Against Self-Incrimination (Germany)*, 51 J. CRIM. L., C. & P.S. 172, 172-73 (1960).

⁵ This provision reads as follows:

"(i) The freedom of determination and manifestation of the defendant's will shall not be impaired through ill-treatment, fatigue, subjecting to bodily trespass, application of drugs, through torturing, deceiving, or hypnosis. Coercion may only be used to the extent permitted by the Criminal Procedure Statute. Threats with any measure outlawed under its provisions and the promise of any advantage not provided for by the law is prohibited.

"(ii) Measures impairing the memory or discernment of the defendant are not allowed.

"(iii) The prohibitions enacted in paras. (i) and (ii) are binding regardless of the consent of the defendant. Statements obtained in violation of this prohibition must not be used in evidence, not even with the consent of the defendant."

69(iii), CCP—was inserted in the CCP through an amendment in 1950.⁶

Prior to 1950 the CCP, originating in the year 1877, contained no provisions outlawing certain methods of interrogation. Such provisions appeared to be unnecessary, because the law presupposed as a matter of course that the German judges, public prosecutors, and police officers would refrain from dubious interrogation methods.

The sad experiences during the time of the Nazi regime (1933 to 1945), in the course of which the use of force and other disreputable methods was quite common, in particular during interrogations to which the suspect had to subject himself before the police, justly demanded that a recurrence of such disgraceful happenings should be banned by the provisions of Section 136a, CCP.

It must be emphasized that this provision contains not only a prohibition against specific interrogation methods, but also an unequivocal prohibition against using in evidence statements of the defendant which were obtained in violation of the first-mentioned prohibition. The ban on the use of such evidence applies even in the event that the defendant has given his consent.

It might be of interest that Section 136a, CCP, has received a broad interpretation on the part of the courts and the law professors. Thus the German Federal Supreme Court⁷ and part of the legal teaching profession⁸ have taken the view that obtaining a statement from the suspect through the use of a so-called "lie detector" falls under the ban of Section 136a(i), CCP, and that such a statement cannot, under Section 136a(iii), be used in evidence. The Bavarian Supreme Court⁹ goes even farther. In a judgment rendered in 1951 it held:

"It does not appear out of place to interpret

⁶ Art. 3, No. 51 des Gesetzes zur Wiederherstellung der Rechtseinheit auf dem Gebiet der Gerichtsverfassung, der Bürgerlichen Rechtspflege, des Strafverfahrens und des Kostenrechts vom 12 Sept. 1950 (Art. 3, No. 51 of the Law dated September 12, 1950, on the Restoration of Legal Unity in the Field of Court Constitution, Administration of Civil and Criminal Justice and Law Costs).

⁷ 5 Entscheidungen des Bundesgerichtshofs in Strafsachen 333 (Decisions of the Federal Supreme Court in Criminal Matters).

⁸ For instance: KLEINKNECHT-MÜLLER, KOMMENTAR ZUR STRAFPROZESSORDNUNG (Commentary on the CCP) §136(a) n.3(c) (4th ed.) and EBERHARD SCHMIDT, LEHRKOMMENTAR ZUR STRAFPROZESSORDNUNG (Instructional Commentary of the German Code of Criminal Procedure) pt. II, §136(a) n.9 (1957).

⁹ Entscheidungen des Bayerischen Obersten Landesgerichts in Strafsachen (Decisions of the Bavarian Supreme Court in criminal matters) 460 (1951).

the provision of Section 136a, CCP, as the legal manifestation of the will of the law-maker going beyond the wording of the statute to rule out in a trial the use of evidence obtained through *immoral* means."

Also any wilful violation of Section 136a (i and ii), CCP, is punishable under Section 343 Criminal Code, which deals with the extortion of statements.

Moreover, the right of the police to interrogate the suspect subsequent to his preliminary arrest is subject to certain time limits. These are laid down in Section 128(i), CCP, which says that the arrestee must be brought before the judge without delay ("unverzüglich"), at the latest on the day following his preliminary arrest. This provision is the result of an amendment made in 1950.¹⁰ The former text of this provision merely required the "bringing of the arrestee before the judge *without delay*," without providing for a specific time limit. This statutory phrase gave rise to a dispute which persisted for some decades as regards the interpretation of the term "without delay." The police, following a dubious practice, used to interpret this term as entitling them to detain the arrestee as long as appeared necessary to them for the purpose of gleaning the complete incriminating evidence. Grave objections were justly raised against such practice. In 1922 they culminated in a judgment rendered by the Frankfort/Main Appellate Court¹¹ which interpreted the words "without delay" to mean that the appearance before the judge had to take place at the latest on the day following the apprehension, and that a prolonged delay for the purpose of procuring further evidence was improper.

Also the Reichsgericht (Supreme Court of the former Deutsche Reich) rendered a decision in 1932,¹² in which it said that as a rule the bringing of a preliminarily arrested person before the judge must take place at the latest on the day following the apprehension. During the period subsequent to 1933 this decision was open to strong criticism. A report by the Chief of the Berlin Criminal Police which appeared in 1934¹³—that means at the

¹⁰ Art. 3, No. 50 of the Law dated September 12, 1950. For complete citation to Law, see note six, *supra*.

¹¹ JURISTISCHE WOCHENSCHRIFT (Weekly Law Journal) 1058 (1922).

¹² 135 Entscheidungen des Reichsgerichts in Zivilsachen 161 (Decisions of the Reichsgericht in Civil Matters).

¹³ Quoted in KAUFMANN, DER POLIZEILICHE EINGRIFF IN FREIHEITEN UND RECHTE (The Police Encroachment upon Liberties and Rights) 78 (Frankfort/Main 1951).

beginning of the Nazi regime—denounced the decision as completely out of place, and went on to say

“that an end had to be put to the excessive esteem of individualistic interests, and neglect of collectivistic interests which had carried fatal irresolution into the ranks of the police, hamstringing many of them in the impetus of the first action. Not only had the constitutional protection of the right of liberty to be taken into account, but much the more so the state's general interest in the interpretation of the words ‘without delay.’ For this very reason the arrestee would often have to put up with a police detention in excess of the 24-hours limit. On this a clear legal rule must be demanded.”

In spite of this criticism the predominating police practice subsequently adhered to the decision of the Reichsgericht. However, the conflict of opinions on the interpretation of the words “without delay” did not come to an end until after the new phrasing of Section 128, CCP, in 1950.

For the purposes of an interrogation (or the collection of other evidence), the police, according to the present wording of Section 128(i), CCP, may detain a suspect arrested by them at the latest until the expiration of the day following his apprehension, whereupon he shall be brought before the appropriate judge. In the event his interrogation (or the collection of other evidence) has already been finished prior to that time, he shall be brought before the judge even earlier, that is, immediately upon completion of the inquiries. The infraction of these rules will constitute an illegal deprivation of liberty.

Going beyond the time-limit laid down in the law is not permitted, not even with the consent of the arrestee.¹⁴

It may be emphasized that the police are not entitled to detain the defendant on any ground whatsoever if he was arrested on the strength of a judicial warrant. In such case they are obligated, as is prescribed by Section 114(b), CCP, to take him before the judge “without delay,” at the latest during the day following his apprehension, without being authorized, according to the prevailing and correct opinion, to delay the commitment by procuring evidence, or interrogating the arrestee. Neither are the police authorized to release the arrestee, because his arrest had not been ordered by them, but by the judge.

¹⁴ See KLEINKNECHT-MÜLLER, *op. cit. supra* note 8, at §128 n.3.

THE DEFENSE OF THE SUSPECT DURING THE PRELIMINARY PROCEEDINGS

Section 137, CCP, provides that at any stage of the proceedings—which includes the police or district attorney's investigations—the suspect can avail himself of the aid of a defense counsel. The latter's communication with the arrested defendant, however, is subject to certain limitations, laid down in Section 148, CCP, which reads:

“(i) Written and oral communication with counsel is permitted to the arrested defendant.
“(ii) As long as the court case is not opened the judge may refuse written communications, if he is not permitted to look into them.

“(iii) Until the same moment the judge, unless the arrest is based only on danger of escape, can order the talks with counsel to take place in his presence or the presence either of a deputy or of a commissioned judge. . . .”

Hence, the arrestee can confer with counsel orally or in writing prior to his first police interrogation. He can defeat the restrictions laid down in Section 148(ii) and (iii), CCP, by taking advantage of his privilege of silence, conceded to him under Section 136, CCP.

Furthermore, counsel is in principle not entitled to attend the interrogation by the police or prosecution of either the defendant or other persons.

Pursuant to Section 147, CCP, however, counsel (and counsel alone; the defendant has no such right) is entitled to the inspection of the minutes of the district attorney and the police regarding the interrogation of the defendant and the opinions of the experts. Such right is granted him even during the initial stages of the investigation.

These far-reaching restrictions imposed upon counsel have met with vehement criticism in Germany of late. At the German Lawyer's Meeting in May, 1959, the president of the Federal Supreme Court supported this criticism by saying:¹⁵

“I agree that the position of counsel is too weak in our Code of Procedure, and that it must be built up strongly. Especially during the preliminary proceedings counsel will have to take a more active part, and no doubt his status as a whole will have to be raised. . . . That counsel may attend at the police interrogation, that he is supposed to attend at the prosecutor's interrogation, that he is allowed to ask questions, all this . . . I think is a matter of course.”

There is good reason for entertaining hopes that very soon the position of counsel for the defense

¹⁵ ANWALTSBLATT (Lawyers' News) 209 (1959).

during the preliminary proceedings will be considerably fortified by way of an amendment of the law, and especially that he will be granted the right to be present at the police and district attorney's interrogations of his client, the witnesses and the experts, and to communicate with the defendant at any stage of the procedure without any supervision on the part of the judge or other persons.

In German criminal procedure it is counsel's function to help the defendant by having him exonerated, that means in the first place to obtain his acquittal or, if not, a sentence which is as lenient as possible. He is prohibited from acting to his client's detriment. In other words, he holds a one-sided party position. The public prosecution, on the other hand, is under German law an authority which is bound to be impartial. They will, therefore, ascertain under Section 160(ii), CCP, not only all incriminating, but also all exonerating and mitigating circumstances. Section 296(ii), CCP, even goes as far as entitling the public prosecution to make appeals and other remedies under the law in favor of the defendant. Such rights and duties of counsel and prosecution prevail at all stages of the criminal proceedings, hence also during the preliminary proceedings.

As the district attorney is the sole master of the preliminary proceedings (that means the proceedings prior to the presentation of the written charge to the trial judge), the part played by counsel for the defense can only be relatively restricted during this stage of the proceedings. Heinrich Henkel,¹⁶ Professor of Criminal Law at the University of Hamburg, has rightly pictured that part as follows:

"In regard to his investigation-activities counsel is limited to submitting the exonerating material which has come to his knowledge, to the public prosecutor. He is not entitled to make his own investigations running parallel to those of the public prosecutor.

"The dividing line which must be drawn between the preparing and assisting activities of counsel on one hand, and the investigation-activities of the public prosecutor on the other hand, can, it is true, hardly be ascertained in general terms; here the merits of the individual case must prevail, and the various objectives of the parties must be considered, at all events,

¹⁶ STRAFVERFAHRENSRECHT (Law of Criminal Procedure) 211 (1953).

however, the sole and exclusive responsibility of the public prosecutor for this stage of the proceedings. Certainly, counsel may not only accept enlightenment in the matter (through the defendant, his relations and friends), but also inquire who might be a witness to the facts. However, as a rule he is not permitted to question witnesses, as the latter would mean an encroachment upon the investigating activities of the public prosecutor, and might possibly expose counsel to the suspicion of influencing witnesses within the meaning of Section 159, 160 of the German Criminal Code."

The position of counsel during the course of the preliminary proceedings, as set out, appears to be too weak. It should be fortified considerably by way of a change of the law.

UTILIZATION OF A CONFESSION MADE BY THE DEFENDANT DURING HIS ILLEGAL PRELIMINARY POLICE DETENTION

As was mentioned above, the police may interrogate the defendant, preliminarily detained by them, without delay, at the latest until midnight of the day following the apprehension. A confession made to the police by the defendant at a moment subsequent to this time-limit has therefore been brought about in violation of statutory provisions.

This, however, does not necessarily mean that the judge is prevented from using it as evidence. This will occur only if the statute prohibits the use of such evidence.

While there is in the CCP no prohibition against using as evidence a confession which the defendant made to the police after the expiration of the time-limit provided for in Section 128, CCP, such confession can in principle be used with the qualification that the judge, within the scope of the free evaluation of evidence (Section 261, CCP), can refrain from using it¹⁷ in an individual case. The legal position is different in a case where the confession was brought about through ill-treatment, fatiguing or similar illegal devices. The above-mentioned statutory prohibition under Section 136a, CCP against using the evidence applies to such a case.

¹⁷ This matter will be dealt with in a report concerning "The Exclusionary Rule with Respect to Illegally Seized Evidence" which will appear subsequently in this JOURNAL.

CONCLUSION

In the light of the foregoing observations the three questions posed for discussion in connection with this topic¹⁸ can be answered as follows:

(1) Under German law the police are authorized to interrogate a preliminarily detained suspect at the latest until the end of the day following his apprehension. This provision is satisfying and has not given rise to objections.

The commitment-limit provided for in Section 128, CCP, does not appear to be too long, and there is as yet no need for shortening it, which indeed cannot be recommended, because by doing so the police would in many instances have no sufficient chance to clear up the facts to such extent as would enable the judge, once the arrestee has been brought before him, to make his decision forthwith, without being compelled to make further inquiries himself as to whether a warrant of arrest appears necessary. There is no need either for prolonging the above-mentioned time-limit.

In comparison to a statute providing that the

¹⁸ The questions are set forth in the introduction to this symposium.

bringing of the suspect before the judge shall be effected "without delay" (the legal requirement in Germany prior to 1950) or "within a reasonable time," it is felt that the present German law, on account of its lack of ambiguity, should be given preference.

(2) Under German law the arrestee is entitled—and should be entitled everywhere—to get in touch with counsel immediately following his preliminary arrest, and by all means prior to his first police interrogation. The rights of counsel during this stage of procedure, however, are, as was shown, too restricted under German law and should be broadened.

The legal and ethical rules to be respected by prosecutor and counsel at this procedural stage should be the same as in the subsequent court proceedings, because the preliminary and the subsequent court proceedings represent one organic entity.

(3) A confession made by the defendant during his illegal police detention should not—following German law—be suppressed in principle, but only if it was obtained through immoral means, e.g. duress.

E. Israel

HAIM H. COHN*

A person arrested without a warrant must be taken forthwith to the nearest police station, and if the arrest was lawful, the officer in charge of the police station takes that person into custody; "otherwise, the arrested person shall be at once released."¹ Where he is detained, he must be brought before a magistrate within 48 hours of his arrest; if he has not been brought before a magistrate within 48 hours, he must be released.²

A police officer of or above the rank of inspector or specifically authorized in that behalf, may examine orally any person, whether in custody or not, who is supposed to be acquainted with the facts or circumstances of any offence in respect of which such officer is enquiring; the person so

examined is bound to answer truly all questions put to him by the officer, other than questions the answer to which would have a tendency to expose him to a criminal charge.³ Where, however, a person makes a confession to have committed an offence, such confession is not admissible in evidence against him unless the prosecution has adduced evidence to prove the circumstances in which it was made and the trial judge is satisfied that it was made freely and voluntarily.⁴

The precaution invariably taken by the police to ensure that the statement made by a person in custody should be free and voluntary, is strict compliance with the English Judges' Rules.⁵ Thus, where a police officer has made up his mind that a

* Justice, Supreme Court of Israel. Additional biographical data may be found in 51 J. Crim. L., C. & P.S. 175 (1960).—EDITOR.

¹ CRIMINAL PROCEDURE (ARREST AND SEARCHES) ORDINANCE §§7 & 8, LAWS OF PALESTINE cap. 33.

² *Id.*, §10.

³ CRIMINAL PROCEDURE (EVIDENCE) ORDINANCE §2, LAWS OF PALESTINE cap. 34.

⁴ EVIDENCE ORDINANCE §9, LAWS OF PALESTINE cap. 54.

⁵ ARCHBOLD'S PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES 422 (34th ed. 1959).

person in custody is likely or liable to be charged with an offence, he first cautions him that he is not under any obligation to make a statement or to say anything, but that any statement he may choose to make will be taken down in writing and may be given in evidence; and where that person then expresses the desire to make a statement, he is invited to do so in his own words, and may not be cross-examined or asked questions except for the purpose of removing ambiguity in what he has actually said. Although, in ordinary criminal procedure, the Judges' Rules are not yet part of the law of Israel (any more than they are part of the law of England⁶), they were enacted in Israel as binding law for military police investigations,⁷ and are to be incorporated in a new code of criminal procedure which is at present in the process of being drafted. But whether these Rules are binding law or only rules for the guidance of the police, it is well established that a court may reject a confession as not freely or voluntarily made, although the Judges' Rules were in fact duly complied with, and a court may find a confession to be free and voluntary although the Judges' Rules have not in fact been complied with.⁸ The question whether a confession was free and voluntary is a pure question of fact to be determined by the trial judge upon the evidence before him, and the defendant is entitled to the benefit of any doubt remaining in the mind of the trial judge.⁹

Although the requirement that it should be free and voluntary applies under the statute only to the "confession by the accused that he has committed an offence,"¹⁰ the courts in Israel have always applied it to any statement made by the accused while he was in police custody, the reason being that if the prosecution produces such a statement in evidence, presumably it produces it for the purpose of incriminating the accused. The rule would probably not be applied if such statement were produced in evidence by the defence (but no case is reported in which this question has actually arisen).

Police interrogation of persons in custody is

conducted as a matter of course. When such persons are brought before a magistrate, they are sometimes heard to complain that although they have been in police custody for two days already, they have not once, or only once, been questioned; on the other hand, it is a frequent occurrence that magistrates are asked by the police for further remands because it is desired to obtain a further statement from the person in custody. In most cases, however, in which a further remand is asked for purposes of police interrogation, it is because of apprehensions on the part of the police that the person in custody might, if set at liberty, interfere with or improperly influence other witnesses or conceal or destroy material evidence.

The question of the admissibility of a statement made to the police while the person making the statement was in unlawful custody, e.g. where the 48 hours' period had elapsed and he had not been brought before a magistrate, has never arisen in Israel. It is submitted that the rules applying to statements made in lawful custody, *a fortiori* apply to statements made in unlawful custody; but, apart from that, any unlawfulness of the arrest or of the custody should have no direct bearing upon the question whether the statement was made freely and voluntarily—the less so as in many cases the prisoner is not, at the time he makes the statement, aware of the fact that he is unlawfully detained, such unlawfulness deriving not unfrequently from purely formal defects in warrants of arrest. There are civil, criminal and administrative remedies open to a person who was unlawfully arrested or unlawfully detained, but it is not one of those remedies that a statement he made while in unlawful custody must for this reason be rejected *in limine*.

On the other hand, the physical conditions under which a person is detained, the time of the day or night at which his statement is taken, the length of time during which it was taken, or the number of times it was asked of him—have all been held to have a direct bearing upon the question whether the statement was or was not free and voluntary. Statements were rejected which were given four hours after the person had first been cautioned and refused to speak¹¹; or which were given in the middle of the night, whether after long hours of interrogation or upon his being suddenly awakened

⁶ *Id.* at 424.

⁷ MILITARY JURISDICTION ACT, 5715-1955, §§266-69, reproduced in English in UNITED NATIONS YEARBOOK ON HUMAN RIGHTS FOR 1955, at 142.

⁸ MILITARY JURISDICTION ACT, 5715-1955, §478; *Muffah v. Attorney-General*, 3 Piskei Din 31 (1949).

⁹ *Grossberger v. Attorney-General*, 8 Piskei Din 182, 188 (1954).

¹⁰ EVIDENCE ORDINANCE §9, LAWS OF PALESTINE cap. 54.

¹¹ *Attorney-General v. Aharonovitz*, 10 Piskei Din 599, 604 (1956).

out of his sleep.¹² The argument that all police custody involves *ipso facto* some measure of duress and that no confession made in such custody should ever be admitted in evidence,¹³ would, if accepted, lead to most serious handicaps in the administration of justice and does not appear, at any rate as a generalisation, to be justified on the facts. The only proper and just method of proceeding would appear to be that each statement be considered on its own merits, according to the particular circumstances under which, and the motives for which, it was actually made.

The principle underlying the rejection of non-voluntary confessions is that such confessions are likely to be untrue, whereas a voluntary confession may reasonably be taken to be true, as no person will wilfully make a statement against his interest.¹⁴ It is as well to bear in mind that the issue before the court when considering the admission or rejection of a statement made by a person in custody, is not whether the police misconducted themselves and ought to be penalized, but solely whether the statement as such is or is not reliable and credible.

As to the right of persons in custody to have the advice of counsel prior to their interrogation, it is provided that any advocate charged with the defence of an unconvicted prisoner may have access to him on any day and at any reasonable hour, care being taken that the prisoner may see his legal advisers without the presence of any other person.¹⁵ The procedure followed is that the person in custody notifies the officer in charge of the prison or other place of detention, on a form to be provided to him for that purpose, that he wishes to see a certain advocate and charge him with his defence; that advocate is then notified by the police accordingly, and if he wishes to see the person in custody, he is given the necessary facilities. The same applies to an advocate charged by friends or relatives of the arrested person with his defence, provided the arrested person agrees to execute a power of attorney for that advocate. It happens very frequently that a person in

custody refuses to make any statement to the police so long as he has not seen a lawyer, in which case his refusal is usually taken down in writing to be signed by him, and often produced in evidence at his trial. It has also happened that persons in custody agreed to make a statement on condition that their counsel be present, in which case counsel is invited to be present, with the not infrequent result that eventually, on counsel's advice, no statement is forthcoming.

It is noteworthy, and at first sight alarming, that in almost every major trial where it is sought to produce in evidence a statement given to the police by the accused while in custody, the defence raises objection to the effect that the statement was improperly obtained. The cases in which those objections were upheld, are very rare; and in the few cases in which such a statement was rejected, it was not necessarily owing to any proven misconduct on the part of the police, but because of the trial judge's doubt whether the statement was free and voluntary or perhaps given under some misconception on the part of the accused that there was some duty on him to make it. As the law imposes on the prosecution the burden to prove positively that any such statement was made freely and voluntarily, there can not, either legally or tactically, be any harm in putting the prosecution to its proof; and it can easily happen that a perfectly admissible statement is rejected because the trial judge is not satisfied with the quantum of proof adduced by the prosecution as to the circumstances in which it was made, or because the accused, testifying on his own behalf (in what is known as the "little trial" on the admissibility of the statement), succeeded in raising a doubt in the judge's mind as to whether his evidence or that of the police witness was to be preferred. But even if the statement is held to be admissible, the case of the accused has not in the least been prejudiced by his false accusations against the police (trial in Israel not being by jury, but by professional judges only).

Nor is it considered unethical for a defence lawyer to advise his client that the admission in evidence of his statement should be contested. A lawyer will advise his client on what grounds it *may* be contested, and he need not be suspected of doing more than that; if his advice is clear and intelligible, he will receive his instructions promptly. It would, of course, be unethical for the lawyer to suggest to his client a fabricated

¹² Goldstein v. Attorney-General, 10 Piskei Din 505, 545 (1956).

¹³ See, e.g., REPORT OF THE SEMINAR ON THE PROTECTION OF HUMAN RIGHTS IN CRIMINAL LAW AND PROCEDURE (U.N. Doc. ST/TAA/HR/2). The seminar was held in Baguio City, Philippines, in 1955.

¹⁴ 3 WIGMORE, EVIDENCE §§822-23 (3d ed. 1940).

¹⁵ Rules 260 and 263, Prison Rules, 1925, as amended in 1945.

story; but not only persons with some experience as defendants in criminal cases, but also readers of trial accounts in newspapers, will be apt to do their own fabricating and instruct their lawyers as if in good faith. As a matter of conjecture it is not unrealistic to assume that many of the stories of police misconduct for the consumption of the courts are concocted in prison, where the more experienced veterans place their masterminds at the service of the uninitiated. The damage undeservedly done to the reputation of the police force in general, and the officers involved in particular, by the publicity attending the "little" as all trials, whatever their ultimate outcome, should not pass unnoticed.

In the eyes of many a judge, the refusal to make a statement to the police at the first opportunity, is some indication either that the accused wished to conceal what he knew and did not cooperate with the police, or that he had some good reason not to make a statement. Considerations of this kind have been held not to be sufficient to corroborate other evidence, let alone to be evidence in their own right; they cannot even, standing alone, be sufficient reason to negative the credibility of the accused as a witness; but it is no use denying their existence. It is, therefore, not surprising that many advocates encourage their clients to make statements to the police when asked to do so, even while in custody; generally speaking, however, an advocate will not advise a person in custody to make a statement or to refuse to do so, until he himself has heard his client's story. It is in any event entirely proper for an advocate to advise his client not to make a statement but to exercise his right to remain silent.

Insofar as prosecuting counsel are concerned, it

is an unwritten rule that there should be no contact between a person in custody and any member of the prosecuting staff (other than police), except upon the express request of the person in custody. No statement of any person suspected of crime is ever taken by prosecuting counsel, nor is any such person ever interrogated by prosecuting counsel except in court. Where the prosecution desires to have a statement made to the police clarified or amplified, police are instructed to request a further statement from the person in custody, provided the trial has not yet started. Any meeting between prosecuting counsel and an accused person before the trial, in the absence of the judge or of defending counsel, even for purposes of a pre-trial conference, would render the prosecutor liable to disciplinary action (all prosecuting counsel in Israel are civil servants). Similar rules apply to the contact between prosecuting counsel and witnesses for the defence, although the contact between counsel for the defence and witnesses for the prosecution is considered legitimate, so long as no attempt is made to exercise undue influence upon them.

In conclusion, it should be noted that in Israel even the full confession of the accused, although found to have been made freely and voluntarily, is not, if made out of court, sufficient to support a conviction; there need not be corroborative evidence, but the confession must be shown, by some other evidence, to be at least probably true and to fit in with the proven circumstances surrounding the acts confessed to.¹⁶ No such evidence is required to support a plea of guilty in court; it is just another safeguard against illegal police interrogation, superimposed by the judiciary on the safeguards already provided for by the legislature.

¹⁶ *Anderlarsky v. Attorney-General*, 2 Pesakim 87, 88 (1949).

F. Japan*

HARUO ABE†

POLICE INTERROGATION SUBSEQUENT TO ARREST
AND PERMISSIBLE DELAY PRIOR TO
ARRAIGNMENT

Should the police be permitted an opportunity to interrogate an arrested person prior to taking him before a judicial officer for a hearing? If so, should the provision for delay due to police interrogation be general (e.g., a "reasonable time" or "without unnecessary delay") or specific (e.g., four hours, twelve hours, or twenty four hours)? The answer depends upon how far one goes with idealism. If the arrest should be regarded as the terminal of criminal investigation or if the suspect should not be regarded as evidential means, the right of the police to interrogate the arrested person should be denied. Again, if one insists that rigorous limitation be placed on police interrogation, the permissible delay should be prescribed by a general term with very strict interpretation or by a specific term of a few hours.

In Japan the statutes and practices have dealt with this problem in a very realistic manner. In conducting criminal investigations, most Japanese investigators, whether the police or public prosecutors, are very anxious to obtain confessions rather than circumstantial evidence. Consequently, ordinary criminal investigators in Japan believe that one of the most important functions of the criminal investigator is to interrogate an arrested person prior to taking him before a judicial officer. The Japanese system of procedure subsequent to arrest will not be well understood without a deep insight into the psychological background of the investigators.

In Japan the principal investigating agencies are the police and the public prosecutors. They cooperate and divide the work of investigation between them; the former collect evidence in a crude form, whereas the latter refine and supplement it from a legal standpoint. When a suspect is

arrested by the police, he is usually taken to the police station where he may be detained for 48 hours from the time of arrest. During the period of 48 hours the police may interrogate him from time to time; if he confesses, the confession may be reduced to a written statement.¹ It is unlawful for the police to detain him beyond this limit. If the police need to detain an arrested suspect longer, they must take him to a public prosecutor within 48 hours from the time of arrest together with evidence showing reasonable grounds to support the suspicion of guilt.² Otherwise the police must release the suspect at the expiration of the 48 hours period.

The public prosecutor who receives the suspect must immediately inform him of the charges against him and of his right to counsel and give him an opportunity for explanation.³ The public prosecutor makes investigation, usually by questioning the suspect and other persons, to obtain further evidence supporting the suspicion of guilt. His major reliance upon personal evidence, however, does not mean that he pays little attention to physical or real evidence. If the public prosecutor believes that the grounds for detention of the suspect are reasonable, he shall within 24 hours from the time of receiving the suspect request a judge to issue a warrant for detention.⁴ If he fails to make the request within the prescribed period or if the judge does not issue a warrant upon the request, the prosecutor is obliged to release the suspect, unless during the same period he institutes a prosecution by filing a written information against the suspect.⁵ Thus the total period during which the investigators may interrogate the suspects without a warrant for detention may be at most 72 hours from the time of arrest.⁶ However, this does not mean that the police have free rein to interrogate around the clock during the period.

The judge who has been requested to issue a warrant for detention shall hear the suspect and

* The author gratefully acknowledges the encouragement and advice of Professors Fred E. Inbau and Claude R. Sowle in preparing this article for publication. The author also wishes to express his appreciation to Miss Ruth E. McKee of the American Embassy, Tokyo, who has been kind enough to refine the English and give him valuable advice on linguistic matters.

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¹ CODE OF CRIMINAL PROCEDURE, art. 198 (1948).

² *Id.*, arts. 203, 204.

³ *Id.*, art. 205.

⁴ *Id.*, art. 205.

⁵ *Id.*, art. 205.

⁶ *Id.*, art. 205, par. 2.

decide on the necessity and ground for detention.⁷ The hearing is closed to the public. The period of detention secured by a warrant of detention is no longer than ten days.⁸ However, the judge may extend it at the request of the public prosecutor. The total period of such extension should not exceed ten days⁹ except that, when certain serious crimes are involved, an additional extension period not exceeding five days is permissible.¹⁰ The public prosecutor is required to carry out the investigation within this period¹¹ and to decide whether or not there is sufficient evidence to support the prosecution of the detained suspect. If the prosecutor is convinced of the guilt of the suspect, he may file a written information with the court to open prosecution. The suspect has no right to be released on bail during this detention period unless and until a prosecution be instituted against him.

Recently a minority of progressive lawyers has been criticizing the present statutes for allowing investigators too much freedom. Clearly influenced by the development of the confession rule in American federal courts,¹² these lawyers contend that the

72 hours delay legalized under the Japanese system is clearly improper. The opinion of the United States Supreme Court in the *Mallory* case¹³ and the dissenting opinion of Edgerton, C. J., in the *Netoyer* case,¹⁴ seem to encourage the radical views of the lawyers who doubt the lawfulness of such statutes and practices as allowing the detention to be used for criminal interrogation.

However, such extremely idealistic views are not popular among the majority of Japanese lawyers who find in the present statutes a practical compromise between idealism and realism. The author is inclined to support the popular view for the following five reasons:

- (1) At the present stage of scientific criminal investigation confession is still one of the most important sources of evidence;
- (2) Japanese judges are reluctant to convict an accused upon circumstantial evidence;
- (3) Under the Japanese substantive criminal laws, where rules of presumption have very limited room to function, it is highly difficult to prove *mens rea* of the accused;
- (4) The public prosecutor in Japan must make a "quasijudicial" decision in that he has to be well convinced by the evidence supporting the probable conviction of the accused before he decides to institute a prosecution;
- (5) In Japan, people expect the public prosecution to maintain a very low "not guilty" rate (less than 1%).¹⁵ If the prosecution made it the rule to prosecute suspects upon *prima facie* evidence and raised the "not guilty rate" over 1%, the prosecution

⁷ *Id.*, art. 207.
⁸ *Id.*, art. 208, par. 1.
⁹ *Id.*, art. 208, par. 2.
¹⁰ *Id.*, art. 208a. This provision was newly adopted in 1953. So far, no such additional detention has been requested or permitted under this new provision.
¹¹ The following table, constructed from the data published in MINISTRY OF JUSTICE, THE 84TH ANNUAL STATISTICAL REPORT OF PUBLIC PROSECUTION FOR 1958 (1959), shows the number of persons received by all public prosecutor's offices in 1958 and detained for various periods for investigation. Where a suspect is detained more than once, his detention period is calculated as the total of those detentions.

Detention Period	Prosecuted		Not Prosecuted	Others	Total
	Trial	Non-Trial			
Not detained.....	40,919	184,490	292,453	140,326	658,188
Within 5 days.....	9,171	4,908	6,325	2,177	22,581
Within 10 days.....	54,616	18,246	26,997	13,206	113,065
Within 15 days.....	5,859	975	2,214	857	9,905
Within 20 days.....	14,985	1,169	4,562	1,948	22,664
Over 20 days.....	411	28	57	21	517
Total.....	125,961	209,816	332,608	158,535	826,920

¹² Cf. Abe, *Jihaku ni kansuru Eibeiho jo no Shogensoku* (*Anglo-American Rules on Confession*), KEISATSU KENKYU (The Police Studies) Vol. 29, No. 8, p. 15; *Id.*, Vol. 29, No. 10, p.3; Vol. 29, No. 11, p.45 (1958); *Id.*, Vol. 30, No. 1, p.96; Vol. 30, No. 6, p.29 (1959) (a comparative analysis of the development of the confession rule from the standpoint of a Japanese lawyer).

would be severely criticized by public opinion and the legislature.
¹³ *Mallory v. United States*, 354 U.S. 449 (1957).
¹⁴ *Netoyer v. United States*, 250 F.2d 31 (D.C. Cir. 1958).
¹⁵ The following table shows the "not guilty" rates in recent years in Japan.

What is stated above does not mean that we should be content with the unsatisfactory reality.¹⁶ On the contrary, the author agrees with the contention of Professor Kaino, one of the most progressive scholars in Japan, who wisely suggested that we should be able to reach the ideal of criminal justice only through a painful period in which sly criminals escape justice wholly unpunished, and that the privilege against self-incrimination, though seemingly obstructive, has a disciplinary effect on the development of scientific

and circumstantial investigations.¹⁷ However, the author believes that the ideal should be reached step by step. The first step should be to train the police in scientific and civilized techniques of criminal interrogation rather than to prohibit the police from depending on the confession of the suspect. For this purpose the use of the "polygraph,"¹⁸ for example, is highly recommended. There are many Japanese cases in which the timely use of the polygraph has led to successful investigation.¹⁹ In a few cases Japanese courts have used polygraph records in weighing the trustworthiness of the defendant's testimony.²⁰

THE NUMBER OF THE ACCUSED PRONOUNCED "NOT GUILTY" AFTER FORMAL TRIAL IN THE COURTS OF FIRST INSTANCE

Year	Defendants Finally Adjudicated in Ordinary Courts of First Instance	Not Guilty*	%
1953	115,354	1,202	1.0
1954	109,696	869	0.8
1955	124,037	925	0.7
1956	124,179	710	0.6
1957	106,351	566	0.5
Total	579,617	4,272	0.72

* Defendants pronounced "not guilty" do not comprise those who were excused from punishment or acquitted because of statutes of limitation, etc. See Abe, *The Role of Public Prosecutors in a Modern Society*, in KAINO (ed.), SAIBAN (Trial) 115, 116 (1959) (in Japanese).

¹⁶ Cf., Abe, *The Role of Public Prosecutors in a Modern Society*, in KAINO (ed.), SAIBAN (Trial) 115, 129 (1959) (in Japanese). In this article the author pointed out as follows: "It is the tradition of placing too much emphasis upon confession which is hampering the growth of this scientific spirit. In Japan it appears that the police, public prosecutors, and the judges are very fond of confessions. Among the police there are still those who regard a 'fist' as the best lie-detector. It is a shame that a distinguished public prosecutor should give hell to the suspect in order to obtain a confession. Among judges there are those who do not like to pronounce 'guilty' except upon confession. In the technical terminology of criminal investigation, to force the accused to confess is called to make him 'break down.' Today, a good many people still think that a good criminal investigator is a person who is skilled in making a suspect 'break down' (i.e., compelling him to talk in exhaustion). If every one depends upon confession, criminal investigation does not grow up. It is true that forcing to confess is an easier and more convenient method than gathering physical evidence by walking around. But unless one decides to give up obtaining confession and rely on physical evidence, the modernization of criminal investigation cannot be expected. To abstain from self-incriminating evidence and to give up obtaining confession may result in temporary inefficiency of investigation, but the prosecution and the police will not mature without going through this thorny path."

THE RIGHT OF THE ARRESTED PERSON TO COUNSEL *Right to Counsel in General*

The Constitution of Japan guarantees the right of the accused²¹ and the arrested person²² to counsel. The Code of Criminal Procedure specifically provides²³ for the privileges of the arrested

¹⁷ See Abe, *Self-Incrimination—Japan and the United States*, 46 J. CRIM. L., C. & P.S. 613, 624 (1956).

¹⁸ It appears that techniques and devices of polygraphy in Japan have been greatly improved by Mr. Yoshimasa Imamura and his colleagues in Scientific Police Research Institute. One of the characteristics of the Japanese lie-detector is its sensitivity to galvanic skin reflex. For the development of lie-detection techniques in Japan see Imamura *et al.*, *Development of Lie-detection Techniques in Japan*, 11 SCIENCE AND CRIME DETECTION, (No. 2) 228 (1958) (in Japanese).

¹⁹ It is reported that from May, 1956, to July, 1959, 1,211 cases were tested by means of the polygraph. Data of polygraphic experiments are collected in series of publications (in Japanese) by The Scientific Police Research Institute.

²⁰ Decision of the Kyoto District Court, Fukuchiyama Branch, March 5, 1959 (prosecution for larceny; polygraphic records received); decision of the Chiba District Court, Yokaichi Branch, May 28, 1958 (prosecution for rape-murder; polygraphic records received).

²¹ THE CONSTITUTION OF JAPAN, art. 37, par. 3: "At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State." The original Japanese term for "the accused" is "*keiji hikokumin*" which literally means "criminal defendant." The word "the accused" being used in the official translation is, therefore, inaccurate and misleading, because the word "accused" may imply also the status of a person who has been accused but not yet formally indicted. In Japanese legal terminology "*keiji hikokumin*" or "the criminal defendant" does not include "*higisha*" or "the suspect" which means one who has been investigated but not yet formally prosecuted by a written indictment (or more exactly a written "information").

²² *Id.*, art. 34: "No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel. . . ."

²³ CODE OF CRIMINAL PROCEDURE, art. 30 (right of defendant, suspect and their relatives to assign the counsel); arts. 203, 204 (mandatory requirement of informing the arrested person of the right to counsel).

person to counsel. According to the provisions of the law, an arrested person is entitled to counsel prior to the hearing before the detention judge, whereas he has no right to the public counsel to be appointed by the court unless and until prosecution be formally instituted against him.

Communication Between Counsel and Arrestee and Its Restrictions

The principle of free communication between counsel and arrestee is statutorily established in Japan.²⁴ Counsel may communicate with and personally interview an arrested person without being monitored or having any one present.²⁵ There are two major exceptions to the principle. In the first place, it is provided that certain measures may be prescribed by law or the rules of the Court to prevent the escape of the arrested person or the destruction of evidence.²⁶ Thus far, however, no such restrictions have ever been prescribed except for the case where the arrested person is on the premises of a court.²⁷ Secondly, investigating officials may designate the date, place and time of interview, if such designation is necessary for investigation and only if it is made prior to the opening of the public prosecution.²⁸ Despite the proviso warning "that such designation should not unreasonably restrict the right of

the suspect to prepare for defense," Japanese investigators are prone to utilize this privilege of designation to the extremity. In certain cases involving election law violation, bribery or racketeering, investigators often feel the necessity of restricting free communication between the arrested person and outside people. In such cases investigators ask the court to issue an order to restrain free communication between the arrestees and outside persons other than the counsel.²⁹ But since this order does not restrain the approach of the counsel to arrestees, public prosecutors usually attempt to go one step further by invoking the provision authorizing investigators to designate the time and place for interviewing.

The degree to which public prosecutors utilize the privilege of restraining the interview varies from place to place³⁰ and from case to case. In small or middle-sized towns, where there is no perceivable tension between defense lawyers and investigators, public prosecutors seldom use this privilege of restriction. However, in large cities, such as Tokyo or Osaka, where there is some tension between defense counsel and criminal investigators, public prosecutors frequently use their privilege. Should the public prosecutor, for example, invoke this privilege in a case involving election law violation in Tokyo, the average practice would be as follows: During the ten day period of detention a defense lawyer would be permitted to interview the arrestee only once. If the detention were to be extended beyond the ten day limit, he would be entitled to see his client once more. This means that an arrested person may personally communicate with his counsel six

²⁴ *Id.*, art. 39. It should be noted that the restriction of communication and interview by the order of the court under article 80 of the Code of Criminal Procedure does not extend to the privilege of counsel to communicate with or interview an arrested person. For the translation of article 81, see note 29, *infra*.

²⁵ *Id.*, art. 39, par. 1: "The accused or the suspect placed under physical restraint in any way may, without having any official bystander present, have an interview with his defense counsel or any other person who is going to be his defense counsel upon request of the person who is entitled to appoint defense counsel . . . and may deliver or receive any documents or any other thing."

²⁶ *Id.*, art. 39, par. 2: "With regard to the interview and delivery or receipt of things prescribed in the preceding paragraph, such measures may be provided by law or ordinance (including the Rules of the Court; the same shall apply hereinafter) as are necessary for preventing the escape of the accused or the suspect, the destruction or concealment of evidence, or the delivery or receipt of those things which may hinder the safe custody of the accused or the suspect."

²⁷ THE RULES OF THE SUPREME COURT, art. 30.

²⁸ CODE OF CRIMINAL PROCEDURE, art. 30, par. 3: "The public prosecutor, public prosecutor's assistant officer and judicial police official . . . may, when it is necessary for investigation, designate the date, place and time of interview and delivery or receipt of things mentioned in Paragraph 1 only prior to the opening of public prosecution, provided that such designation should not unreasonably restrict the right of the suspect to prepare for his own defense."

²⁹ *Id.*, art. 81: "When there is reasonable ground to suspect that the accused under detention may escape or destroy evidence, a court may, upon request of a public prosecutor or on its own initiative, forbid him interview with other persons than those prescribed in Art. 39, Par. 1, examine documents and other things he may deliver to or receive from such persons, forbid him to deliver or receive them, or seize them. However, he shall not be forbidden to receive food nor shall it be seized."

³⁰ It was reported that out of 10,808 suspects, for whom detention was requested by the Tokyo District Public Prosecutors' Office from January to June, 1951, 821 (or about 7.6%) were those against whom orders to forbid the interview with outside people (except their counsel) were issued by the court. There were, however, many districts where the percentage of the issuance of such orders was less than 1%. For details see MINISTRY OF JUSTICE, CRIMINAL AFFAIRS BUREAU, A SURVEY OF THE ADMINISTRATION OF THE CODE OF CRIMINAL PROCEDURE AND THE SUGGESTIONS TO ITS AMENDMENTS (Materials on Prosecution, No. 33) 83 *et seq.* (1952) (in Japanese).

times during a 20 day detention period if he has three defense lawyers. In cases where a designation of date for interview is made, the average time for one interview is usually about 15 to 20 minutes.

The practice of restraining interview has naturally been arousing considerable feeling of dissatisfaction among progressive lawyers.³¹ Some bar associations have passed resolutions requesting public prosecutors to exercise within reasonable limits their privilege of restraining interview. The Federation of Japanese Bar Associations also made a declaration³² urging investigators not to abuse their privilege of restraining interview.

Thus far, there have been only a few Supreme Court decisions regarding the legitimate limitation of the investigator's privilege of restraining interview.³³ They indicate that the Supreme Court has been rather reluctant to handcuff investigators in exercising this privilege.

It should be noted that the law³⁴ provides for the recourse to a judicial remedy in the form of "*jun kokoku*" (quasi minor-appeal) to the court. This quasi appeal may be taken by a person who is not content with the restraining measure taken by investigators for hampering the interview between counsel and arrestee. It is reported that recently a few progressive lawyers took recourse to this provision. But no cases have ever been reported where the measures taken by investigators were set aside by the court. The proper solution of this problem seems to be not in judicial control but in the sense of humanity existing in the minds of criminal investigators.

Ethics of Counsel Concerning Free Communication with an Arrestee

To destroy or conceal evidence in criminal cases of others constitutes a crime under the Japanese Penal Code.³⁵ If a defense counsel instigates or helps an arrestee to destroy or conceal evidence, the counsel is punishable under the Code. Investigators sometimes complain that there are cases,

though very few, where defense counsel instigate or help arrestees to obstruct investigation.³⁶ However, since the communication between counsel and arrestee is not monitored, it is impossible to ascertain whether such complaints are true or not. The key to securing fairness on the part of counsel in free and secret communication between counsel and arrestees must be sought in the ethics of lawyers and the mutual trust between counsel and investigators. The days when the arrestees were detained *incommunicado* have passed. But the days of sound practice of free communication being established upon the mutual trust between counsel and investigators will not come very soon.

LEGAL REMEDIES FOR AN ACCUSED PERSON WHO CONFESSED DURING AN ILLEGAL DETENTION PERIOD

What legal remedies should be available to an accused person who confessed to a crime during a period of police detention which extended beyond prescribed limits? Should he be entitled to have the confession suppressed?

These questions seem to be somewhat academic to Japanese lawyers because in practice there has been (and perhaps "there will be") no actual case where a Japanese prosecutor has ever attempted to introduce in evidence a confession which was obtained during a period of detention which extended beyond prescribed limits.

However, there was a case where the admissibility of a confession obtained by a police officer during an illegal detention was in question.³⁷ In this case the Supreme Court held that the written confession should not be regarded simply as null and void even if it had been made during an illegal detention. In another case, where the time of counsel's interview with the suspect under police detention was limited to two or three minutes and the admissibility of the confession

³¹ See, e.g., Ozu, *Improper Restrictions on the Interview of Counsel with the Accused or the Suspect*, 51 JURIST 14 (1954) (in Japanese).

³² *Id.* at 17.

³³ Vol. 7, No. 7 Sup. Ct. Crim. Rep. 1474 (2d Petty Bench 1953), prosecution for bribery, four times of interview in a few minutes each held "improper" (dictum); Decision of the Supreme Court (2d Petty Bench, April 20, 1955) designation of the date of interview on the very day when the accused was indicted, held not necessarily unlawful.

³⁴ CODE OF CRIMINAL PROCEDURE, art. 430.

³⁵ PENAL CODE OF JAPAN, art. 104.

³⁶ Several cases in which defense lawyers appeared to abuse their privilege of free communication with the arrestees are reported in MINISTRY OF JUSTICE, CRIMINAL AFFAIRS BUREAU, A SURVEY OF THE ADMINISTRATION OF THE CODE OF CRIMINAL PROCEDURE AND THE SUGGESTIONS TO ITS AMENDMENTS (Materials on Prosecution, No. 33) 56 *et seq.* (1952) (in Japanese). Also see Ozu, *op. cit. supra* note 31, at 16, reporting five cases in which counsel allegedly abuse their right to free communication as experienced by Mr. Okazaki, during his 3 years and 7 months activities as a public prosecutor in Tokyo.

³⁷ Vol. 6, No. 10 Sup. Ct. Crim. Rep. 1245 (3d Petty Bench 1952).

made during the detention was challenged, the Court held that the confession was admissible because the illegality of the interview procedure did not affect the voluntariness of the confession.³⁸ From these precedents it may be inferred that the Supreme Court of Japan has been taking the position that "voluntariness" is the sole or most important criterion for the admissibility of a confession. In some cases a detention beyond prescribed limits may psychologically distort the voluntariness of a confession, but illegal extension of detention does not logically insure the involuntariness of a confession obtained during illegally prolonged detention. Under the Japanese system a confession obtained during "unreasonably

³⁸ Vol. 7, No. 7 Sup. Ct. Crim. Rep. 1474 (2d Petty Bench 1953).

prolonged" detention is presumed to be involuntary and inadmissible;³⁹ but a detention extended beyond prescribed limits does not necessarily mean "unreasonably prolonged" detention, unless the extension be made for such a long period as to have a torturing effect upon the detained person.⁴⁰ Most judges and public prosecutors seem to agree with the position of the Supreme Court, but majority opinion among scholars and private lawyers appears to be against the position of the Court. The author also favors this latter opinion.

³⁹ THE CONSTITUTION OF JAPAN, art. 38, par. 2; CODE OF CRIMINAL PROCEDURE, art. 319, par. 1.

⁴⁰ There is a case where the Supreme Court held that a confession based upon another confession which had been made in a preliminary hearing after more than 40 days detention was not a "confession made after prolonged detention." Vol. 2, No. 10 Sup. Ct. Crim. Rep. 1209 (2d Petty Bench 1948).

G. Norway

ANDERS BRATHOLM*

In Norway the police have power to question a witness or a suspected person. But neither the witness nor the suspected person has any duty to make a statement, apart from giving his name, address and position.¹

If a witness chooses to make a statement to the police, he is obliged to tell the truth, if he can do so without exposing himself or one of his relatives to danger of being punished or losing the respect of his fellow citizens.² A suspect can, however, without penalty make a false statement.

If the questioning implies that the witness is suspected of the crime in question, he is in the same legal position as an expressly suspected person and can, accordingly, make a false statement without risking being held criminally responsible.

The police have no duty to draw the attention of a suspect to the fact that he need not make a statement or that everything he says may be taken down and used as evidence against him. On the contrary, if the suspect declines to make a statement, the examining officer can draw his attention to the fact that his refusal could be considered as a circumstance which weighs against

him. The same applies if the accused refuses to make a statement in court.³

As far as witnesses are concerned, it is laid down in the regulations for the Public Prosecuting Authority that the police shall inform a witness, who is not obliged to give a statement on ground of his relationship to the suspect, about his right in this respect. Otherwise, the police have no duty to inform the witness about his right to decline to answer questions.

It is made clear in the Criminal Procedure Act, and in the regulations which apply to the police, that no form of pressure must be brought to bear on a person being questioned.⁴ There are, however, few regulations as to *how* the questioning shall take place. But it is understood that the questioning cannot be carried out under such conditions, or last so long, that the interrogated person is exposed to undue strain. To question him at night or for many hours without a pause, would in most cases be considered impermissible. It happens, however, in practice, especially in serious cases, that suspected persons have to undergo somewhat long and exhausting questioning, but really overwhelming strain is avoided. A confession obtained

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¹ CRIMINAL CODE OF 1902, §§167, 333.

² *Id.*, §167(2).

³ CRIMINAL PROCEDURE ACT OF 1887 (hereinafter called CPA), §260.

⁴ CPA, §§256–58.

as a result of improper questioning will, as a rule, be admitted in evidence.⁵

The statement of a suspected person (or a witness) to the police is, as a rule, taken down and read over to him, and, in most cases, signed by him.

It is generally held that Section 332 of the Criminal Procedure Act does not permit the reading in court of the statement of the accused to the police, but in practice this interdiction has been of little significance. As a rule the police officer who took down the statement will give evidence in court with respect to what the accused told him. In this connection, the officer usually reads through the statement just before he enters the courtroom.⁶

The accused person has the opportunity to have counsel in attendance during police questioning, but it is seldom that this happens in practice in any case during the time before or just after his arrest.⁷

A person who is arrested must, if at all possible, be brought before an examining judge within the

⁵ See BRATHOLM, *NORDISK TIDSSKRIFT FOR RETTSVITENSKAP* (NORTHERN JOURNAL OF LAW) 109 (1959).

⁶ Andenaes contends, and supports his contention with very convincing arguments, that the CPA can reasonably be interpreted in such a way that the police report in most cases can be read in court as a supplement to the oral statement of the officer. See his article in *POLITIEMBEDSMENNENES BLAD* (THE JOURNAL OF POLICE OFFICIALS) 149, 158 (1958).

⁷ See BRATHOLM, *PAAGRIPELSE OG VARETEKTSFENGSEL* (ARREST AND DETENTION BEFORE TRIAL) 92, 263-64 (Oslo 1957).

end of the day after his arrest, if the police have not set him at liberty within this time.⁸ Strictly speaking he should be brought before a magistrate at the earliest possible opportunity, and at the latest within the next day. But in practice it is seldom that his appearance before the court takes place before about 24 hours have passed.⁹

While the accused person is in custody, he is more or less frequently questioned by the police, either in prison or at the police station. The accused can refuse such questioning, but in practice it seldom happens that he does so. A refusal would in most cases worsen his position.¹⁰ Questioning both before and after remand in custody can take place without witnesses. According to Swedish law, a witness must be present, if at all possible, during the police questioning.¹¹ A policeman can serve as a witness.

⁸ CPA, §§235, 236.

⁹ Sometimes the time limit is exceeded without a valid reason. See BRATHOLM, *op. cit. supra* note 7, at 263. Evidence, or a confession, obtained during such a period, is valid. A survey of the arrest and remand provisions in CPA is given in 51 J. CRIM. L., C. & P.S. 437 (1960). A more detailed survey may be found in the author's article, *Arrest and Detention in Norway*, 108 U. PA. L. REV. 336 (1960).

¹⁰ If it turns out that the remanded (or prosecuted) person was innocent, he is, as a rule, entitled to compensation by the State for economic loss caused by his imprisonment (or by the prosecution). Such a claim is in first instance generally decided upon by the Magistrate's Court. CPA, §§469-71.

¹¹ THE SWEDISH PROCEDURE ACT OF 1942, c. 23, §10.