

Winter 1960

Police Detention and Arrest Privileges under Foreign Law

G. Arthur Martin

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

G. Arthur Martin, Police Detention and Arrest Privileges under Foreign Law, 51 J. Crim. L. Criminology & Police Sci. 409 (1960-1961)

This Symposium is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

POLICE DETENTION AND ARREST PRIVILEGES UNDER FOREIGN LAW

A. Canada*

G. ARTHUR MARTIN**

POWERS OF ARREST¹

In general

The powers of a peace officer to arrest for suspected violations or suspected potential violations of the criminal law are to be found in the Criminal Code of Canada,² or in Provincial enactments creating Provincial offences. The common law distinction between felonies and misdemeanours has been abolished. Crimes are designated simply as indictable offences (i.e., offences which may be tried by indictment) and offences (i.e., less serious types of crimes which are triable by a Magistrate or Justice of the Peace under a special code of procedure set out in Part XXIV of the Code).³

The Criminal Code empowers both the peace officer and the ordinary citizen to arrest without warrant in certain circumstances, the powers of the peace officer being wider than those of the citizen. Section 434 of the Code relates to the powers of the citizen and reads as follows:

"Anyone may arrest without warrant a person

* A brief discussion of the Canadian federal system, which may be helpful in better understanding certain portions of this paper, appears in 51 J. CRIM. L., C. & P.S. 161-63 (1960).—ED.

** Member of the bars of British Columbia and Ontario with offices in Toronto. Additional biographical data may be found in 51 J. CRIM. L., C. & P.S. 161 (1960).

¹ The subject of arrest under a warrant is not discussed in this report. Section 440 of the Criminal Code provides that the Justice, upon an Information under oath, may issue a warrant or a summons to compel the attendance of the accused before him.

² 1953-54 (CAN.) c.51; *Frey v. Fedoruk*, [1950] S.C.R. 517.

³ Section 28 of The Interpretation Act, R.S.C., c.158 (1952), provides:

"(1) Every Act shall be read and construed as if any offence for which the offender may be

(a) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence;

(b) punishable on summary conviction, were described or referred to as an offence; and all provisions of the Criminal Code relating to indictable offences, or offences, as the case may be, shall apply to every such offence."

whom he finds committing an indictable offence."

Section 435 deals with power of a peace officer to arrest without warrant and reads as follows:

"A peace officer may arrest without warrant

(a) A person who has committed or who, on reasonable and probable grounds he believes has committed or is about to commit an *indictable* offence, or

(b) A person whom he finds committing a *criminal* offence."

Criminal offence in subsection (b) means any offence punishable on indictment or upon summary conviction under the Criminal Code or any Dominion Statute but does not include a violation of a Provincial Statute.⁴

There are certain other sections dealing with the power of the citizen to arrest in certain circumstances. Section 30 authorizes *every person* who witnesses a breach to detain any person who commits or is about to join in or to renew the breach of the peace, for the purpose of giving him in custody to a police officer. Section 436 provides that *anyone* may arrest without warrant a person who on reasonable and probable grounds he believes has committed a *criminal* offence and is escaping therefrom and is freshly pursued by persons who have a lawful authority to arrest that person. Section 437 empowers the owner or any person in lawful possession of any property or any person authorized by the owner or any person in lawful possession of property to arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property.

Powers of the Police Officer

Section 435, in its present form, was first enacted in 1955 and was derived in part from the former Section 652,⁵ which reads as follows:

"Any peace officer may, without a warrant,

⁴ CRANKSHAW'S CRIMINAL CODE OF CANADA 595 (7th ed.).

⁵ R.S.C., c.36 (1927).

take into custody any person whom he finds lying or loitering in any highway, yard or other place during the night, and whom he has good cause to suspect of having committed or being about to commit, any indictable offence, and may detain such person until he can be brought before a justice to be dealt with according to law.

"(2) No person who has been so apprehended shall be detained after noon of the following day without being brought before a justice."

Section 435 in its present form gives the police officer much wider powers than were enjoyed by him at common law. The power to arrest one whom he on reasonable and probable grounds believes *to be about* to commit an indictable offence obviously enables the officer to intervene at a stage prior to the commission of an attempt. The attempt to commit an indictable offence is itself an indictable offence and an attempt to commit an offence punishable on summary conviction only is a summary conviction offence.⁶ Since by Section 435 a peace officer has the power to arrest any person whom he finds committing a criminal offence, it is clear he could justify arresting a person attempting to commit any criminal offence by the power there conferred, and the power to arrest a person whom he believes "is about to commit an indictable offence" would be unnecessary if this power were construed as being limited to situations where an attempt to commit an offence has already begun. It follows that a police officer may arrest under Section 435 where he believes the person arrested is about to commit an indictable offence although he has no basis for charging him with the commission of any offence. The peace officer is by virtue of Section 438(2) of the Code required to bring the arrested person before a Justice of the Peace within 24 hours, if one is available within that period, and if a Justice is not available within that period he must bring the prisoner before the Justice as soon as possible.⁷

⁶ CRIMINAL CODE OF CANADA, §406.

⁷ "438(1). Any one who arrests a person without warrant shall forthwith deliver that person to a peace officer, and the peace officer may detain the person until he is dealt with in accordance with this section. (2) A peace officer who receives delivery of and detains a person who has been arrested without warrant or who arrests a person with or without warrant shall, in accordance with the following provisions, take or cause that person to be taken before a justice to be dealt with according to law, namely,

(a) where a justice is available within a period of

If, during that period, as a result of his investigation or as a result of admissions made by the prisoner, the officer obtains sufficient evidence to warrant the laying of a charge, he may do so; otherwise, the prisoner must be discharged upon being brought before the justice as required by Section 438(2).

The wide powers conferred by Section 435 may be justified as a form of preventive justice, and no doubt the taking into custody of a person whom the police believe is about to commit a crime has some therapeutic value even though no charge is ultimately laid. A recent case decided by the Ontario Court of Appeal makes it clear, however, that in order to justify himself under this section the officer must have some objective grounds for believing that the person arrested was about to commit an indictable offence.

In *Koechlin v. Waugh & Hamilton*,⁸ the plaintiff was awarded damages against two policemen for unlawful arrest. The plaintiff was walking home with a friend after having attended a picture show. There had been a number of crimes of breaking and entering in the area, and the attention of the defendant officers was attracted to the plaintiff and his companion by reason of the dress of the plaintiff's companion, who was wearing rubbersoled shoes and a windbreaker. The officers asked the plaintiff to identify himself and, when he refused, removed him forcibly to the police station. Laidlaw, J. A., in delivering the judgment of the court, said:

"A police officer has not in law an unlimited power to arrest a law-abiding citizen. The power given expressly to him by the Criminal Code to arrest without warrant is contained in s. 435, but we direct careful attention of the public to the fact that the law empowers a police officer in many cases and under certain circumstances to require a person to account for his presence and identify himself and to furnish other in-

twenty-four hours after the person has been delivered to or has been arrested by the peace officer, the person shall be taken before a justice before the expiration of that period; and

- (b) where a justice is not available within a period of twenty-four hours after the person has been delivered to or has been arrested by the peace officer, the person shall be taken before a justice as soon as possible."

Since the provisions of §438 are for the benefit of the prisoner, it would seem that the officer might lawfully release the prisoner at any time before the expiration of the period without taking his prisoner before a Justice of the Peace.

⁸ [1957] O.W.N. 245, 118 Can. C.C. 24.

formation, and any person who wrongfully fails to comply with such lawful requirements does so at the risk of arrest and imprisonment. None of these circumstances exist in this case. No unnecessary restriction on his power which results in increased difficulty to a police officer to perform his duties of office should be imposed by a Court. At the same time, the rights and freedom under law from unlawful arrest and imprisonment of an innocent citizen must be fully guarded by the Courts. In this case, the fact that the companion of the infant plaintiff was wearing rubber-soled shoes and a wind-breaker and that his dress attracted the attention of the police officers, falls far short of reasonable and probable grounds for believing that the infant plaintiff had committed an indictable offence or was about to commit such an offence. We do not criticize the police officers in any way for asking the infant plaintiff and his companion to identify themselves, but we are satisfied that when the infant plaintiff, who was entirely innocent of any wrong doing, refused to do so, the police officer has no right to use force to compel him to identify himself. It would have been wise and, indeed, a duty as a good citizen, for the infant plaintiff to have identified himself when asked to do so by the police officers. It is altogether likely that if the infant plaintiff has been courteous and co-operative, the incident giving rise to this action would not have occurred, but that does not in law excuse the defendants for acting as they did in the particular circumstances. . . ."⁹

The *Koechlin* case, *supra*, may be contrasted with that of *R. v. Beaudette*.¹⁰ In the latter case, the accused appealed from his conviction on a charge of unlawfully resisting a peace officer in the execution of his duty in arresting the accused. The principal ground of appeal was that the officer was not authorized by law to arrest the accused in the circumstances and hence was not acting in the execution of his duty. The evidence disclosed that the accused had been in a beverage room and had become intoxicated. When he refused to leave at the closing hour, the police were summoned and they eventually persuaded the accused to leave.

⁹ See also *R. v. Carroll*, [1960] O.W.N. 9, holding that in the circumstances before the court the accused was under no duty to identify himself to the constable when requested so to do.

¹⁰ 118 Can. C.C. 295 (1957).

Outside the premises a man in a taxi, of which the accused was the owner, shouted to the accused to drive him home. It became evident to the police that the accused intended to drive the car while in an intoxicated condition. The court, in dismissing the appeal, held that there was substantial justification for the police officer entertaining the belief that accused was about to commit the indictable offence of driving a motor vehicle while intoxicated. These authorities make it abundantly clear that the peace officer is confined within the limits of the powers conferred on him by the statute, and when he interferes with the liberty of the citizen he does so with the knowledge that he may subsequently be called upon to justify his action in a court of law.

It is of course a truism that a police officer investigating a crime is entitled to question any person that he thinks may be able to throw light upon the subject whether or not he suspects the person to whom the questions are directed. However, there is no general right to *detain* a person for questioning unless that detention is specifically authorized by Section 435 or some other statutory provision. If the person sought to be questioned chooses to co-operate, well and good, but if he does not the peace officer must be prepared to make an arrest and subsequently justify his action or let the citizen continue on his way. Very frequently the police assert that a suspected person voluntarily accompanied them to a police station for questioning although he was not under arrest and hence free to refuse if he had desired to do so.

Under the vagrancy section of the Code a police officer has a certain limited right to call upon a person to justify his presence at a particular place. Section 164 of the Code in part defines a vagrant as one who,

"(a) not having any visible means of support is found wandering abroad or trespassing and does not when required justify his presence in the place where he is found."

POWER TO SEARCH SUSPECTED PERSONS

Generally speaking, a police officer has no right to search a suspected person unless he is under arrest, and such unlawful interference with the person would render him liable in an action for damages for assault. A peace officer has the right to search a person under arrest for the purpose of discovering evidence of the crime for which he

has been arrested or for weapons with which he might do harm to himself or others.¹¹

In *R. v. Brezack*¹² the accused appealed against his conviction on a charge of assaulting a peace officer in the execution of his duty. The peace officer arrested the accused in the reasonable belief that he was carrying narcotic drugs in his mouth; he seized the accused by the throat and thrust his fingers into the accused's mouth and was bitten by the accused. The court held that under the circumstances the officer was justified in thrusting his fingers into the accused's mouth and that accused was properly convicted.

The police may be assisted in the investigation of certain types of crimes by special statutory provisions. Section 19 of the Opium and Narcotic Drug Act¹³ provides that a peace officer who has reasonable cause to suspect that any drug is kept concealed in any place may search such place for such drug without a warrant and, if necessary, by force *may search any person there found*. Under Section 76(1) of the Highway Traffic Act,¹⁴ every operator of a motor vehicle is required to carry his license with him at all times while he is in charge of a motor vehicle and to produce it when demanded by a constable.

The Ontario Liquor Control Act¹⁵ by Section 110 authorizes a police officer, if he believes that liquor is unlawfully kept or had for unlawful purposes, to search without warrant for such liquor wherever he may suspect it to be. Moreover, the officer may search by force, if need be, anyone who is suspected to have such liquor upon him.

DUTY OF PEACE OFFICER TO GIVE NOTICE OF THE CAUSE OF ARREST

At common law a peace officer who arrested a person either with or without a warrant is, subject to certain exceptions, required to inform the person arrested of the cause of arrest.¹⁶ If the citizen is not so informed the peace officer is liable for false imprisonment.

That duty is now statutory in Canada. Section 29 of the Criminal Code provides as follows:

¹¹ CRANKSHAW'S CRIMINAL CODE OF CANADA 78 (7th ed.).

¹² [1949] O.R. 888, 96 Can. C.C. 97.

¹³ R.S.C., c.201 (1952). The right to search premises without warrant probably does not extend to a dwelling house.

¹⁴ R.S.O., c.167 (1950).

¹⁵ R.S.O., c.210 (1950).

¹⁶ *Christie v. Leachinsky*, [1947] A.C. 573.

"(1) It is the duty of every one who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.

(2) It is the duty of every one who arrests a person, whether with or without warrant, to give notice to that person, where it is feasible to do so, of

- (a) the process or warrant under which he makes the arrest, or
- (b) the reason for the arrest.

(3) Failure to comply with subsection (1) or (2) does not of itself deprive a person who executes a process or warrant, or a person who makes an arrest, or those who assist them, of protection from *criminal* responsibility."

It will be noted that subsection (3) provides that failure to comply with subsection (1) or (2) does not of itself deprive the person making the arrest of protection from *criminal* responsibility. The civil responsibility of the person making the arrest remains as it was at common law.

In *Garthus v. Van Caesele*,¹⁷ Lord, J., said: "It has been held that although police officers *bona fide* and on reasonable grounds believed a person had committed an offence but failed to inform him as to why he was being arrested, they would be liable in damages for false imprisonment." In *Koechlin v. Waugh & Hamilton*, Laidlaw, J. A., speaking for the court said:¹⁸

"We direct attention to an important fact. The infant plaintiff was not told by either of the police officers any reason for his arrest. The infant plaintiff was entitled to know on what charge or on suspicion of what crime he was seized. He was not required in law to submit to restraint on his freedom unless he knew the reason why that restraint should be imposed."

The right of the accused to be informed of the cause of arrest is not absolute and does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained or if the menacing attitude of the accused and his associates renders it impractical for the officer to inform him of the cause of arrest.¹⁹

¹⁷ 122 Can. C.C. 369, 374 (1959).

¹⁸ [1957] O.W.N. 245, 247.

¹⁹ *R. v. Beaudette*, *supra* note 10; *R. v. Hurlen*, 123 Can. C.C. 54 (1959); *R. v. George*, 63 Can. C.C. 225 (1934), *aff'd on app. to the Sup. Ct. of Can.*, 67 Can. C.C. 33 (1936); *R. v. Bain*, 111 Can. C.C. 281 (1955).

B. England

GLANVILLE L. WILLIAMS*

To apprehend a suspect as a step in charging him with crime is a serious matter. What can the police do short of this? Whether or not they have power to arrest in a particular instance, may they take some action against a suspect which does not amount to arrest?

The questioning of suspects

A constable may, of course, invite the suspect's voluntary co-operation in the further investigation of the suspected offence. He may question him, either in the street or, with his consent, in the police station.

If the suspect is requested to remain where he is for questioning, he need not answer the questions put to him; but if he does submit to answer, he may give the constable sufficient material to justify an arrest, even though there were insufficient grounds of suspicion before. It seems that the suspect's refusal to stop and answer could not add anything to the constable's justification. This is because the exercise by the citizen of his constitutional right to keep silent cannot be regarded as a circumstance of suspicion.

Detention for questioning

Can the officer, in the earliest stage of suspicion and without any arrest, use force to make the suspect stop and submit to questioning, or to make him go to the police station for questioning? Continental systems recognise a distinction between arrest proper and detention for questioning: the latter, unlike the former, does not require reasonable suspicion or a definite charge. It is quite common even in the most liberal and democratic of Continental countries for a suspect to lie in prison for many months, without a definite charge, while the police are building up the case against him. Even in England the police make a practice of "detention for questioning", though they limit it at most to three or four days. The suspect is not regarded as under arrest, yet he is not at liberty. Sir Archibald Bodkin, the Director of Public Prosecutions, described the

procedure in his evidence before the Royal Commission on Police Powers. The suspect was put in the waiting room and given a bed there, not in a cell; he was questioned freely without caution or charge, but was fed and treated well, and not kept in this condition for more than three days.¹ Commenting on this, the Royal Commission pointed out that in the case of *Voisin*² the detention was for four days; and an admission made by Voisin while in this custody was held admissible against him. The Commission had no doubt that the practice of detention for questioning was illegal: any form of restraint is in law an imprisonment; nor is the alleged distinction material for the purpose of Rule 3 of the Judges' Rules, relating to questioning.³ This, too, was the opinion of the Home Office, and it is abundantly clear on the authorities.⁴ The decision in *Voisin* is not to the contrary, for that merely shows that an admission may be allowed to be given in evidence although obtained contrary to the Judges' Rules.

Since *Christie v. Leachinsky*⁵ it has become clear that detention for questioning cannot be justified as an arrest, even in circumstances where the police would have power to arrest. A suspect detained for questioning is not informed that any charge is made against him; consequently his imprisonment cannot be supported by common-law or statutory powers of arrest. It seems that this is so even though the particular statute uses some word other than "arrest." Parliament has no fixed language in relation to arrest; instead of using the expression "arrest" it may allow a constable to "apprehend," "detain," "seize and detain," or "take into custody." Pretty evidently, all these are synonyms for "arrest." Even a

¹ ROYAL COMM'N ON POLICE POWERS, MINUTES OF EVIDENCE 1385 *et seq.* (1928).

² [1918] 1 K.B. 531 (C.C.A.).

³ C.M.D. No. 3297, at 55 (1929).

⁴ *Dunne v. Clinton*, [1930] Ir. R. 366, is directly in point. But the rule is also evident from the cases requiring arrested persons to be taken before a magistrate as soon as reasonably possible (*e.g.*, *John Lewis & Co. v. Tims*, [1952] A.C. 676). It is clear that this rule cannot be circumvented by claiming that the accused is not arrested but only detained. The judges set their faces against detention in custody for the purpose of collecting evidence without bringing the subject before a magistrate: *Wright v. Court*, 4 B.&C. 596 (1825).

⁵ [1947] A.C. 573.

*Reader in English Law in the University of Cambridge and a Fellow of Jesus College, Cambridge. Additional biographical data may be found in 51 J. CRIM. L., C. & P.S. 166 (1960).

statute using the word "detain" would not authorise an indefinite detention without bringing the prisoner before a magistrate. Nor would it authorise a detention without stating the reason for the arrest. Exceptionally, there is a group of statutes authorising the police to search for goods unlawfully possessed.⁶ Apart from these statutes, and a few other statutes of limited scope, every detention for questioning is a false imprisonment, unless it satisfies the rules for a valid arrest.

Although the law on this subject is reasonably clear, there is much evidence that the practice of detention for questioning continues. On some occasions the police protect themselves by using the language of request, but there can be no doubt that on other occasions, when compulsion is evidently intended, the action of the police is illegal.

The objection to "detention for questioning" is that it deprives the accused of the safeguards that have been thought necessary to be included in the law of arrest. The argument in its favour is that the man may be innocent, and then detention without charge gives him a good prospect of being released without any publicity or stigma. The importance of avoiding publicity where guilt is not fairly clear was recognized by the Royal Commission which referred in its Report to Section 19 of the Indictable Offences Act of 1848 (now Section 4 of the Magistrates' Courts Act of 1952), which allows the preliminary examination to be conducted behind closed doors. "In cases where the police find that a mistake has been made, although a charge has been preferred, and wish merely to ask for the prisoner's discharge, or where they propose to ask for a remand on evidence so slight as still to admit of the possibility that they have got the wrong man, we think that, in the words of the section, 'the ends of justice will be best answered' by conducting the proceedings *in camera*." For some reason this valuable suggestion seems never to have been acted on, and indeed the statutory power of proceeding *in camera* has rarely been used.

In the type of case first mentioned in the above-quoted passage from the Commission's Report, namely where a charge has been made and the police now wish to discontinue the case, it may be suggested that no appearance before a magistrate is necessary.

Defects in the law

The extent to which the police are hindered by not possessing a power of detention for questioning stands in inverse relation to the extent of their powers of arrest. The English law of arrest is extremely complex, and little purpose would be served in reproducing the multifarious statutes which give special powers. However, it is worth mentioning the power of arrest of those "found" in certain private premises for an unlawful purpose, and the power of arrest of suspected persons who loiter with intent to commit felony. These powers are indulgently construed,⁷ but still they would not justify an arrest if the court took the view that the suspicion felt by the officer was unreasonable.

The real reason why the police wish to detain for questioning is because they feel that they have not sufficient evidence to make a positive charge, and yet they have enough to put them on enquiry. Under the present law, there is no power to detain for questioning without arrest even for a few minutes, and even though the suspect's name and address are unknown. Nor is there a general power to arrest on refusal of name and address. This is an inadequacy in the police powers of law enforcement, or would be so if actions against the police were commoner than they now are.

The distinction between command and request

The foregoing remarks do not mean that every request by a police constable to a suspect to accompany him to the police station, followed by acquiescence, amounts to an arrest. One has to face the very difficult distinction between a command and a request.

It is submitted that if the officer merely makes a request to the suspect, giving him to understand that he is at liberty to come or refuse, there is no imprisonment and no arrest. If, however, the impression is conveyed that there is no such option and that the suspect is compelled to come, it is an imprisonment. The distinction does not turn merely on the words used but on the way in which they are spoken and on all the circumstances. All manner of ambiguous expressions may be used by the officer, as if he says: "I must ask you to come with me"; or "I think it would be better if you came with me"; or, weaker, "I suggest that we both go to the police station where you can tell your story to the superintendent." The question

⁶ See the last section of this article.

⁷ See [1955] CRM. L.R. 66, 136.

"Will you come with me?" may look in print like a request; but it is capable of being intoned as an imperative instead of as a question, and will then be a command.

This view of the law, that a person who goes voluntarily is not imprisoned, runs counter to the charge to the jury of Alderson, B., in *Peters v. Stanway*.⁸ He said:

"The question as to the verdict will depend, not on whether the plaintiff went voluntarily from the defendant's house to the stationhouse, but whether she volunteered to go in the first instance. There is a great difference between the case of a person who volunteers to go in the first instance, and that of a person who, having a charge made against him, goes voluntarily to meet it. The question, therefore, is, whether you think the going to the stationhouse proceeded originally from the plaintiff's own willingness, or from the defendant's making a charge against her; for, if it proceeded from the defendant's making a charge, the plaintiff will not be deprived of her right of action by her having willingly gone to meet the charge."

The ruling of Alderson, B., even if accepted, might not invalidate the practice of the police in inviting a suspect to go to the police station to help them with their enquiries into a specified crime, because this form of words does not involve the making of a charge. However, it is possible that the learned Baron would have regarded the formula as equivalent to the making of a charge. It is submitted that in any event his ruling is unacceptable, because it gives too great an ambit to the concept of false imprisonment.

The ruling of Alderson, B., was quoted with approval in the Canadian case of *Conn v. David Spencer Ltd.*⁹ The plaintiff was making some purchases in a self-service store, when he was mistakenly accused by the house detective of stealing soap. The detective requested him to go upstairs, which after some demur he did, thinking it advisable to give way in view of the crowded state of the store. In the upstairs room, the plaintiff consented to be searched, and, no soap being found, he was allowed to leave. In an action for false imprisonment, the store detective (who was a woman) admitted that she maintained control over the plaintiff, and that if he had tried to escape she might not have been able to hold him but would

⁸ 6 C.&P. 737, 172 E.R. 1442 (1835).

⁹ 42 B.C.R. 128, [1930] 1 D.L.R. 805, 1 W.W.R. 26.

have done her best to prevent it. On these facts the Supreme Court of British Columbia held that there was a false imprisonment. The decision was justifiable on the facts of the case, but it may be perhaps respectfully doubted whether those facts necessitated approval being given to the ruling of Alderson, B.

At first sight it may seem attractive to argue that a request to visit the police station should always be taken as a command in law unless the police make it clear that the request can be declined. To the ordinary citizen, a request of the police is a command—particularly if he feels himself implicated in suspicion. On the other hand, there are certainly some cases where a request cannot be taken as a command. For example, it sometimes happens that the police leave a note at the house of a suspect, asking him to attend at the police station because it is thought that he may be able to help them with their enquiries into a specified matter. Such a written request cannot be construed as carrying an implied threat of immediate force if the request be not complied with. Even where the request is conveyed by word of mouth, it would be a strong thing in many circumstances to regard it as equivalent to a command. An ordinary witness may sometimes be invited to attend at the police station to give evidence, and it would be absurd to hold that this invitation when accepted amounts to a false imprisonment by the police. The argument that there is an imprisonment is stronger when the request is addressed to the suspect. Yet the suspect may not know at that moment how strong the suspicion is against him; and the police may not have made up their minds to arrest him. To interrogate a suspect by arrangement at the police station is often kinder than an official visit to his home, because the latter may be harmful to his reputation. The suspect may well feel that, if he has to visit the police station, he would rather go there "voluntarily" to assist the police in their enquiries than under technical arrest. A newspaper report of the suspect's being arrested is more damaging to him than a report that he has visited the police station. Also, the law creating the offence of escape comes into operation only if there has been a technical arrest; and for this reason, if for no other, the courts should be slow to find that there is an arrest unless the suspect has clearly been told that he is under arrest.

On all these accounts, it seems clearly necessary

to maintain the distinction between a command which results in an imprisonment and a request which does not, and to hold that there can be no imprisonment in the absence of words or conduct by the arrester intimating that the suspect is under arrest or that force will be used if he fails to comply with the invitation.

The best course for the suspect, if he is "invited" to accompany the officer to the police station and if he wishes to decline the invitation, is to ask point-blank: "Is this an arrest?" If the answer is in the affirmative, he will then have his action for false imprisonment if he complies and the arrest is illegal. If the answer is in the negative, he can refuse the invitation and will not be guilty of obstructing the police.

The interpretation of words as amounting to command or request is somewhat affected by the proceedings in which it has to be determined. If the suspect is being charged with escape, or with obstructing the officer in the execution of his duty, the question is: did the suspect realise that he was under arrest? If the suspect is suing for the tort of false imprisonment, the question is: did the officer intentionally or negligently cause the suspect to believe that he was under arrest or otherwise detained? If the officer is being prosecuted for the crime of false imprisonment, the question is: did he intentionally or recklessly cause the suspect to believe that he was under arrest or otherwise detained? The distinction between the tort and the crime arises from the fact that on a charge of crime, *mens rea* must be shown. In each case the question is what was conveyed to the mind of the suspect, except that in a legal proceeding against the officer fault or *mens rea* has to be considered.

The effect of a secret intention to detain

In English law a person can be falsely imprisoned without his knowledge. This follows from *Meering v. Grahame-White Aviation Co.*¹⁰ where the Court of Appeal held that a man was falsely imprisoned when he was kept in an office under pretence of his evidence being needed, there being men stationed outside the door to prevent his escape, even though he did not realise that he had been deprived of his liberty. Atkin, L. J., said that "a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is a lunatic." The concluding reference

¹⁰ 122 L.T. 44 (1919).

to the lunatic may be thought to be beside the point, because even a lunatic is physically able to move about, so that the question of imprisonment is in his case a realistic one. The case of the unconscious man is different; he cannot move, and it may seem somewhat pedantic to assert that if his door is locked and then unlocked during the state of unconsciousness, he can, when he gets to know of it, sue for nominal charges for false imprisonment. It is true that false imprisonment, being an application of trespass *vi et armis*, is actionable *per se*; but this assumes that there has been an imprisonment. Although the decision of the Court of Appeal settles the law for all English courts short of the House of Lords, it will not necessarily be followed in other jurisdictions. Section 42 of the Restatement of the Law of Torts adopts the opposite rule and rejects the opinion of the English Court of Appeal.

An analogy with battery may bring out the difficulty in the English view. Suppose that D points a loaded pistol at P from behind, and is about to pull the trigger when he is stopped by the intervention of a third party. P is unaware of the whole incident until he gets to hear of it afterwards. No tort has been committed against P. It is not an assault because he suffered no apprehension. D is guilty of the crime of attempted battery, and also of other graver crimes; he is punishable in the criminal law for his wicked intent; but he is not liable in tort, because his intended victim did not suffer any damage—not even the momentary damage of apprehension. Returning now to the person who is imprisoned without knowing it, it is submitted that he should not be able to recover in tort, because he has sustained no damage of any kind—he suffers no anxiety or humiliation, except possibly in retrospect, and there is not even a momentary contact with his person or property.

The decision in *Meering's* case is of doubtful policy because it seems to penalise a person who acts with caution and consideration. If P is reasonably suspected of a felony like shoplifting (larceny), and if the felony has been committed by someone, it is generally lawful for D to say to him: "I arrest you on a charge of stealing goods from the counter." But if D, wishing to give P every chance to explain himself, and trying to avoid an accusation unless it becomes absolutely necessary, says to P: "Please step this way because the manager would like to see you," and then stands outside the door in case P decides to

run away while he is being questioned, this is an actionable tort. *Meering's* case decides that it is an imprisonment, and if so, it cannot be justified as an arrest, because there has been no proper communication of the cause of arrest to the person arrested. There seems to be no social policy in penalising such conduct when an outright arrest would be lawful.

Another argument may be developed against *Meering's* case by supposing the following pair of hypothetical cases. (1) D is a policeman sitting next to P. He suddenly suspects P of a minor crime (for which he has no power to arrest) and makes up his mind that if P attempts flight, he will apprehend him. Shortly afterwards the circumstances of suspicion are explained, and D changes his mind. He is not liable in trespass for false imprisonment, because there has been no act on D's part, but only a mental resolution. (2) As before, except that D moved to P's side after forming the intention to detain P. Here there is an act, namely of moving, so that this particular requirement of the action of trespass is satisfied. But is it not excessively technical to say that there is a false imprisonment, in the absence of any actual restraint and of any constraint upon the mind of the person supposed to be imprisoned? Let us suppose that D communicated his intention to P, but P refused to submit to the arrest, and walked away unmolested. The law is that there is then no arrest because there is no actual restraint and no touching of the body.¹¹ If this is so, there can surely be no arrest before the intention to arrest has even been communicated.

The practical effect of *Meering's* case seems to be that, where the police have requested a suspect to attend to help them with their enquiries and the suspect complies but afterwards sues for false imprisonment, the outcome of the action will depend upon the answer to a hypothetical question addressed to the police officer on cross-examination. The officer may be asked what he would have done if the plaintiff had attempted to escape. If the officer replies that he would have let him go, and is believed, there is no imprisonment. If the officer replies that he would have tried to stop him,¹² there is an imprisonment.

This assumes that the officer's secret intent is accompanied by a course of conduct on the officer's part, as where the officer walks to the station with

the suspect. Such a course of conduct constitutes the "act" which makes the officer liable in trespass. But now suppose that the officer's secret intent is unaccompanied by an act on his part. This may happen if the intent is formed only after the suspect is in the police station. The police have been interrogating him and at a certain point in their interrogation become convinced that they are on the right track. In that event, as the Royal Commission on Police Powers pointed out,¹³ either of two courses may properly be pursued. The police may ask the suspect whether he is willing to stay voluntarily at the station until his statements have been verified. But as soon as he expresses a wish to leave, the police should either let him go or else arrest him and adopt the procedure of the formal charge. If they do not do this, but continue to keep him at the police station (perhaps for further questioning), secretly intending not to let him go, can there be said to be an imprisonment? The question is a difficult one, on which there is no direct judicial authority. If there is an imprisonment, it is certainly illegal; it cannot be justified as an arrest, because the grounds of the arrest have not been communicated, so that the rule in *Christie v. Leachinsky*¹⁴ is violated. It may be argued that there is an imprisonment, under the doctrine of *Meering's* case. But in *Meering's* case there was a positive act of imprisonment by the servants of the defendant, who stationed themselves near the room in which the plaintiff was in order to prevent the plaintiff escaping from the room should he try to do so. In the case we are considering, there is no positive act, but merely a mental resolution on the part of a policeman not to let the suspect go. Can the formation of a mental state mark the transition from a state of affairs that is not an imprisonment to one that is? Surprising as it may at first appear, the answer seems to be in the affirmative. For example, suppose that an employer locks the factory gates in order to prevent the ingress of unauthorised persons. An employee demands to be allowed to leave before the end of his work period, and the employer then for the first time decides to keep the gates locked to prevent the egress of the employee. It would seem that, were it not for the defence of consent on the part of the employee,¹⁵ the employer would be guilty of a false imprison-

¹¹ *CMD.* No. 3297, at 59 (1929).

¹² [1947] A.C. 573.

¹³ See *Burns v. Johnston*, [1916] 2 Ir.R. 444, *aff'd*, [1917] 2 Ir.R. 137 (C.A.).

¹¹ [1954] *CRIM. L.R.* 11-14.

¹² This was the fatal reply given in *Conn v. David Spencer Ltd.*, *op. cit.* *supra* note 9.

ment, notwithstanding that his wrong consists of a mental resolution resulting in an omission to act.

The "frisking" of criminals

Where a suspected criminal is also suspected of being offensively armed, can the police search him for arms, by tapping his pockets, before making up their minds whether to arrest him? There is no English authority, but the power is so obviously necessary for the protection of the police that it is difficult to believe that it can be condemned by the courts. It might be regarded as a reasonable extension of the existing law of self-defence, or as an application of the doctrine of necessity, or as an essential power of the police in the performance of their duty of preserving the peace.

Motor vehicles

The police have an important power of controlling motor vehicles, without being put to the embarrassment of arresting the driver. By Section 20(3) of the Road Traffic Act of 1930 a police constable *in uniform* can require any vehicle to stop; and he can then exercise his statutory powers of demanding to see the driving licence or insurance certificate.¹⁶ It is not stated in the Act for what other purpose the officer may require the vehicle to remain stationary, and one is safe in saying that the power to stop a vehicle does not give the power to detain it indefinitely. Probably the vehicle can be detained only for a reasonable time as a mode of controlling traffic. There is certainly no power under the Act to search the vehicle or to require its occupants to alight. At the same time, the power to stop gives a useful means of delaying a suspected criminal and ascertaining his identity. Also, it seems safe to say that comparatively small circumstances of suspicion would suffice to justify an arrest under Section 28(3) of the Act, which empowers a police constable to arrest a person whom he reasonably suspects of driving a vehicle without the owner's consent. When the arrest has been made under this section, it may well be found that a big fish has been netted, since fleeing criminals often drive purloined vehicles.

Goods vehicles are subject to a special régime. Section 16 of the Road and Rail Traffic Act of 1933 requires the holder of a licence for the carriage of goods to cause work records to be kept showing particulars of each journey, etc.; and regulations made under this Act require the works records to

be carried on the vehicle.¹⁷ By Section 8, examiners appointed under the Act, and also police constables, may require the driver to produce his work records, and may inspect and copy them. The same statutory powers are applied to the provisions of the Transport Act of 1947, by Section 60(4) of that Act.

Whether acting under the Road Traffic Acts or not, the police do in fact stop vehicles and question drivers as a means of controlling crime. Their activities are sometimes strikingly rewarded. On August 13, 1955, at 2 a.m. a band of armed men broke into a military training centre at Arborfield and stole arms and ammunition which they carried off in vans. Before the theft had been reported, two policemen in a radio car, carrying out a routine check on the Reading-Ascot road, stopped and searched a two-ton motorvan. Two men inside offered no resistance. In the back were 15,000 rounds of the missing ammunition.¹⁸ It is not clear whether the search of the van was lawful, but the police certainly had a right to see the driver's work records, and possibly some circumstance connected with these records or the demeanour of the men aroused a reasonable suspicion of felony.

Statutory powers of search and arrest on the ground of unlawful possession

It remains to be mentioned that there are certain local statutes giving the police power to search vessels and carriages on reasonable suspicion that they are being used to convey stolen goods, and also to search persons who may be reasonably suspected of such conveyance. The first of these statutes was the metropolitan Police Act of 1839, Section 66. It is still extensively used in London, the police stopping several hundred thousand people a year in the streets and asking to see the contents of a bag they are carrying, or enquiring as to any other thing they may have which may possibly have been stolen. Litigation rarely arises and the police report that they have few complaints; yet their exercise of the statutory powers does not seem to be legal. The statute is plainly limited to cases where the police have reason to suppose that a stolen article is being conveyed; yet they use it to make a random check in the hope of netting a thief or receiver. In any case, most large cities are without these special powers, and Parliament is no longer willing to extend them to areas where they do not now exist.

¹⁷ GOODS VEHICLES (KEEPING OF RECORDS) REGULATIONS, [1935] STAT. RULES & ORDERS (No. 314).

¹⁸ *News Chronicle*, August 15, 1955.

¹⁶ ROAD TRAFFIC ACT, §§ 4(5), 40(1) (1930).

C. France

ROBERT VOUIN*

(a) Generally, according to the new Code of Penal Procedure, applicable in France since March 2, 1959, a person can be taken into custody only if the examining magistrate (Juge d'Instruction) has delivered a warrant of arrest against him.¹ However, the Code provides otherwise in the case of an obvious crime (or of offences of moderate gravity punished by a sentence of imprisonment where such offences are obvious), that is to say, in the case of the crime which is being committed or has just been committed, or in the case where, shortly after a crime, a person is either prosecuted by public outcry or in possession of objects or presenting signs leading to a suspicion he participated in the crime.² In such a case, in fact, any person is qualified to arrest the author of a flagrant offence and to take him before the nearest judicial police officer; in this instance, no warrant of justice is necessary.³

In addition to the right to arrest, the French law grants also to the Police (that is to say to the Gendarmerie Nationale, to the Surete Nationale, and in Paris to the Prefecture de Police) the right of keeping a close watch on someone, or checking his identity, or searching him.

1.—*Keeping a close watch on somebody*—

In the case of a crime or a flagrant delict, the judicial police officer in charge of the investigation may keep in his power, for 24 hours at the most, three categories of persons:

(1) Those who happen to be at the place of the breach of the law.

(2) Those for whom it seems necessary to establish or verify identity.

(3) Those who seem able to give information on the facts. This keeping on a close watch may be extended for another period of 24 hours, with written permission from the "Procureur of the Republic," but only in the case of persons against whom serious and concordant incriminating evidence exists.⁴ Persons kept on a close watch may be interrogated by the judicial police officers, provided they observe a certain number of rules

* Professor of Criminal Law, Faculty of Law, University of Paris. Additional biographical data may be found in 51 J. CRIM. L., C. & P.S. 169 (1960).

¹ CODE OF PENAL PROCEDURE (hereinafter C.P.P.), art. 122.

² C.P.P., arts. 53, 57.

³ C.P.P., art. 73.

⁴ C.P.P., art. 63.

which tend to guarantee the correctness of the close watch and of the interrogation.⁵

On another hand, even outside the case of crime and flagrant delict, the judicial police officer may carry out enquiries called "preliminary enquiries," either on the Procureur de la Republique's request or of his own accord.⁶ In this case, house-searches and seizures of material evidence may be carried out only with the written permission of the persons whose houses are thus visited. However, the judicial police officer may then legally retain at his disposal certain persons for 24 hours at the most "for the necessities of preliminary enquiry," and this delay may be extended for another 24 hours by decision of the Procureur de la Republique, even if there is no serious and concordant incriminating evidence.⁷

2.—*Checking of Identity*—In case of a crime or a flagrant delict (in addition to the possibility of keeping a close watch on a person as just mentioned), "every person whose identity it seems necessary to establish or check, must lend himself to the operations requested by this measure," otherwise he might be liable to imprisonment, and to a fine of 10 days maximum and 360 NF.⁸

It should be noticed that this obligation of lending oneself to this proof and checking of identity was provided for previously by the Article 8, paragraph 1, of the law of Nov. 27, 1943, which created a service of technical police. Moreover, this text, which was not abrogated at the time of the coming into force of the Penal Procedure Code, may be applied even outside the hypothesis of a crime or a flagrant delict.

On another hand, one should also take into account the authority given to the military of the "Gendarmerie Nationale" as it is stated in the decree of May 20, 1903 (modified by the decree of August 22, 1958), dealing with the organization and service of the "Gendarmerie". The latter, for instance, is bound to secure bodily any person circulating in France without any card stating his identity (ou bien: without his identity duly authenticated by documents). To this end, any policeman in uniform is entitled to ask to be shown documents of identity and cannot suffer a

⁵ C.P.P., art. 64.

⁶ C.P.P., art. 75.

⁷ C.P.P., art. 77.

⁸ C.P.P., art. 61.

refusal. The checking of these documents should be done in one of the community rooms of the hotel, never in the traveller's own room, and generally speaking, "the gendarmerie is directed to behave with courteousness in performing this duty, and not to feel entitled to any action which might be qualified as a vexatious measure or misuse of authority."⁹

The military personnel of the Gendarmerie may even use their fire arms if there is no other possibility to arrest persons who, in spite of repeated calls of "Halte, Gendarmerie," uttered in a loud voice, try to escape their investigation or custody or "when it is impossible for them to stop vehicles, boats or other mean of transportation whose conductors do not obey the order to stop."¹⁰

Actually, the Gendarmerie, which alone is granted the right of using fire arms, very seldom takes advantage of it, for the ordinary "Gendarme", who is always a regular soldier with the grade of sergeant, is a wise man, disciplined and self-controlled. In the ordinary course of things, the only penalty inflicted for the "refusal to comply" of the driver who refuses to stop is the one provided by the Article L. 4 of the highway code (ordonnance of December 15, 1958), according to which "any conductor of a vehicle who has knowingly omitted to obey the summons to stop given by an official person or policeman whose duty is to state breaches of the law, and who carries the exterior and apparent badges of his quality, or, who will refuse to submit to all prescribed checkings concerning the vehicle or the person, will be punished with imprisonment which can last from ten days to 3 months, and will be fined from 500 to 3,000 frs, or with one of these two penalties only."

3.—*Searching of a Person*—According to the French Law, one may still wonder to what extent the police are permitted to practice the searching of a person, or "fouille a corps," with someone whose appearance or behaviour aroused police suspicion.

(b) The fundamental principle according to the French jurisprudence is that the searching of a person must be assimilated to the house-search or domiciliary visit, and that it is legally impossible whenever the searching of the person's house itself would be impossible.¹¹ On the other hand, the

searching of the person may be undertaken by the judicial police officer when he would be entitled to carry out a search of the man's house. Mere suspicions cannot justify the arrest and search of a person, because they do not make the delict flagrant. Thus, a judicial police officer cannot—without a warrant from an examining magistrate—arrest in the street and search a person who is merely suspected either of collecting illicit bettings on horse-races or carrying weapons illegally.¹² On the other hand, the searching of such a person is proper if the delict is flagrant, i.e., if the weapon is conspicuous or if it can be seen in the person's hands.¹³ In the same way, the arrest and searching of a person are also possible when a judicial police officer knows for certain that a person carries with him a certain quantity of a drug, such as cocain.¹⁴

Also, the French jurisprudence admits of searching a person who is legally under arrest as a "mere police measure, the application of which is general and necessary, taken as well for the public interest as for the arrested person's interest." And, in this case, a penal sentence may be built upon the facts established in the process of the searching. If, for instance, a person is searched after having been arrested because, drunk and disorderly, he has been a cause of disturbances, the discovery of a gun on this person justifies his being sentenced for "port d'arme prohibé" (carrying unlawful weapons).¹⁵

If these solutions are quite certain, there is still a question, in France, whether the "garde a vue" (keeping a close watch on somebody), now admitted and under the regulation of the Code of Penal Procedure, must be assimilated to a real arrest—in a word, to know whether the person on whom the police keep a close watch may be subjected to a search as in the case of a person legally arrested. Until the question is solved by the jurisprudence, it is propounded to admit that the searching of a person merely kept on watch is possible, as a "mere police measure," if the person is kept for serious and concordant incriminating evidence.¹⁶ According to the decree of May 20, 1903, Article 307, the persons arrested by the constabulary in the case of a crime or a flagrant

¹² Nîmes, Rec. Dalloz 1929.2.46 (1928).

¹³ *Ibid.*

¹⁴ Nîmes, Rec. Sirey 1930.2.80 (1930).

¹⁵ Nîmes, Rec. Dalloz 1928.2.64 (1926).

¹⁶ Cf. BESSON, VOUIN & ARPAILLANGE, CODE ANOTÉ DE PROCÉDURE, art. 76, all.

⁹ DECREE OF MAY 20, 1903 (as modified), arts. 165, 166.

¹⁰ *Id.*, art. 174.

¹¹ Cass. Crim., Rec. Dalloz 1953.533 (1953).

delict, and kept on a close watch before being brought before the Public Prosecutor, "must be searched, in order to insure as well their own security . . . or for the discovery of things which might help to the revelation of the truth."

(c) As we just saw, the French Law gives to the police a certain number of rights which, outside all properly so called arrests, allow them to summon persons, to keep them, to hear them and even to interrogate and possibly to search them. These powers, of course, are not granted without restrictions and conditions. Related to the close watch of persons in the enquiry for flagrant delict, particularly, Article 64 of the Penal Code embodies some important dispositions.

First of all, the judicial police officer must mention on the report of the hearing of the person who is kept on a close watch how long the interrogatories and the breaks that divided them lasted, the exact day and time when the person started being kept on a close watch, and the exact day and time when he or she was either discharged or brought before the competent magistrate. The report must mention also the reasons for the close watch.

Secondly, these mentions must be specially initialled by the persons concerned (or, in the case of a refusal of signature, the report must be made complete by exposing the reasons of the refusal). In addition, they must appear on a special register, maintained for this purpose in every police quarter liable to receive persons kept a close watch.

Finally, of his own accord, or on the request of one of the person's relatives, the public prosecutor may have the person kept on a close watch checked by a doctor at any time during the watch. After

24 hours, this medical examination cannot be refused if the person who is kept on a close watch asks for it.

All these precisions are not unimportant. But, there are still more important guarantees for individual liberties, such as those which result either from the fact that keeping a close watch on a person, according to the Code, can never be decided but by a magistrate or a judicial police officer (and never by an ordinary police constable), or from the conditions to which the jurisprudence subordinates the possibility of compelling a person to be searched.

(d) In France the juridical system explained above seems to be accepted by the public and the police do not actually ask for other powers than the ones which are granted by the legislation. Concerns expressed at the time of the promulgation of the Code of Penal Procedure concerning the shortness of time allowed by the Code for keeping a close watch of a person seem already to have died away, except perhaps when it comes to dealing with attempts against the State safety, or struggles against criminal gangs, such as the ones which practise the drug-traffic or coinage offence.

However, it is not true that the police, according to the French law, are permitted to summon anybody in the street, and to ask this person what he or she is doing, only because the person's appearance or behaviour might have aroused suspicion. But one must notice that the policeman may always speak politely to another person, like any citizen, and collect his statements, if he gets any. This possibility, carried on by policemen who know their jobs, seems to be sufficient, and there is no need in this matter to change or add anything to the French Law.

D. Germany

WALTER CLEMENS*

In the field of fighting delinquency the police in Germany have to perform a twofold task: first, the preventive one of avoiding crimes, and, secondly, the repressive one of taking part in the detection and prosecution of crimes. The repressive function of the police will be outlined first. Their preventive function will be discussed later.

* Head Officer, Ministry of Justice, State of Hamburg, Germany. Additional biographical data may be found in 51 J. Crim. L., C. & P.S. 172 (1960).

POLICE RIGHTS AND DUTIES IN THE PROSECUTION OF CRIME

General duties

Pursuant to Section 152 of the German Code of Criminal Procedure (hereinafter called CCP), neither the police nor any other administrative authority has, in principle, the right to prosecute in court. This right is exercised exclusively by the Staatsanwalt (public prosecutor, district attorney),

a fully qualified lawyer who has a career position with permanent tenure. He *must* take action as soon as he is notified of any offense punishable in a criminal court, provided he has reasonable cause for believing such act to have in fact been committed. He has no discretion.

In his work he will be supported by the police who act as the district attorney's "auxiliary organs." The police, pursuant to Section 161, CCP, have to comply with all orders and instructions of the district attorney. Further, on their own initiative they prepare the prosecution for the district attorney and assist him in his work; their duties in this regard are laid down in Section 163, CCP, which provides:

"(i) The offices and officers of the police shall investigate criminal offenses and take all measures that permit of no delay, with a view to preventing collusion in the case.

"(ii) The provisions of sec. 136a and sec. 69(iii)¹ will apply.

"(iii) The offices and officers of the police will submit their reports to the district attorney without delay. If the speedy grant of judicial rulings appears necessary during the course of the investigation, the reports may be submitted directly to the County Court Judge."

According to Section 163, CCP, the police, when faced with lawbreakers, have the so-called "right to make the first move" ("Recht des ersten Zugriffs"). Their concrete measures are subject to the same restrictions as those of the district attorney. Just like the district attorney, the police must respect the rights of the individual, guaranteed by the Basic Law and the provisions of the CCP.

In detail

(a) Preliminary arrest of suspects

The liberty of the person is guaranteed in Germany through Article 2(ii) and Article 104(i) of the Basic Law for the Federal Republic of Germany dated May 23, 1949.²

¹These two provisions outlaw the use of dubious methods in connection with the interrogation of the defendant and of a witness.

²These provisions, as far as of interest here, read: "Article 2(ii). Everyone shall have the right to life and to physical inviolability. The freedom of the individual shall be inviolable. These rights may be interfered with only on the basis of a law.

"Article 104. (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."

In implementation of these Basic Law provisions, the right of preliminary arrest is governed by Section 127, CCP, as follows:

"(i) If a person is caught in the act or on pursuit, anybody is authorized to apprehend him even in the absence of a judicial warrant, if he is suspected of escape, or his identity cannot be established on the spot.

"(ii) In the event of imminent danger the district attorney and the police are authorized to make a preliminary arrest, if the legal requirements of a warrant of arrest are complied with."

While within the limits of subparagraph (i), *supra*, everybody—not just the district attorney and the police—is authorized to make a preliminary arrest, the rights established in Section 127, CCP, subparagraph (ii), *supra*, are vested exclusively in the district attorney and all members of the police.

The use of these rights presupposes that the facts of the case warrant judicial arrest, and further that imminent danger prevails. The requirements established in Section 112, CCP,³ for the issuance of a warrant of arrest, which can only be granted by a judge, are strong suspicion of an offense *and* danger of escape or collusion.

The first requirement of a preliminary arrest by the police is therefore that the facts warrant strong suspicion (that is, a high degree of probability) of the commission of an offense by the suspect. A faint or remote or even reasonable suspicion is not sufficient.

In addition to a strong suspicion, either the danger of escape (Section 112(i)(1), CCP) or the

³Section 112, CCP, reads:

"(i) Custody awaiting trial can only be ordered against the suspect if there is strong suspicion against the suspect and if

(1) he has escaped or is in hiding or if, in recognition of the merits of the case, especially the circumstances of the suspect and the opportunities of an escape, there is cause for concern that he will evade trial or

(2) if specific facts exist giving rise to the concern that the suspect by means of destroying traces of the act or other evidence or by influencing witnesses or accomplices might impede the finding of the truth.

(ii) The facts evidencing the suspicion of escape or danger of collusion must be entered on the record. The danger of escape requires no further proof if

(1) a major crime is the subject matter of the investigation or

(2) within the area of jurisdiction of this Federal Law the suspect has no fixed residence or address, especially if he is a vagrant or fails to prove his identity."

danger of collusion (Section 112(i)(2), CCP) must be present. The suspicion of escape will arise if the offender intends to evade prosecution. Whether there is suspicion of escape will be decided on the facts of the case. The police will be safe in assuming danger of escape if the offender is taking measures to prepare his escape, e.g., abandoning his regular work or inquiring about travel facilities. In the cases of Section 112(ii)(1) and (2) the danger of escape appears patent and therefore needs no further proof.

The last requirement of a preliminary police arrest is "imminent danger." It exists if obtaining a judicial warrant entails a loss of time which would give rise to concern that the arrest of the suspected person might thereby become impossible.

The police officer who wants to effect a preliminary arrest pursuant to Section 127, CCP, has to use his discretion in deciding whether the mentioned legal requirements are complied with. A bona fide error in the use of such discretion will not affect the legality of the arrest made by him.⁴

Under German Law the preliminarily arrested person must be taken before a judge who shall decide whether or not to issue a warrant of arrest.⁵

The preliminary arrest of a suspected person by the police is often hampered by the latter's escape or forcible resistance. The statute does not answer the question as to what means may be used to enforce arrest. It is, however, common ground in the practice of the courts as well as in the opinion of the law professors that for the enforcement of arrest, preliminary or judicial, adequate means, including necessary force, may be used. The Supreme Court of the former Deutsche Reich (Reichsgericht) holds that the extent and limit of an arrest has to be confined to the purpose of neutralizing the freedom of movement of the person to be arrested, and that every force in excess of actual apprehension shall only be permissible in the event of resistance being offered to the arrest.⁶ The chaining or tying of the suspect is therefore allowed only in an exceptional case.⁷ The right to make an arrest does not include

⁴ 37 Entscheidungen des Reichsgerichts in Strafsachen 37 (Decisions of the Reichsgericht in Criminal Matters) and 55 *id.* 166.

⁵ This question will be dealt with in a report concerning "Police Interrogation Privileges and Limitations" which will appear subsequently in this JOURNAL.

⁶ 17 Entscheidungen des Reichsgerichts in Strafsachen 28.

⁷ See 17 Entscheidungen des Reichsgerichts in Strafsachen 28.

the authority to inflict injuries to life or limb.⁸ Resistance against a legitimate arrest (e.g., the person seized by a police officer hits him in the face or points a pistol at him or a bank-robber shoots at the police) will justify self-defense by means of a weapon.⁹ The use of arms by police officers is governed in the various German Länder by Service Regulations which—in appreciation of the especially dangerous nature of firearms—limit the use of weapons to a narrow scope.

The requirements which must be complied with by the police if a suspect is intended to be deprived of his liberty for prosecution purposes are governed exhaustively by Section 127, CCP. If they are not complied with, if, in particular, the "strong" suspicion is missing (a mere "police suspicion" will not be sufficient), the police are not entitled, according to the consistent practice of the Reichsgericht¹⁰ which still today is acknowledged without reserve, to arrest the suspect against his will, to march him to the police station, or otherwise make any restraint on his liberty, be it only by holding him on the street.

(b) Questioning of suspects

The police—in pursuit of their duty established in Section 163, CCP, to investigate criminal offenses—may question suspects who are at large, or volunteer to an interrogation, or are in legal custody. But in the absence of a legal basis, they cannot force a suspect at large into appearing before them for an interrogation, or into being interrogated on the street or elsewhere, unless the qualifications of Section 127, CCP, which justify his preliminary arrest, are fulfilled. Apart from this, the suspect can always obstruct his interrogation by using his privilege of silence.¹¹

(c) Physical examination of suspects

Section 81a, CCP, provides for the physical examination or blood-testing of suspects. A mere, that is, "reasonable", suspicion of an offense is sufficient for the ascertainment of facts relevant to

⁸ See 34 Entscheidungen des Reichsgerichts in Strafsachen 446; 65 *id.* 392; 69 *id.* 312.

⁹ See 34 Entscheidungen des Reichsgerichts in Strafsachen 446.

¹⁰ 27 Entscheidungen des Reichsgerichts in Strafsachen 155; 32 *id.* 271; 38 *id.* 374; and 59 *id.* 114.

¹¹ As regards the interrogation of the suspect by the police, see Clemens, *The Privilege Against Self-Incrimination (Germany)*, 51 J. CRIM. L., C., & P.S. 172 (1960). This question also will be dealt with in a report concerning "Police Interrogation Privileges and Limitations" which will appear subsequently in this JOURNAL.

the issue. Bodily interferences by a doctor as well as the taking of blood-tests without the consent of the suspect are admissible only if there are no grounds for an apprehension that they might result in detriments to his health.

Further, Section 81d, CCP, provides for the physical examination of a woman, irrespective of her consent, to be made by a woman or a doctor, and for the calling in, on request, of a woman or next-of-kin, if the examination might hurt the sense of shame of the woman to be examined.

Orders of such nature are in principle reserved to the judge. Only in cases where the success of the investigation is endangered through delay, the district attorney and especially qualified police officers (namely members of the Criminal Police) are entitled to take appropriate action in their own right. This will always apply in a traffic accident, if an alcohol-test is required from a suspect, because the alcohol will soon be eliminated from the body and hence cease to serve as evidence for the suspected offenses.

(d) *Taking of fingerprints, photos, etc., from suspects*

Section 81b, CCP, authorizes the police—as well as the judge and the district attorney—to take photos, fingerprints, measurements and similar evidence from a suspect even against his will to the extent that this will serve the purpose of furthering the prosecution or establishing his identity.

(e) *Searches against the suspect*

Searches against the suspect (which include his frisking) can only be ordered by a judge; in the case of imminent danger, however, the district attorney and specially qualified police officers (namely members of the Criminal Police) can also effect them (see Article 13(i) of the Basic Law, as well as Section 105(i), CCP). The details of searches against suspects are laid down in Sections 102 *et. seq.*, CCP. The most important provisions are Sections 102 and 104, CCP.¹² Section 102 provides for the admissibility of a

¹² They read:

“Section 102. A search of the abode and of other rooms as well as of the person, and of the personal belongings can be effected against anybody who is under suspicion as perpetrator of the crime or accomplice thereto before or after the fact or as a receiver. The search can be made for the purpose of his apprehension or in the event that there are reasonable grounds to assume that it will result in the discovery of evidence.

“Section 104. (i) During night-time the dwellings, the business premises and the fenced-in property must

search against a suspect in general, while Section 104 imposes restrictions on the search in regard to the time during which the search of rooms and fenced-in property, the so-called house-search, is admissible.

It appears noteworthy that a search is permitted where there is mere suspicion—that means “reasonable suspicion”—whereas arrest presupposes “strong suspicion.”

(f) *Impounding against suspects*

The admissibility of impoundings which constitute a restraint of property and therefore, under Article 14(ii) of the Basic Law, are permissible only on the strength of a law, is governed by Sections 94 to 101, CCP. The most important provision is Section 94 which says that objects which may be of importance as exhibits for the investigation will be taken into custody or otherwise safeguarded, and that impounding is necessary if the objects are in the custody of an other person and are not surrendered voluntarily. To order impoundings against the suspect is principally reserved to the judge; only in the case of imminent danger are the district attorney and the members of the Criminal Police allowed to effect them (see Section 98(i), CCP). Sections 95 to 97, CCP, are not applicable to impoundings against the suspect. Sections 99 to 101 provide for the impounding of mails coming from, or addressed to, the suspect; they are without importance for the purposes of this report, as such actions can be effected by the judge or district attorney only, and never by the police.

It must be pointed out that also an impounding against the suspect requires only “reasonable” rather than “strong” suspicion.

POLICE RIGHTS AND DUTIES IN THE PREVENTION OF CRIME

The preventive function of the police is dealt with in the police statutes of the Länder rather

be entered only in hot pursuit or in case of danger or in case of the capture of an escaped person.

(ii) This restriction will not apply to dwellings of persons who are under police supervision or to rooms which during night-time are accessible to everybody or which are known to the police as shelters or meeting-places of persons with previous convictions, as a deposit for objects received by means of criminal acts or as hiding-places for gambling or prostitution.

(iii) Within the period from April 1st to September 30th the night-time covers the hours beginning 9 o'clock p.m. and ending 4 o'clock a.m., and within the period from October 1st to March 31st the hours beginning 9 o'clock p.m. and ending 6 o'clock a.m.”

than in the CCP, which covers only repressive police measures. Their legal ground is afforded by Sections 14 and 15 of the former Prussian Police Administration Act, dated June 1, 1931, which enable the police to take action to ward off dangers threatening public security and order.¹³

These provisions are in force in all Länder of the Federal Republic of Germany, partly on the strength of statutes of the same or similar tenor enacted subsequent to 1945, partly as common law which was valid long before 1931. Naturally, the dividing line between a preventive action of the police on the strength of the said provisions, and a repressive action under the provisions of the CCP is blurred. This becomes obvious especially in the cases of raids. Provided all the persons who are arrested and frisked on this occasion are under strong suspicion, their arrest and their frisking is covered by the provision of the CCP. However, the problem of such raids lies in the very fact that not only strongly suspected persons but also law-abiding and unsuspected individuals, who under the CCP are not subject to arrest and searching, are subjected to arrest and frisking. Nevertheless, it is the common belief in Germany that on the strength of the above-quoted provisions such round-ups are permitted as a preventive police measure.

Hence, the Reichsgericht held in a decision rendered in 1906 that the police were authorized to frisk some coal miners for weapons.¹⁴ A few in fact carried weapons and had already shot at and wounded other people. In the opinion of the Reichsgericht, the frisking was necessary to

¹³ These provisions read:

"Section 14. (i) The police authorities shall, within the limits of the existing laws, take the necessary action to ward off, from the public or the individual, dangers threatening public security and order.

(ii) Moreover the police authorities will perform such duties as have been especially assigned to them by law.

"Section 15. (i) The police are authorized to take persons into police custody only if such measure is necessary

(a) for the protection of such persons

(b) to remove a disturbance of public safety or order which has already occurred, or to avoid an imminent danger subject to public action if the removal of such disturbance or the avoidability of such danger is not otherwise possible.

(ii) The persons taken into police custody must, except in cases of publicly dangerous mentally disordered individuals, be released from police custody during the course of the following day at the latest.

(iii) The above provisions will not apply in extradition and expulsion cases."

¹⁴ See 39 Entscheidungen des Reichsgerichts in Strafsachen 192.

prevent further illegal use of fire-arms and thus remove a public menace.

Similar considerations played their part in German courts in the years following the Second World War. At that time the police—often by order of the Military Government—were searching the baggage of railway and motor-car travelers with a view to detecting and impounding victuals that had been acquired contrary to the rationing regulations. Undoubtedly in such cases the statutory prerequisites of Section 102, CCP, and following, do not apply in regard to all searched travelers, because there were no reasonable grounds to assume that all of them were under the suspicion of rationing offenses.

Even so, the courts ruled such measures to be legal because they were necessary to prevent the food supply of the population from being jeopardized. However, in areas where no "black market" existed such searching was held to be illegal.¹⁵

This broad interpretation of the preventive functions of the police will certainly give rise to objections on the part of liberal observers, because it tends to further a far-reaching undermining of well-considered safeguards embodied in the CCP in connection with the repressive activities of the police.

CONCLUSION

In the light of the foregoing observations on the rights of the police in the prosecution and prevention of crimes, the four questions posed for discussion in connection with this topic¹⁶ can under German Law be answered as follows:

(1) In the absence of a legal basis, police suspicion alone does not entitle the police to stop a person on the street and question him as to his identity and reason for being where he is, unless he consents to his being questioned. On the contrary, such repressive measures are permitted only in the event of a preliminary arrest based upon "strong suspicion," as that term is used in the CCP. As preventive measures they are justified, though, if they are necessary to ward off from the public such dangers as are threatening public security and order. This however, will occur only on rare occasions.

(2) "On the street" searches for weapons or incriminating evidence can only be made by the

¹⁵ As far as can be traced here, the decisions bearing on the matter have not been published.

¹⁶ The four questions are set forth in the opening paragraph of Professor Remington's paper, which appears at the beginning of this symposium.

police upon "reasonable" suspicion, which, as mentioned before, is less than "strong" suspicion, the requisite to an arrest.

As a preventive police measure, however, searches are confined to the rare occasions where they appear necessary to avoid a public danger.

(3) There is no need of curtailing the powers of the police in the execution of their repressive activities. The regulation so far has proved a success. Curtailing the powers vested in the police under the present law would intolerably paralyze their striking power.

However, a more precise regulation of the preventive powers of the police, in particular the permissibility of raids, would be a matter worth considering. Under normal conditions they should be permitted only for clearing out hiding places of criminals and, in politically turbulent times, for the prevention of riots and other disturbances. It would appear advisable to enact a law which reserves the order for a raid to the judge only and subjects the judge to the above requirements.

(4) There is also no need of broadening the statutory powers justifying a police arrest, repressive or preventive, all the less as this would mean a relapse into the foul practices of the Nazi police state which thought nothing of personal freedom.

That state had expanded by a law enacted in 1935¹⁷ the requisites for an arrest and therewith also of a preliminary arrest on the part of the police.

Under that law a suspect could also be arrested for fear he might abuse his liberty to commit new criminal acts, and further, if in consideration of the serious nature of his crime and the public resentment aroused thereby, leaving him at liberty appeared intolerable. The second requirement for an arrest obviously originated in typical Nazi-trains of thought and was repealed as early as 1945. The first requirement was abolished in 1950 in the course of an amendment of the CCP,¹⁸ because it was justly felt that this requirement of an arrest could not be reconciled with the principles of a constitutional system and with the basic right of the freedom of the person.

¹⁷ Article 5 des Gesetzes zur Änderung der Vorschriften des Strafverfahrens und des Gerichtsverfassungsgesetzes (Law for the Amendment of the Provisions respecting Criminal Procedure and the Court Constitution Law, dated June 28, 1935).

¹⁸ Article 3, No. 44, des Gesetzes zur Wiederherstellung der Rechtseinheit auf dem Gebiete der Gerichtsverfassung, der bürgerlichen Rechtspflege, des Strafverfahrens und des Kostenrechts vom 12.9.50 (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).

E. Israel

HAIM H. COHN*

Under Israel law, a police officer may arrest any person without warrant when he has reasonable grounds for believing that that person has committed a felony;¹ or when that person has in his presence, or has recently,² committed an offence punishable with imprisonment for a period exceeding six months; or when that person commits, or is accused before him of having committed, an offence, or when he believes on reasonable grounds that that person has committed an offence, and that person refuses to give his name and address or has no known or fixed abode. Likewise, he may

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

¹ A felony is an offence punishable with imprisonment exceeding three years: CRIMINAL CODE ORDINANCE §5 (Palestine 1936), and Interpretation Ordinance §1.

² "Recently" has been held to mean immediately after the commission of the offence: 11 Pesakim Mekhouziyim (District Court Judgments) 253.

arrest without warrant a person obstructing him while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody, or who is pursued by hue and cry. Finally, a police officer may arrest without warrant a person found in suspicious circumstances, taking precautions to conceal himself or having no ostensible means of subsistence and unable to give a satisfactory account of himself.³

The powers vested in police officers may be conferred on any public officer designated by the Minister of Justice⁴ and have been so conferred on port inspectors, road traffic inspectors, and officers in charge of investigations into black-marketeering offences.

³ Section 3(1), CRIMINAL PROCEDURE (ARREST AND SEARCHES) ORDINANCE §3(1), LAWS OF PALESTINE cap. 33.

⁴ *Id.* §3(3).

Special powers to arrest without a warrant are given to customs officers and police officers where they have reasonable ground to believe that a person is committing, or attempting to commit, or being concerned in the commission of, any smuggling offences;⁵ and to police officers where the driver of a vehicle commits a driving offence within his view and fails to give his name and address or to produce his driving licence on demand.⁶

As to a person who is about to commit an offence but has not yet committed it, it is a misdemeanour punishable with two years' imprisonment to fail to use all reasonable means to prevent the commission or completion of a felony, where it is known that a felony is designed to be committed.⁷ The reasonable means to prevent the felonious act may include, or consist of, the arrest of the would-be offender without a warrant. But the Supreme Court has ruled that this provision "imposes a duty on every person to act only where that persons *knows* that another designs to commit a felony. 'Knows' means what it says: you do not know that which you only conclude, however reasonably, from the circumstances. . . ."⁸

In many cases arrests by police officers were held unlawful where the statutory powers of arrest had been exceeded. Thus, an inferior court is reported to have held that where a police officer in whose presence the offence of soliciting for immoral purposes⁹ had been committed notified the offender that he was arresting her, and only afterwards asked her for her name and address and, when she refused, asked her to accompany him to the police station—the arrest and all subsequent proceedings were unlawful.¹⁰ And where a police officer would have been justified in arresting a person for a felony he actually had committed, but on arresting him told him by mistake that he was being arrested on a charge involving a misdemeanour only (as distinguished from a felony), the arrest was held unlawful by the Supreme Court, as the offence had not been committed in the officer's presence, and in respect

⁵ CUSTOMS ORDINANCE §193, LAWS OF PALESTINE cap. 42.

⁶ ROAD TRANSPORT ORDINANCE §19, LAWS OF PALESTINE cap. 128.

⁷ CRIMINAL CODE ORDINANCE §33 (Palestine 1936).

⁸ Frenkel v. Attorney-General, 5 Piskei Din 1602, 1606 (1951).

⁹ Punishable with one month's imprisonment only: CRIMINAL CODE ORDINANCE §167 (Palestine 1936).

¹⁰ Reported in 1 ISRAEL POLICE QUARTERLY 56 (in Hebrew).

of the misdemeanour he had no power of arrest unless it was committed in his presence.¹¹

A police officer effecting an arrest may search the arrested person, or cause him to be searched, and may take from him any offensive weapons which he has about his person.¹² Where the police officer is not empowered to arrest without a warrant, he is not entitled to search any person except on a warrant of search (or, of course, a warrant of arrest).¹³

It is an offence punishable with one month's imprisonment (or, in the case of subsequent offences after previous convictions of the same offence, with one year's imprisonment) for any person to behave in a disorderly or indecent manner in any public place; or to conduct himself in any public place in a manner likely to cause a breach of the peace; or to be found wandering in any public place at such time and under such circumstances as to lead to the conclusion that he is there for an illegal or disorderly purpose.¹⁴ As subsequent offences are punishable with imprisonment exceeding six months, a police officer may arrest without a warrant a recidivist offender of this kind, and police have tried to exercise their power of arrest under this provision in respect of known prostitutes found in the streets. It has, however, been held by the Supreme Court that it is not sufficient that circumstances are such as to lead to the conclusion that the person arrested was there for an illegal or disorderly purpose; but under the statute both the "circumstances" and the "time" of his being found wandering must lead to that conclusion; and where the time is a time of day or evening where streets are normally and generally frequented, no such conclusion may be drawn.¹⁵

Apart from the power to arrest without warrant, every police officer has the power "to require any person whom he has reasonable grounds for believing to have committed any offence, to furnish him with his name and address, and may require such person to accompany him to the police station, and, if the person refuses to accompany him, he may arrest him."¹⁶ Even this right to

¹¹ Attorney-General v. Kedoshim, 10 Piskei Din 972, 976 (1956).

¹² CRIMINAL PROCEDURE (ARREST AND SEARCHES) ORDINANCE §11(1), LAWS OF PALESTINE cap. 33.

¹³ *Id.*, §§13, 16.

¹⁴ CRIMINAL CODE ORDINANCE §193 (Palestine 1936).

¹⁵ FRENKEL v. Attorney-General, *op. cit. supra* note 8 at 1611.

¹⁶ CRIMINAL PROCEDURE (ARREST AND SEARCHES) ORDINANCE §3(2), LAWS OF PALESTINE cap. 33.

stop and question a person as to his identity and abode is thus confined to criminal offenders or persons reasonably believed to have committed an offence, and in the absence of such belief or of reason for such belief, a person may not be stopped and questioned by a police officer except to give "a satisfactory account of himself" where he was found in suspicious circumstances, taking precautions to conceal himself, or has no ostensible means of subsistence. As a matter of practice, no person is stopped and questioned by police in Israel except in the small hours of the night where the behaviour of the person in the street arouses suspicion; and no case is reported in which the conduct of the police in stopping and questioning such persons, or in arresting persons who could not give a satisfactory account of themselves, has given rise to any complaints.

The opinion generally prevailing in Israel is that the law as it stands (although of British origin and enacted by the Mandatory Government of Palestine¹⁷), and as interpreted by the Israel judiciary, is not in need of revision or reform. The police do not claim that the powers of arrest and questioning vested in them, however restricted they are and however restrictively they are interpreted, are not sufficient to enable them to provide the public with adequate police protection. Hence the question has not arisen, and is not in the near future likely to arise, in this country, whether police should be permitted to arrest, search or question people in the streets in circumstances which are not covered by existing legislation.

It appears arguable, however, that the existing law stands in need of simplification. While the commission of an offence, or the loitering in suspicious circumstances, coupled with either precautions to conceal himself or lack of ostensible means of subsistence, might be retained as minimum conditions precedent to a police officer stopping a person in the street and requiring his identification, it is submitted that whether the offence committed was a felony or a misdemeanour, or whether it was punishable with imprisonment up to or exceeding six months, should be irrelevant for the determination of the question whether it should be permissible for a police officer to effect an arrest without warrant. Moreover, this existing test presupposes

that every police officer knows by heart the measures of punishment prescribed for each and every offence—an erudition which, even if it exists in a police officer, appears to be quite unnecessary. It is suggested that the law should be that a police officer may arrest without warrant any person committing an offence in his presence, where the officer has reasonable grounds to believe that failing such arrest the person could not be brought to justice or would endanger public safety or cause a breach of peace. Where the identity of the offender is known and there is no immediate danger from him if he is left at large, there is no reason why a warrant for his arrest should not first be obtained, however long the term of imprisonment to which he may ultimately be liable; and, on the other hand, where the offence was of a light nature (e.g., conducting himself in a manner likely to cause a breach of the peace), but in all the circumstances the officer reasonably concludes that violence is likely to ensue unless he arrests forthwith, there is no valid reason why he should not have the power to arrest without a warrant. In many—if not in most—cases, the nature of the offence committed will afford *prima facie* indication as to whether the apprehension of immediate danger is justified; in the same way, the nature and gravity of the offence will in most cases indicate whether the offender is likely to escape from justice. But the considerations prompting—and justifying—a police officer to effect an arrest should be police considerations, properly within his province, and whether he acts rightly or wrongly will depend upon the exercise of a discretion which, as a police officer, he is qualified and trained to exercise, and not upon his knowledge, or lack of knowledge, of detailed and complicated provisions of hundreds of criminal statutes.

To sum up *de lege ferenda*:

- 1) The police may not stop and ask any person in any public place to identify, or give an account of, himself, except—
 - a) where that person has committed an offence in the presence of the officer or is reasonably believed by the officer to have committed an offence; or
 - b) where that person was found in circumstances which reasonably caused suspicion that he was there for an illegal or disorderly purpose, and either took precautions to conceal himself or had no ostensible means of subsistence;

¹⁷ The police powers in Palestine and Israel in this respect are, however, much more limited than the powers conferred on police officers by the law of England: See ARCHBOLD'S PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES 1076 (34th ed. 1959).

and in any such case the officer may require such person to accompany him to the nearest police station.

- 2) The police may not arrest any person without warrant of a competent judicial officer, except—
- a) where an offence was committed, and there are reasonable grounds to apprehend that unless arrested forthwith, the person suspected of the offence may commit a further offence or otherwise endanger public order, or that he may attempt to

- prevent his being brought to justice; or
- b) where a police officer is obstructed while in the execution of a duty; or
- c) where the person to be arrested has escaped, or attempts to escape, from lawful custody, or is pursued by hue and cry; or
- d) where a police officer has, in lawful exercise of his powers under subparagraph 1, above, required the person to be arrested to accompany him to the police station, and that person refused to do so.

F. Japan*

HARUO ABE**

POLICE ARREST STATUTES IN GENERAL

The Japanese Code of Criminal Procedure of 1948¹ is the general source of law controlling the police arrest procedure. Under the general law a warrant issued by a judge is necessary for an arrest.² This is an application of the basic principle of Japanese criminal procedure that the exercise of investigative power upon persons or things having evidentiary value shall be generally subject to judicial control in the form of warrants for arrest or search and seizure. This "warrant principle" is

* A brief historical note concerning the Japanese legal system, which may be helpful in better understanding certain portions of this paper, appears in 51 J. CRIM. L., C. & P.S. 178-80 (1960).

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.

** Public Prosecutor, Ministry of Justice, Tokyo. Additional biographical data may be found in 51 J. CRIM. L., C. & P.S. 178 (1960).

¹THE CODE OF CRIMINAL PROCEDURE (Law No. 131 of 1948, with the latest amendment by Law No. 108 of 1958).

²THE CODE OF CRIMINAL PROCEDURE, art. 199, par. 1: "Where there exists any reasonable ground sufficient to suspect that an offense has been committed by the suspect, a public prosecutor, public prosecutor's assistant officer or judicial police official may arrest him upon a warrant of arrest issued in advance by a judge; provided, however, that for the offenses punishable with a fine not exceeding 500 yen [which in most cases should read as 25,000 yen—*author*], penal detention or minor fine, such arrest may be effected only in cases where the suspect has no fixed dwelling or where he fails, without good reason, to comply with the request for appearance which has been made in accordance with the preceding Article."

a basic requirement of the pertinent provisions of the Constitution.³

However, it should be noted here that there are two important exceptions to the principle of "arrest with warrant."

One of them is the rule that any person may arrest, without warrant, an offender who is committing or has just committed a crime in his presence.⁴ This exceptional rule is basically declared by Article 33 of the Japanese Constitution, which indicates that the offender may be exceptionally arrested without warrant, if he is arrested for *genko-han* (offense being committed or flagrant *délit*).⁵ The concept of *genko-han* as used in the Constitution has been interpreted as com-

³THE CONSTITUTION OF JAPAN, art. 31: "No person shall be deprived of life or liberty, nor shall any criminal penalty be imposed, except according to procedure established by law."

Ibid., art. 33: "No person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offense with which the person is charged, unless he is apprehended, the offense being committed." ["... unless he is apprehended, the offense being committed" means "... unless he is apprehended in the act of committing the offense."—*author*].

Ibid., art. 35: "The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Art. 33.

"Each search or seizure shall be made upon separate warrant issued by a competent judicial officer."

⁴THE CODE OF CRIMINAL PROCEDURE, art. 213: "Any person whosoever may arrest a *genko-hannin* without warrant."

⁵For the English translation of art. 33 of the Constitution see note 3, *supra*.

prising the offense which has just been committed⁶ and the "quasi genko-han."⁷

The second of the exceptions is the rule that an investigating official may arrest the suspect without warrant if he has sufficient grounds for believing that the latter has committed any of certain types of serious crimes and if, in addition, there is no time to procure a warrant.⁸ This is so-called the system of "urgent arrest." In the case of urgent arrest, however, a warrant must be procured soon afterwards.⁹ There have been a few cases where the constitutionality of this exceptional rule has been challenged, but the majority of theories and the judicial precedents have supported the constitutionality of the system of urgent arrest.¹⁰ I do not entirely agree with the reasons for which the Supreme Court justified the system of urgent arrest,¹¹ but I am of the opinion that the system is constitutional, because Article 33 of the

⁶ THE CODE OF CRIMINAL PROCEDURE, art. 212, par. 1: "genko-hannin [i.e., l'agent du flagrant délit—author] shall be defined as a person who is committing or has just committed an offense."

⁷ *Ibid.*, art. 212, par. 2: "If any person who falls under one of the following items is found under circumstances which indicate clearly that an offense has just been committed, he shall be deemed a genko-hannin: (1) A person being pursued with hue and cry; (2) a person carrying with him illgotten goods, or weapons or other objects apparently used in connection with the offense; (3) a person bearing on his body or clothes visible traces of the offense; and, (4) a person who attempts to run away when asked to identify himself."

⁸ *Ibid.*, art. 210, par. 1: "When there are sufficient grounds to suspect the commission of an offense punishable by the death penalty, or imprisonment with or without forced labor for life or for a maximum period of three years or more, and if, in addition, because of great urgency a warrant of arrest cannot be obtained beforehand from a judge, a public prosecutor, a public prosecutor's assistant officer or a judicial police official may, upon statement of the reasons therefor, apprehend the suspect; in such cases, measures for obtaining a warrant of arrest from a judge shall be immediately taken. If a warrant of arrest is not issued the suspect must be released immediately."

⁹ *Ibid.* This is a system of judicial control *post facto*.

¹⁰ For the leading case, see Vol. 9, No. 13 Sup. Ct. Crim Rep. 2760 (Grand Bench 1955).

¹¹ In the Supreme Court decision cited in note 10, *supra*, the opinion of the Court stated in substance that the system of arrest without warrant in such a limited form was not repugnant to the spirit of the Constitution. This is nothing but replacing one question with another. One of the two supplementary opinions maintained that art. 33 of the Constitution, as well as the Fourth Amendment of the United States Constitution, excluded reasonable arrest or search and seizure from the cases where warrants were required. The other made practical necessity the grounds for justification. Neither is satisfactory. For further discussion, see ARREST, DETENTION AND RELEASE ON BAIL 52-58 (Yokogawa ed., Tokyo, 1958) (in Japanese).

Constitution, whose basic idea was adopted from the Anglo-American legal system, should be interpreted to presuppose such traditional exceptions to the warrant principle as have been historically justified in Anglo-American common law.¹²

It has frequently been suggested that in the United States the percentage of arrests without warrant or of illegal arrests is quite high.¹³ Fortunately, however, the rate of arrests without warrant has not been very high in Japan according to statistics.¹⁴ This may be one of the psychological reasons why the argument against the constitutionality of the "urgent arrest" has not become very popular among Japanese lawyers.

THE POLICE PRIVILEGES TO STOP AND QUESTION A SUSPICIOUS PERSON

In the absence of sufficient grounds for an arrest, should the police have a right to stop and question a person on the street as to his identity and reason for being where he is, if the appearance or conduct of that person has reasonably aroused police suspicion? Under the Japanese law, this question is answered in the affirmative with some statutory restrictions. The Police Duty Law,¹⁵ which is the sole statute controlling this aspect of police practice, authorizes a police officer "to stop and question a person whom the officer, judging

¹² It should be noted here that in the majority of American jurisdictions the system of arrest without a warrant prevails to a great extent.

¹³ See, e.g., Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 n.1 (1955); Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1183 n. 13 (1952).

¹⁴ See, e.g., the following table extracted from ARREST, DETENTION AND RELEASE ON BAIL 4 (Yokogawa ed., Tokyo, 1958) (in Japanese):

Number of Suspects Arrested by Police in 1956

	Total Suspects	Not Arrested	Arrest with Warrant	Urgent Arrests*	Arrests in the act of Committing the Offense
Offense against Penal Code	565,517 (100%)	295,613 (52.%)	123,851 (21.9%)	33,960 (6.0%)	112,093 (19.8%)
Offense against Special laws	2,419,042 (100%)	2,373,359 (98.1%)	12,268 (0.5%)	660 (0.03%)	33,055 (1.4%)
Total	2,984,559 (100%)	2,668,672 (89.3%)	136,119 (4.6%)	34,620 (1.2%)	145,148 (4.9%)

* It should also be noted that almost 100% of urgent arrests have been justified by the subsequent issuance of arrest warrants.

¹⁵ POLICE DUTY LAW (Law No. 136, 1948, with the latest amendment by Law No. 163, 1954).

reasonably from his unusual conduct and/or other circumstances, has sufficient ground for suspecting to have committed or to be about to commit a crime."¹⁶ In consideration of possible embarrassment of the subject person or the possible disturbance to the traffic, the officer may ask the subject person to come to a nearby police station or police box for further questioning.¹⁷ This, of course, does not mean that compulsion may be used for detention or questioning.¹⁸

Statistics indicate that the "on the street" questioning is contributing considerably toward the successful detection of crime.¹⁹ It would be wise to keep the efficiency of this practice at the present level rather than revert to the pre-war practice of "on the street" questioning which was efficient enough to infringe upon the privacy of citizens. There have been no adequate data available regarding the post-war practice of "on the street" questioning except for the very limited

¹⁶ *Ibid.*, art 2, par. 1: "A police officer is authorized to stop and question any person whom the officer, judging reasonably from his unusual conduct and/or other circumstances, has sufficient ground for suspecting to have committed or to be about to commit a crime, or who appears to have knowledge about a crime which has been committed or is about to be committed."

¹⁷ *Ibid.*, art. 2, par. 2: "When the police officer considers that questioning the subject person on the spot as prescribed in the preceding paragraph may be to the disadvantage of the subject person or disturb the traffic, the officer may ask the person to come to a nearby police station, police box or residential police box for questioning."

¹⁸ *Ibid.*, art. 2, par. 3: "No person mentioned in the preceding two paragraphs shall be detained or forced to come to the police box or resident . . . police box or compelled to answer questions against his will, except in accordance with the provisions of laws concerning criminal procedure."

¹⁹ The following table was constructed upon the data obtained from NATIONAL POLICE AGENCY, CRIMINAL STATISTICS FOR 1958, 174-175 (1959).

Penal Code Offenses Investigated by the Police as Classified by Causes Leading to Investigation (1958)

Total Cases.....	902,316
Criminal Interrogation.....	383,981
Information Obtained by Detectives.....	149,255
Private Information.....	152,795
Offense Committed in the Presence of Other Persons.....	69,343
"Duty Law" Questioning.....	33,517
Stolen Goods.....	33,334
Complaint by Victim.....	26,096
Arrest by Private Person.....	9,213
Self-Surrender.....	7,744
Third Person Accusation.....	3,219
Modus Operandi.....	3,214
Personal Identification.....	2,825
Finger Print.....	1,612
Other Cases.....	26,168

data obtained by a pilot investigation into this matter.²⁰

In principle, no physical power or compulsion shall be used in stopping and questioning under the Police Duty Law. However, there may be some cases where reasonable physical force must be used to stop a subject person who tries to avoid the questioning in an unreasonable manner. For example, a suspicious person may intentionally disregard the request of a police officer who wants to stop him in a lawful manner; or a suspicious person walking along a back street with a suspicious package may take flight when he is asked to stop. In such unusual cases it shall be lawful for the police to exercise the minimum amount of physical power needed to stop the person, such as following the person and crying out, "Stop a moment, please," or stopping him by standing in his way, touching him on the shoulder or grasping him by the arm.²¹ This position has been substantially supported by High Court decisions.²² The

²⁰ From Nov. 18 to 23, 1959, a survey of "on the street" questioning was made by a police station having jurisdiction over a police ward located in the heart of Tokyo. The day and night population of the area was 300,000 and 40,000 respectively; 9 police boxes with 30 policemen guarded and patrolled the area. The survey revealed among others the following facts: 98 were questioned; more than half of them were questioned from 10 p.m. to 2 a.m.; in most cases 10 minutes were used for each questioning; with regard to attitudes, 10 of the questioned persons were "uncooperative"; in majority of cases other measures in addition to questioning (e.g., touching a package from outside) were taken; in 3 cases the questioning led to obtaining incriminating evidence (physical or testimonial); in 94 cases suspicion was cleared; dispositions made were as follows: 95 released (including 6 taken to police boxes for questioning), 2 taken to the police station, and 1 arrested.

²¹ Cf. NATIONAL POLICE AGENCY, POLICE MANUAL FOR FIELD WORK 128 (3d ed. 1957) (in Japanese); NATIONAL POLICE AGENCY, PRACTICE IN QUESTIONING UNDER THE POLICE DUTY LAW 17 (1958) (in Japanese).

²² Vol. 5, No. 12 High Courts Crim. Rep. 2294 (Sapporo High Court 1952). Prosecution for beating over the face of a police officer who allegedly was engaging in official duty. The issue was on the legality of the act of the officer who grasped the defendant by the shoulder to stop him for further questioning when he tried to take flight under suspicious circumstances. The defendant appealed from the judgment of the district court which held against him. The high Court held that the officer's act of grasping the suspicious person by the shoulder when he tried to escape without answering the question was within the scope of lawful performance of official duty under the Police Duty Law.

Supp. No. 33 High Courts Crim. Rep. 47 (Nagoya High Court 1953). Prosecution for kicking and injuring a police officer who allegedly was engaging in official duty under the Police Duty Law. The police officer noticed four suspicious persons, one of whom was the defendant, conferring at a dark corner of a park at about 9:00 p.m. Three of them stated their names when

view of Professor Dando of Tokyo University also appears to be compatible with these decisions.²³

THE POLICE PRIVILEGE TO SEARCH A SUSPECTED PERSON FOR WEAPONS OR FOR INCRIMINATING EVIDENCE

If, in the absence of sufficient grounds for an arrest, the police have a right to stop and question a suspected person under certain suspicious circumstances, should the police be permitted to search such a person for weapons or for incriminating

asked. But the defendant refused to state his name and to open a suspicious package he carried. The officer touched the package from outside and felt something like a lady's handbag. When the defendant was asked to open the package, he refused to do so and started to run away with the package. The officer pursued him and reached him when he stumbled and fell down. Then, the defendant, lying on the ground kicked and hurt the officer when the latter tried to approach the former. The District Court held that the officer had no right to pursue the defendant when he ran. The prosecution appealed from the judgment for the defendant. The High Court held that an officer should have the right as well as duty to pursue a suspected person if he took flight when questioned and, therefore, the officer was engaging in official duty in a lawful manner. The judgment below was reversed and a new judgment was rendered against the defendant.

Supp. No. 33 High Courts Crim. Rep. 58-64 (Nagoya High Court 1953). Prosecution for beating, kicking and injuring a police officer who allegedly was engaging in official duty under the Police Duty Law. At about a quarter past 12 o'clock midnight, two officers noticed a suspicious person, the defendant, approaching on a bicycle. They stopped the defendant and took him with his consent to the nearby police box for questioning. After being questioned a short while, the defendant took sudden flight. Another officer who was there by chance pursued him about 130 meters, reached him from behind and caught him by the arm, crying "Why are you running away?" At that moment the defendant turned around and started to beat him over the head and to kick him. The District Court held that the act of the Officer was "arresting" and beyond the limit of lawful performance of duty under the Police Duty Law, and that the defendant was not guilty, having made a lawful counter-attack in self-defense against the unlawful attack by the officer (Nagoya District Court, May 6, 1953; 1 HANREI JIHO (Law Reports Times) 19 (1953).) The prosecution appealed from the judgment of the District Court for the defendant. The High Court held that under such circumstances it was lawful for the officer to pursue and stop the defendant by reasonable use of physical power, such as catching the defendant by the arm while calling upon him to stop. The judgment below was reversed and a new judgment was rendered against the defendant.

²³ Dando, *The Limitations of Lawfulness of Police Questioning under the Police Duty Law*, 3 HANREI JIHO (Law Reports Times) 2 (1953). In this article Professor Dando criticized the Nagoya District Court decision, *supra* note 22, and suggested that at least it would be lawful for a police officer to touch the body of the subject person to draw his attention or to ask his reconsideration.

evidence? Under the Japanese law this question has been answered in the negative.

As stated above, under the Japanese system the warrant is one of the indispensable conditions for compulsory search and seizure made on a person by the police.²⁴ The sole exception to this rule is found in Article 220²⁵ of the Code of Criminal Procedure, which provides in substance that a person suspected by the police may, on the spot of arrest and without a warrant, be searched and subjected to seizure of dubious articles carried on his person. This implies that, except on the occasion of a lawful arrest, it is unlawful for the police to search the suspected person who is stopped and questioned under the Police Duty Law and seize dubious articles carried on his person. Article 2, paragraph 4, of the Police Duty Law specifically provides that "If a person is under arrest in accordance with laws concerning criminal procedure, a police officer is authorized to search the person for a dangerous weapon." This is a restatement of the logical consequence of the established rule of criminal procedure with specific regard to dangerous weapons.

Under such a general prohibition of search and seizure of the suspect, the police may not even "frisk" him. This means that the police may not even search the person by passing a hand over his clothes or through his pockets. This, however, does not necessarily mean that touching should be absolutely prohibited. It should be permitted for the police to touch the person or package, to a reasonable extent, to fulfill the purpose of questioning. For example, he may pass his hand lightly over the person's clothes or touch the outside of the package he is carrying while asking such questions as "What is this?" or "You appear to have something like a knife; will you let me have a look at

²⁴ THE CONSTITUTION OF JAPAN, art. 35 (for English translation see note 3, *supra*); THE CODE OF CRIMINAL PROCEDURE, arts. 218, 219.

²⁵ Art. 220:1. When a public prosecutor, a public prosecutor's assistant officer or a judicial police official arrests a suspect in accordance with Art. 199 or he arrests a *genko-hannin* [a person who is committing or has just committed a crime], he may, if necessary, take the following measures; the same shall apply, if necessary, to the case where a suspect is arrested in accordance with Art. 210: (1) To enter the dwelling of a person, or the premises, building or vessels guarded by persons to search for the suspect; (2) To seize, search or inspect on the spot of the arrest. 2. The things seized shall be returned immediately if a warrant of arrest is not obtained in the case mentioned in the latter part of the preceding paragraph. 3. For the measures mentioned in the first paragraph, a warrant need not be obtained. 4. [Omitted]."

it?"²⁶ But no further search without consent should be made.

LEGITIMATE LIMITATIONS TO BE IMPOSED ON
POLICE PRACTICES REGARDING "ON THE
STREET" DETENTION, QUESTIONING AND
FRISKING OF SUSPECTED PERSONS

Most Japanese lawyers appear to be satisfied with the present status of limitations imposed upon police practices by the provisions of the Police Duty Law. However, a strong feeling of dissatisfaction with these limitations has been growing among the police and investigators. In response to a growing demand for changing the present situation, the National Police Agency tried to add a new paragraph to Article 2 of the Police Duty Law intended to safeguard the police against dangerous weapons, proposing a bill for partial amendment²⁷ of the Police Duty Law in the 30th Diet Session in October, 1958. In the Diet debate the National Police Agency pointed out many cases where the lack of authority to search for weapons had endangered the police or private citizens and emphasized the necessity of such an amendment.²⁸

The pertinent provisions of what was intended to be the new paragraph 3 of Article 2 read as follows:

"3. If, on the occasion of questioning by a police officer under Paragraph 1 of this Article, the person, by unusual conduct or other circumstances, provides reasonable cause for being suspected of having committed or being about to commit a crime, or if he carries a dangerous weapon or any other object that might endanger the life or body of other persons, the police officer may cause the person to submit the article for temporary custody; or if the officer recognizes that there is a reasonable ground for

²⁶ Cf., NATIONAL POLICE AGENCY, PRACTICE IN QUESTIONING UNDER THE POLICE DUTY LAW 20 (1958) (in Japanese).

²⁷ The proposed bill contained several other points of amendment which are designed to facilitate police activities in many respects.

²⁸ One of the mimeographed materials prepared by the National Police Agency contained many cases, among which only two remarkable ones shall be mentioned here. *Case A*: A police officer questioning a suspected person on the street was stabbed by the person with a concealed knife and died shortly afterwards. *Case B*: A police officer questioning a suspected person had good reason to suspect that the person had a dangerous weapon but could not request him to submit it because of lack of authority to do so; while the officer continued questioning, he was stabbed in the abdomen by the person with a concealed spring knife.

suspecting that the person is carrying such an article, the officer may cause the person to submit the personal effects carried by him for inspection."

Of course this proposal did not mean that the police should have the right to compel the subject person to submit things he carries. It is obvious that the person has the right to refuse to comply with the officer's request even under this proposed provision. Since even under the present law it is lawful for the police reasonably to persuade the suspected person to submit things he is carrying, this proposal theoretically provides very little enlargement of police authority. However, this proposal of amendment was not very popular among those people who are seriously concerned with the protection of human rights. In theory the proposal did not mean much; but in practice it would allow the possibility of abusive exercise of psychological compulsion on innocent citizens. Among the opponents of the amendment there seems to have been this feeling: Allow the police seven miles and they will go nine miles; therefore, if we want to keep them at seven miles, better give them six miles. In any event, the Police Bill as a whole—and it contained many points of amendment—was very unpopular except among certain conservative groups. The bill was vigorously counter-attacked²⁹ and automatically quashed when the period of the Diet session expired with the bill still pending in the House of Representatives. The basis for the opposition to the bill was emotional fear of the probable misuse of enlarged authority, rather than a calculated possibility of mispractice; but there was some wisdom in such distrust of the police. The bitter memory of police brutality in pre-war Japan makes people hesitant to enlarge police authority.

However, practical-minded persons who are seeking for a realistic solution of the matter are dissatisfied with the unrealistic and excessive control of police practices. It is feared that excessive control may give rise to some undesirable by-products, such as (1) excessive timidity on the part of the police in fighting crimes for the protec-

²⁹ Almost the entire press was against the bill. It is reported that about 66 liberal or "democratic" organizations throughout Japan declared their opposition to the bill. For pros and cons concerning the bill, see, e.g., Tsuchiya, *Criticism of the Bill for the Partial Amendment to the Police Duty Law*, 30 KEISATSU KENKYU (The Police Studies) 3, 22 (1959) (in Japanese) Miyazawa, et al., *Symposium on the Amendment to the Police Duty Law*, 166 JURIST 2 (1958) (in Japanese).

tion of society³⁰ and (2) a good excuse for the clandestine practices of the police who try to justify the evasion of legal restrictions on the grounds that it is necessary for attaining a righteous purpose. The well-known police practice of so-called "Youth Guidance" appears to be an example of the latter phenomenon. Annually more than 700,000 problem youths are "guided" by the police with allegedly "free" consent on the part of the youths. It is obvious that a great number of problem youths who are not actually delinquent are often stopped and questioned on the street and sometimes are, as a matter of fact, psychologically compelled to come to police boxes, notwithstanding the fact that they do not actually fall under the category of suspicious persons as prescribed by paragraph 1 of Article 1 or fall under the category of persons who shall be protected under Article 3 of the Police Duty Law.³¹ It is desirable that a procedure for youth guidance should be clearly prescribed and be subject to proper legal control.

FREEDOM OF THE POLICE AND FREEDOM OF CITIZENS

It is said that under Anglo-American law arrest is not the beginning but the end of criminal investigation. For a more exact statement, however, the phrase "is not" should be changed into "should not be." Even under Anglo-American law most criminal investigators and practical-minded lawyers will admit that usually the most important evidence is obtained by questioning the suspect after the arrest.³² The problem is how to harmonize the freedom of the police with the freedom of citizens.

With respect to police arrest statutes, should more freedom be granted to the police in recognition of the fact that existing laws hamper police attempts to meet the public demand for adequate police protection?

The key to the realistic solution of this problem is the discipline of the police. In Japan it would be

³⁰ Similar apprehension is seen in Vol. 33 (supp.) High Courts Crim. Rep. 59 (Nagoya High Court 1953) which stated: "It is obvious that the police should make efforts to avoid the abuse of the provisions . . . however, on the other hand it is likely that the police are prone to be too timid with excessive fear of the voice of protection of human rights . . . such will lead to endangering the public welfare and the basis of democracy . . ."

³¹ Persons who need police protection, such as insane or drunken persons, lost children, or sick or wounded persons.

³² See Inbau, *Restrictions in the Law of Investigation and Confessions*, 52 Nw. U. L. R. 80, 81 (1957).

useless or even dangerous to relax the present restrictions on arrest. Such a step would not only infringe upon human rights but also hamper the progress of police discipline. Despite the complaints made by the police about the strictness of the present arrest statutes, most Japanese lawyers appear to be content with the present status of the law of arrest. Statistics show that 99.5% of applications for arrest warrants are granted by the judge.³³ This seems to indicate that the judicial control over arrest is not so strict as to hamper police attempts to meet the public demand for adequate police protection.

It was reported that in 1956 in Japan 136,488 suspects were prosecuted in formal proceedings. 91,699 or 67% of those accused had been arrested for investigation, while only 44,789 or 33% of them had not been arrested.³⁴ This statistical fact seems to indicate that the arrest is still the beginning of criminal investigation in Japan. However, this phenomenon may be partially attributed to the fact that in Japan there is no such system as summons for the suspect. Because of the lack of a summons system the police or prosecutors must sometimes arrest those suspects who have committed minor offenses and have refused to report at the investigators' office for questioning. This practice apparently is one of the factors contributing to the increase in the arrest rate in Japan. Introduction of a summons system is a measure that should be seriously considered.

SOME MEASURES AGAINST ILLEGAL ARREST BY THE POLICE WITH SPECIFIC REFERENCE TO THE COMPENSATION FOR THE SUSPECTED PERSON

Penal Sanctions Against Illegal Arrest

In Japan, what penal deterrents to illegal arrest practices by the police are used? In the first place, attention should be drawn to the provisions of the Penal Code³⁵ which are specifically designed to deter government officials from engaging in uncivilized practices.³⁶ Under these provisions a police officer who illegally arrests or imprisons a person

³³ ARREST, DETENTION AND RELEASE ON BAIL 47 (Yokogawa Ed., Tokyo, 1958) (in Japanese).

³⁴ Id. at 99.

³⁵ THE PENAL CODE OF JAPAN, arts. 193-196.

³⁶ It should be noted that beside these specific provisions there are general ones under which malfeasant officers are punished as ordinary persons. For example, an illegal arrest or imprisonment is punished by arts. 200 and 221; an officer who makes illegal search and seizure is also liable for robbery (art. 236) or larceny (art. 235).

is punished by imprisonment with or without forced labor for not more than ten years and not less than six months.³⁷

One might doubt the practicability of the enforcement of these provisions, because public prosecutors may be reluctant to prosecute their fellow investigators or may be influenced by political pressure. Such apprehension, however, is unfounded. The legislature has wisely set up a safeguard against the possibility of unfair or arbitrary dropping of cases. Under the Code of Criminal Procedure a citizen who believes that his accusation against a public officer for certain crimes involving uncivilized practices has been unreasonably turned down may have prompt recourse to the judicial court which, in turn, may order the public prosecutor to institute a prosecution against the public officer who allegedly exercised his authority in an illegal manner.³⁸ In this case the court must appoint an *ad hoc* public prosecutor from among private practicing lawyers, so that a fair and sincere prosecution may be secured by this impartial prosecuting agency. This special recourse is called "quasi public prosecution" and has been taken rather frequently. It is reported that for the last decade (1949-1958) 624 persons including 132 police officers, 65 public prosecutors, 36 judges and 391 others have been brought before judicial courts pursuant to this procedure for consideration as to whether they should actually be prosecuted.³⁹

Civil Actions for Damages Caused by the Police

A citizen who has suffered from illegal arrest by public officers has recourse to either of two types of judicial remedy. First, he may bring an ordinary civil suit against the public officers for damages caused by the illegal arrest. Secondly, he may institute a civil action against the State for damages wrongfully caused by the arrest per-

formed by an investigating officer working within the scope of his official duty.⁴⁰ The system of legal aids in civil litigation applies equally to these cases, so that even poor citizens may bring such suits against investigating officers. Data taken from materials kept at the Ministry of Justice show that for seven years, from October, 1947, to April, 1954, 69 civil suits were brought against the Government for damages wrongfully caused by police officers and prosecuting officials.⁴¹

Insufficiency of the Traditional Remedies

What has been explained might have created the impression that Japanese citizens are well protected from illegal exercises of investigating authority. But such an impression is rather delusive.

Unfortunately, many over-zealous investigators pay little attention to civil rights of citizens. It appears that even the penal sanction has very limited value as a deterrent to investigating officers. The fact that very few investigating officials have been punished for abusing their authority suggests the inefficacy of the penal sanction.⁴² Moreover, Japan, where the level of "legal consciousness" is not very high, has very few citizens as brave as "Michael Kohlhaas" who declared war on his Government in pursuit of his personal rights. Even if a citizen be brave enough to bring a civil suit against the Government, he faces the difficult task of *proving* his case against the Government. Everyone knows how hard it is to collect sufficient pieces of evidence from the stronghold of the Government to make a strong case against it. It is also very difficult to prove such mental elements as "malicious intent" or "negli-

⁴⁰ The system of governmental liability is established by THE CONSTITUTION OF JAPAN, art. 17 which provides that "Every person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official." Pursuant to this provision the STATE LIABILITY LAW (Law No. 125; Oct. 27, 1947) provides that the State or public entity is primarily liable for damages when a person's rights have been violated by illegal governmental activity. However, the law further provides that such liability exists only in the event that the illegal act of the public official is due to his intent or negligence. This means that fault, not risk, is the basis of state liability in Japan.

⁴¹ This figure does not necessarily include the number of cases involving illegal arrests by the police. On the contrary, most of them are those involving brutality allegedly inflicted by police officers or prosecuting officials.

⁴² See Hirano, *Control of Investigation by Exclusion of Evidence*, 7 KEIHO ZASSHI (Jour. of Crim. Law) 165, 168, 172 n.2 (1957).

³⁷ THE PENAL CODE OF JAPAN, art. 194.

³⁸ THE CODE OF CRIMINAL PROCEDURE, arts. 262-267.

³⁹ These figures were taken from the records kept at the Criminal Affairs Bureau of the Ministry of Justice. Of these 624 persons, only 5 persons were actually prosecuted and tried on the grounds of their brutality. In the five cases tried, four defendants were found guilty and one case is still pending. The extremely low percentage of cases actually prosecuted may mean that this procedure is not used by those who need its merit. The procedure has frequently been misused as a political challenge. Those who are actually suffering from the abuse of investigating authority are often too ignorant or timid to take recourse to this procedure.

gence" on the part of a government official. What, then, is the remedy?

A Suggested Remedy—State's Strict or Absolute Liability

One possible suggestion for remedying this situation would be to proceed a few steps toward the system of State's strict or absolute liability. If a highly organized modern State, a veritable "Leviathan," happens to infringe upon individual rights in exercising its investigating authority, it should be only fair for the State to pay the damages under certain conditions, whether or not the officials, as the agents of the State, have caused the damages intentionally or negligently. Theoretically, strict or absolute liability or "risk" liability has little to do with illegal exercise of public authority. However, we can hardly say that the official exercised the public authority illegally until or unless we succeed in proving that he did so intentionally or negligently. Therefore, substantially the system of State's strict or absolute liability is a substitute for ordinary litigation for State's liability based upon intent or negligence of public officials, because it allows the citizen to dispense with proof of intent or negligence which is otherwise indispensable to the recovery of damages from the State. This system would be particularly useful in the field of criminal investigation where investigating officials are required to make speedy and vigorous moves with high probability of infringing upon citizens' rights.

An Experience in Japan—Criminal Compensation Law

It would be of some interests to review the progress which Japan has made in this direction in recent years.

Under the "Criminal Compensation Law," which was originally enacted in 1933 and repealed by the new law of the same title in 1950,⁴³ an accused who has been arrested or detained and has been finally adjudged "not guilty" by the court is entitled, under certain conditions, to be awarded some flat compensation by the court. The maximum amount of compensation is fixed at 400 yen per diem for the period of illegal restraint of freedom. Although the amount of flat compensation is not sufficient for recovering damages ac-

tually caused, the significance of this system should not be underestimated.⁴⁴

One of the defects of this system, however, is the point that the Criminal Compensation Law does not cover the case involving a criminal suspect who is arrested for investigation but eventually discharged by the investigating officials.

Let us suppose, for example, that Mr. John Doe was arrested while he was walking along Ginza Street in Tokyo. His conscience was clear, but the police had good reason for believing that he might be the criminal being sought. After 24 hours of investigation at the police station, he turned out to be innocent and was released. In such a case, is he entitled to compensation under the Criminal Compensation Law? This answer is "No." He can not sue for damages against the police because there was no irregularity or fault on the part of the police; nor is he entitled to compensation under the Criminal Compensation Law because he was not formally prosecuted as a criminal defendant.

⁴⁴ The following tables constructed from the data provided by judicial statistics show how the Criminal Compensation Law has been actually administered in recent years. According to these statistics amount of compensation *per capita* is 28,445 yen.

Table I. Criminal Compensation Cases Finally Disposed Of (1956-1958)

Year	Total Cases Considered	Compensation Granted			Dismissed, etc.
		Grantees	Days	Amount (yen)	
1956	279	271	26,093	6,622,670	8
1957	184	161	15,514	3,838,367	23
1958	133	126	18,326	5,411,550	7
Total	596	558	59,933	15,872,587	38

(Source: The Secretariat General, The Supreme Court of Japan, Annual Report of Judicial Statistics, 2. Criminal Cases, Part II for 1956, '57 and '58)

Table II. Number of Persons Compensated as Classified by Amount Granted *Per Diem*

Year	400 yen	399-300 yen	299-200 yen	Other	Total
1956	41 (15.1%)	75 (27.7%)	154 (56.8%)	1 (0.4%)	271 (100%)
1957	33 (20.5%)	46 (28.6%)	80 (49.7%)	2 (1.2%)	161 (100%)

(Source: Secretariat General, the Supreme Court of Japan)

⁴³ Law No. 1, Jan. 1, 1950, repealing Law No. 60, April 1, 1933.

The Birth of the Regulation for Suspect's Compensation

Increasing criticism of such an unsatisfactory situation stimulated the issuance of "the Regulation for Suspect's Compensation."⁴⁵ Under this Regulation an amount not exceeding 400 yen per diem may be paid to the suspect, under certain conditions, in compensation for the mental pains and property damage which he has suffered from physical restraint pending criminal investigation, in the event the real offender has been discovered or the suspect has been finally found innocent after a certain period of arrest or detention. In this procedure the public prosecutor decides to make such compensation upon the request of the discharged suspect, but the request is not the prerequisite for the compensation. In addition, if the person compensated requests a public notification that he was compensated, an account to that effect must be published in the *Official Gazette* or a newspaper for the rehabilitation of his honor.

Theoretically, this compensation is of a gratuitous nature and the suspect is not entitled to take

⁴⁵ MINISTRY OF JUSTICE, INSTRUCTION No. 1 (1957).

recourse to the judicial court from the public prosecutor's discretionary decision of not awarding compensation. But, as a matter of practice, prosecutors have been rather generous in awarding compensation pursuant to Article 1 of the Regulation providing that "this Regulation shall be reasonably administered in the spirit of respecting human rights and in accordance with individual circumstances." Moreover, it is generally agreed that the discharged suspect who is not content with the decision made by a public prosecutor with regard to the compensation may take a special administrative appeal from this decision to the hierarchical superior of the public prosecutor.

Thus far only a few persons have been compensated under this Regulation.⁴⁶ However, it appears to be too early to decide whether this is due to the fact that the system has not yet become familiar to the people or to the fact that the arrest privilege of the police has been exercised moderately.

⁴⁶ From June, 1957, to February, 1960, fifteen cases involving fifteen suspects arrested and detained were considered for compensation under the Regulation. Of the fifteen cases, thirteen were disposed of and seven suspects were granted compensation. This data was taken from the records kept at the Criminal Affairs Bureau, Ministry of Justice.

G. Norway

ANDERS BRATHOLM*

The power of the police in Norway to arrest suspected persons is regulated by the Norwegian Criminal Procedure Act of 1887.

The chief provisions are found in Chapter 19 of the act. They may be divided into *material* and *formal* prerequisites. The material prerequisites deal with the requirements to be met as regards the punishable act. The formal prerequisites refer to the procedure to be followed when arrest is ordered.

The material prerequisites may be divided into *general* and *special* prerequisites. Arrest may take place only when the general and at least one of the special conditions are present.

The chief general provision is found in Section 228(1). According to this provision the police can arrest a person who, on reasonable grounds, is suspected of a punishable action for which the maxi-

mum statutory penalty is a term of imprisonment longer than six months.

If the general conditions are satisfied, arrest may take place when at least one of the following special conditions is met:

- (1) The suspected person is seized *in flagrante delicto*, or the traces of his action are fresh.
- (2) There is reason to fear that he will flee to avoid punishment.
- (3) His conduct gives special reason to fear that he will tamper with evidence.
- (4) There is special reason to fear that he will repeat the punishable offence.
- (5) The question will arise of application of security measures (that is, generally speaking, relatively indefinite measures in the case of recidivists).¹

* Professor of Law, University of Oslo. Additional biographical data may be found in 51 J. CRIM. L., C. & P.S. 186.

¹ A more detailed statement of the prerequisites to arrest and detention will be found in Bratholm, *Arrest and Detention in Norway*, 108 U.P.A.L.REV. 336 (1960).

The police can, in certain cases, arrest a suspect even if the maximum statutory penalty cannot exceed six months of imprisonment.

The most important of the provisions in this regard is Section 229 of the Criminal Procedure Act. In this section it is laid down that arrest may be made regardless of the weight of penalty when at least one of these three special conditions is present:

- (1) The suspected person is taken *in flagrante delicto* and does not desist from his punishable activity.
- (2) He is found in the act of absconding or evidently preparing to abscond.
- (3) He has no fixed address in the country, and there is reason to fear that he will attempt to avoid punishment.

The most important *formal* requirement is that the police shall procure a warrant—that is, the consent of a Magistrate—before the arrest is made. But if the purpose of the arrest might be thwarted by waiting, the arrest may be made without a warrant. In practice, however, it is very seldom that the police do procure the consent of the court, even in cases where there is ample time to do so. This police practice was strongly criticised by the Supreme Court in a ruling of 1936;² however, this did not have the effect of changing matters to any significant degree.

It may be mentioned that the arrested persons in the 1936 case were two well known Norwegian lawyers who were suspected of financial crimes. The charges were dropped on lack of evidence, and the lawyers claimed and were awarded high damages under Section 469 of the Criminal Procedure Act. According to this section, the State is responsible for the economic loss detention in custody has caused the detained person, where there are grounds for believing that he is innocent. This rule applies even if nobody can be blamed for the detention of the innocent.³

It is interesting to note that, after the Supreme Court ruling in 1936, the police in Norway, as far as possible, have avoided arresting a lawyer without having obtained a warrant in advance.

If the arrested person is not released the day after his arrest, the police must bring him before an examining judge with an application for com-

mitment to custody.⁴ If the judge finds that the general material conditions, and at least one of the special conditions mentioned in Section 228(2)–(5), or Section 229(2)–(3), exist (Sections 228(1) and 229(1) only grant the power to *arrest*), he can pronounce judgement that the arrested person shall be detained in custody for a certain time.⁵

We thus see that the conditions of arrest, as well as of detention in custody, are carefully regulated by the Criminal Procedure Act. This is taken to be a necessary consequence of Section 99 of the Norwegian Constitution of 1814, which, *inter alia*, lays down that arrest and imprisonment can only take place as determined by the law and in the manner prescribed by the law. This is one aspect of the general principle of legality on which the Norwegian Constitution is built and which demands that regulations that invade the sphere of the rights of an individual shall in general have the form of *written law*.

While this principle applies unimpaired as regards imprisonment as penalty, it is to a certain extent neglected as far as arrest (and detention) is concerned.⁶ Thus it is quite common for the police to halt and examine persons who are found in the neighborhood of the place where a crime has just been committed and who could be suspected of being implicated in the crime or who could have been witnesses of it.⁷

It may be said that the right to halt and detain for a short time can be justified by Section 333 of the Norwegian Penal Code of 1902 which declares it the duty of every person to give his name, position and address to a policeman who requests this information in the public interest.⁸ The police practice does not, however, involve merely halting a person and requesting his name and address. He may also be examined with respect to the crime or searched without the full authority of the law. It may be added that Norwegian criminals, as well as the police, very seldom are armed, and frisking for weapons does not often occur.

If the person who was questioned cannot give a fully satisfactory account of himself, or if compromising articles are found on him, he generally will

⁴ CRIMINAL PROCEDURE ACT (hereinafter called CPA), §§235, 236.

⁵ CPA, §§240, 239.

⁶ For more detailed information than given in this article, see Bratholm, *op.cit. supra* note 1, at 343–47.

⁷ See BRATHOLM, PAAGRIPELSE OG VARETEKTSFENGSEL (Arrest and Detention Before Trial) 9–10 (Oslo 1957).

⁸ Offences against §333 are punishable by a fine or imprisonment for a term not exceeding three months.

² Norsk Retstidende (Nor. Law Rep.) 567 (1936).

³ Section 469 has also a rule according to which damages can be awarded an accused person who has not been arrested or remanded in custody. However, in these cases the court has a discretionary power to refuse damages.

be taken to the police station for closer examination.

Especially in cases where a serious crime has been committed (for example, murder) can the police go to considerable lengths when it comes to taking to the police station persons who might be suspected of having had something to do with the offence. Most of these are set free after a short time—if, for example, their alibi is in order—but in some cases they may be detained in police arrest overnight. In such cases, where several persons are detained as suspected of a crime which only one single person can be imagined to have committed, the terms of the Criminal Procedure Act, which demand that there shall exist *reasonable* grounds for suspicion, will not be complied with, and the police will therefore make no attempt to obtain the court's ruling for detention. Only if special reasons should be present for the belief that one single individual among the suspects is guilty will the person concerned be brought before the court with application for remand in custody.

Such a check-up of a number of persons who can be suspected of having had something to do with the crime often permits the police to lay their hands on the guilty party. The trial and error method is fairly effective in Norway, where the conditions are so uncomplicated that the police can often point with considerable confidence to the milieu within which the offender is to be found.

Furthermore, it is not only when it is known that a crime has already been committed that the police sometimes arrest persons on a vague suspicion. Under other circumstances the police detain and examine and, if necessary, take to the police station, persons whose conduct arouses suspicion. Thus, some time ago, the police took a young man to the police station who at a late hour of the night was unable to give a satisfactory account of himself. The police had a strong impression that he had stolen the bicycle which he had with him, but this proved not to be the case. However, before they had given the young man his liberty, a report came in of a brutal sex murder that had been committed in the neighborhood in which he had been arrested, and further examination showed that the arrested man was the criminal.

In this case it may well be said that a legally most doubtful arrest led to the solution of one of the most brutal murders committed in Norway since the second world war. (It may be added that a confession or other evidence obtained in con-

nection with an illegal arrest will not be excluded during the trial.)

In such routine check-ups of suspected persons, it is seldom necessary for the police to use force. Those who have come under scrutiny nearly always go willingly to the police station, because they know that otherwise force will be used and that a refusal will only aggravate suspicion against them.

The police seldom designate persons who are arrested on a vague suspicion as "suspected" persons or "arrested" persons, but they are referred to as "taken" or "brought in"—designations which the law does not use.⁹ The same procedure is used to some extent in Denmark.¹⁰

In spite of the terminology of the police, the suspected person in such cases must be considered as arrested, and therefore he must also have the rights of an arrested person. This means, among other things, that he, like other accused persons, cannot be punished for giving a false statement (as can a witness). In a decision of the Supreme Court in 1940 this was expressly laid down.¹¹ The court concluded that when a suspected person is more or less expressly faced with the choice between voluntarily accompanying an officer to the police station and arrest, then from a legal point of view, he must be considered as arrested.

The police practice which I have described here, and which in certain cases undoubtedly lacks the authority of the present law, and in other cases must be said to lie on the borderline of legality, has not to any great extent led to complaints from arrested persons or from other quarters. This is due partly to the fact that the suspected persons as a rule are not aware that the police are acting on the borderline of their authority or even beyond it.

In this connection, it can be mentioned that persons who are arrested and detained at the police station for a short period of time seldom acquire counsel, although they are entitled by the law to do so on their own expense.¹² The deprivation of

⁹ See BRATHOLM, *op. cit. supra* note 7, at 10.

¹⁰ See HURWITZ, *DEN DANSKE STRAFFERETSPLEJE* 648 (2d ed. Copenhagen 1949).

¹¹ Norsk Retstidende (Nor. Law Rep.) 343 (1940); PENAL CODE, §167. The terminology of the police may in certain respects be of advantage to the suspect. Thus, when he is considered as "taken in", he is not recorded as arrested in the police-register.

¹² CPA, §99. In rare cases, counsel may be appointed for the accused at public expense just after his arrest. See CPA, §102, which prescribes that counsel shall be appointed if it is considered necessary in view of the nature of the case, provided that the accused has applied for appointment of counsel. If the defendant is going to be tried, then he, as a rule, is entitled to counsel at public expense. See CPA, §§100, 101.

liberty is so short in most cases that there is no time to obtain legal assistance. Most of them, therefore, do not know that the action of the police can give rise to criticism.

Another reason why the doubtful police practice has not led to complaint or public criticism to any great extent is that most people realize that the present police practice seldom goes beyond the bounds of what may be called reasonable action. It seems to be generally agreed that the current provisions of law, which regulate the power of the police to arrest suspected persons and which were passed in a society quite different from the present society, are somewhat too restricted and that they should be revised so that the prevailing practice would be to some degree legalized.¹³

In this connection it can be mentioned that the new Swedish law of procedure (1942) has legalized the former Swedish police practice of bringing persons to the police station for questioning, check-up, etc. Thus a person who has been on the spot where a crime has been committed has a duty, if requested by an officer, to accompany him to the police station for questioning. If the person refuses without good reason, he can be compelled to go with the officer.¹⁴

¹³ For some suggestions for reform, see Bratholm, *op. cit. supra* note 1, at 349-53.

¹⁴ THE SWEDISH PROCEDURE ACT OF 1942, c. 23, §8. The person can be kept at the police station for ques-

Furthermore, the Swedish police can arrest a suspected person, even if the suspicion is not founded on reasonable grounds, as it must be in the case of detention in custody.¹⁵ The strength of suspicion consequently need not be so great in the case of arrest as in case of detention. The same applies in the case of Danish law.¹⁶

The Norwegian Criminal Procedure Act is now under revision, and there is much to be said for Norwegian adoption of arrest provisions corresponding to those now existing in Sweden. The objections against introducing such regulations need hardly be very great, since the Norwegian police, practically speaking, never behave brutally towards suspected persons, and since the arrangement does not seem to be attended by serious handicaps in any other way. It should, however, be considered as a safeguard to introduce rules which make it mandatory that the accused shall be provided with counsel at public expense if he is not released within a reasonable period (e.g., 24 hours) after his arrest.¹⁷

tioning for a period up to six hours, but if there is reason to suspect him of a crime, up to twelve hours. If then the suspicion does not appear strong enough to justify his imprisonment, the police must set him free.

¹⁵ THE SWEDISH PROCEDURE ACT OF 1942, c.24, §§5, 1.

¹⁶ THE DANISH PROCEDURE ACT OF 1916, §§771, 780.

¹⁷ See Bratholm, *op. cit. supra* note 1, at 353.