

# DECISION OF DETENTION AND INTERROGATION OF A SUSPECT

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## I. *Guarantee of Due Process in Article 31 of the Constitution of Japan and Process of Criminal Investigation*

1. The phenomena in which the guarantee of due process in Article 31 of the constitution of Japan becomes loose might arise in the process of criminal investigation.

Art. 33 of the constitution (guarantee for requirement for arrest), Art. 34 (guarantee for arrest and detention), Art. 35 (guarantee for search and seizure), Art. 36 (prohibition for torture), Art. 38 (restriction of evidence of confession), all of them make mainly the process of criminal investigation, specially the compulsory investigation, an object of regulation, and, under the idea of Art. 31, give strict controls on the procedure in which human rights are apt to be injured because of the necessity and the discretionality of investigation.<sup>1</sup> The purpose of investigation lies, needless to say, in finding of offenders and obtaining of evidence. Its function is a preliminary action for prosecution. Its sphere of action extends from the stage of searching offenders to that of finding and preservation of offenders and moreover of prosecution. In its sphere, as a whole, the discretionality in investigation strongly prevails. It may be said that a discretionary action is an essential factor of investigation. Without such a discretionary action we cannot expect effectiveness of investigation.<sup>2</sup> Hence, it follows that there are many risks to injure human rights. When on the background of strong state power the discretionality combines with a procedure without formality, we cannot deny the risk of abuse. For the investigation is carried out against a suspect called a destructor of legal system. It is already well known that under Arts. 31, 33 and 38 of the Constitution the present Criminal Procedure Act, conscious of such character of investigation, has attempted to make an epoch-making reform for a fundamental structure and procedure of investigation.

2. The place on which the idea of law is severely opposed to the reality and many difficult problems are provided is, after all, that of the decision of detention in investigation.<sup>3</sup>

The decision of detention in itself belongs to the sphere of justice, not to investigation itself. But where it contacts with investigation and is used as a means of investigation, pro-

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<sup>1</sup> Arts. 33, 34, 35, 36, 38 of the constitutional law guarantee the pretrial privilege, control the discretion of the police and the prosecutor, and materialize the idea of due process.

<sup>2</sup> The question of discretion is the most serious one for the criminal procedure. The course of crime investigation by police or prosecutor, where the consequences of official action directly affect a citizen's freedom and property, contains serious matters about exercise of discretion.

<sup>3</sup> Difficult problems arise as to whether police ought to be entitled to conduct in-custody investigation, particularly interrogation of a suspect, and, if so, under what circumstances, when arrest-detention is available positively as a way of attempting to obtain evidence.

blems occur. It can be said that all of problems in detention in investigation occur in relation to how an investigation utilizes a decision of the detention in reality. On occasions the way of utilization may produce risks to break easily the fundamental meaning of Art. 31 of the Constitution. It is our reality that the necessity and the discretionality of investigation tend to be concentrated on a purpose-fitting use of detention. And we cannot deny the reality that the right of defense of a suspect in detention is extremely weakened and its disadvantage will exert great influence upon future litigation.

The decision of detention, observing from the side of conduct in process, is a compound conduct which contains both a justice by a judicial institution and its actual execution, and an investigator has only a position as a declarant to require the detention as its justice and a position as a conductor to execute justice. The subject of conduct and competence in decision of detention remains in judicial institution to the last, this does not essentially alter in the process of investigation as well. Of course, a detention on a process of investigation arises from the necessity of investigation, so it cannot be separated from investigation. The above-mentioned necessity of investigation is fulfilled, when an investigation, (to prevent danger of flight of a suspect and destruction of evidence, and from the necessity to preserve a suspect beforehand for the preparation of prosecution,) requests to judiciary institution to decide detention and obtains the decision of detention by judiciary institution.<sup>4</sup>

As to the use of decision of detention in investigation our law ideally shows such limits, but an alive actual investigation, the institution as an idea may have possibility to exceed easily its frame.

The decision of detention in the process of investigation takes place in the developing process of investigation and it is only one phase of the process of investigation.<sup>5</sup> In a condition of a stage of detention itself, a suspect cannot be prosecuted. Although reasonableness of suspicion of offense can be a requirement for decision of detention, it cannot be a substantial requirement for charging decision. It is needed that investigation proceeds from reasonable suspicion of offense to sufficient suspicion with which the prosecution, namely requirement for judgment of guilty, can be carried out.

To jump from the stage of detention of a suspect to that of prosecution we must gather evidences at beginning of the detention and do more evidences than them based on the first. There we find a special meaning of the detention in process of criminal investigation. There might be necessity to interrogate to a suspect in detention regarding as the already obtained evidentiary materials and to confirm evidences. As a method to confirm the identity of an offender and a suspect by witness (victim, eye-witness) we need the form of investigation to make witness observe a suspect in detention. The volition of investigation to get statements from a suspect about crime facts as a new obtaining of evidence may occur. Under circumstances an investigator could have suspicions for a suspect under detention about any offence other than the special offence as an object in detention. When requirements for an arrest warrant is strict like our present system, it is never rare that someone is suspected of several

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<sup>4</sup> In our criminal procedure, as the West Germany criminal procedure, it is one of the reasonable causes of arrest-detention.

<sup>5</sup> The procedure after the arrest stage in the Anglo-American system takes the form of the judicial course. In our criminal procedure, an arrestee is not brought before the magistrate as soon as practicable, but is remained in the custody of the police for 48 hours after arrested, and is under detention for investigation for the days.

offences and that some of them satisfy requirements for an arrest warrant, others not satisfy.

In such a case, it will be a realistic problem whether it is permitted or not to interrogate a suspect in detention about another offence which does not satisfy requirements for warrant. The all above-mentioned are the problems that arise about use of the detention system in the process of criminal investigation.

3. The existing code of criminal procedure provides various legal regulations of the decision of detention in criminal investigation, but these regulations mainly give us standard of judgment (Arts. 207, 60, 62, 64, 208) and that of action (Arts. 204~206, and Rule of Crim. Proc., Arts. 147~153) on the occasion of admitting decision, and they do not make clear the standard for limitations about the use of the detention system in investigation. Of course Art. 60 of Criminal Procedure Act has the function as a criterion, that is, it works as a criterion of judgment in making decision. So we have no direct regulations about the scene in which execution of justice contacts with criminal investigation in reality; in other words about what the use of decision of detention in investigation should be. In that point there is a danger that a decision of detention might be unduely abused. The meaning that the said phenomena in which the guarantee of due process in Art. 31 of the Constitution breaks down, may happen in the process of investigation, in fact, is largely based upon the consciousness that in such an important phase of contact the guarantee regulation lacks. Regarding as the method of the use of decision of detention in the investigation and how far an investigator can interrogate to a suspect under detention, namely, limitation to be permitted after all, we have no choice but to search for the criterion from its theoretical viewpoint in the light of the existing legal system. It is very regrettable that because of unclerness of law, judicial control on the procedure by judicial institution can not accomplish its function sufficiently. As for the sphere of the process in which a phenomena of loosening the guarantee of Art. 31 of the Constitution is likely to occur, the judicial control on the procedure by a judicial institution must work effectively, and so as to guarantee the due exercise of its function we should illuminate the above-mentioned criterion theoretically.

The main function of the existing writ system is that the system makes judicial control on the procedure directly and concretely, and attempts to secure balance between the competence of investigation and human rights. So its guaranteeing function must operate not only in the original step of compulsory deposition (issue of warrant), but in the ex post facts executing phase in reality. Thus, the importance of control on the process is keenly recognized both for the phase of contact between justice (decision of detention) and investigation (the use of detention) and for the crossing phase between investigation of a suspect under detention and a suspect's advantage of defense (in particular the right of silence of a suspect).

## II. *Decision of Detention as Idea*

1. The decision of detention in the existing law is a pure justice by which a judicial institution orders the accused or a suspect to be in detention for a definite term and in a definite place of the special decisions of detention by an investigator (a prosecutor) as seen in our old law<sup>6</sup>

<sup>6</sup> In the old code of our criminal procedure, the prosecutor had a right to order the detention against a suspect under the special circumstances (Art. 123).

they are not permitted at all. It can be considered as a fundamental demand of the existing law to provide a clear distinction between a judicial process and an administrative process in criminal procedure. It is an indispensable prerequisite so as to realize a fair justice which is the purpose of criminal procedure, so for the realization of that purpose the present law as to the phase of construction of organ<sup>7</sup> and that of procedure<sup>8</sup> respectively attempts to drive home the idea of disjunction of judicial process from administrative process. The meaning of abolition of decision of detention-system by an investigator is essentially no more than the embodiment of such idea.

A decision of detention is a specific justice in that it makes a direct and compulsory, an intervention to a suspect's right of liberty before the settlement of judgment. Theoretically it is inconsistent with the accusation's system in action to impose a compulsory restriction upon the right of liberty of the accused who is one of parties in the developing-process of litigation. As a result of decision of detention, not only a physical liberty of the accused, but his liberty of defense in litigation can not help being limited.

In the existing law which intends to strengthen substantially the right of defense in litigation, decision of detention certainly ought to be expressed as a specific existence. Strengthening the accusation-system on the one side, further on the other side approving the existence of decision of detention which is contrast to such a system, both of them show nothing more than that complicated character of litigation. The accused is the subject of litigation, and at the same time the addressee of prosecution. The accused has rights to appear in litigation as a subject of litigation who corresponds to a prosecutor and to participate in the development of litigation and the formation of basis of judgement, at the same time he has an obligation to appear in litigation and cooperate as to litigation, for the litigation concerned shall confirm the existence of his criminal responsibility. Without the positive participation of the accused, there can be neither realization nor development of the relationship in litigation. The more the system of litigation is made to be accusation's system, the stronger this should be conscious of. From these consciousness, the present law strengthens the right of defense of the accused on the one side, on the other side, recognizes decision of detention to preserve the accused under a strict limitation.

We must realize that the essential function of decision of detention is a negative one. When the danger that the accused unduely will escape from litigation is recognized, it is necessary to prevent its danger beforehand and preserve the secure and prompt development of a further litigation. Decision of detention is admitted as an inevitable disposition in such an occasion, its function is limited exclusively to the prevention of danger and the preservation of the accused. As for the extent of the prevention of danger, it is an important issue related to the status and function of the accused in litigation. The present law, as Art. 60 of Criminal Procedure Act expresses clearly, has limited its extent to the danger of destruction of evidences and that of escape. From the viewpoint of guarantee of right to silence and solidification of accusation's system, it raises much question to make the prevention of danger of destruction of evidences the function of decision of detention. However, we can

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<sup>7</sup> The clear discriminate between the function of the court and one of the prosecution is of indispensable essence of fair trial and procedural fairness guaranteed by Art. 37 of the constitution.

<sup>8</sup> The prosecutor can exercise wide and strong discretion in the decision of the prosecution. At this point, the prosecutor has a quasi judicial character. This, however, is a discretionary power which must be controlled by the possibility of a review of the substance of the decision by an independent court.

argue that the fundamental meaning of law is to make its decision the preserving function for the sake of the prevention of danger of escape of accused and the secure development of litigation. Thus it must be said that decision of detention essentially has not a positive function aiming at the obtaining of evidence.

If such a positive function were admitted, the position of the accused would be extremely injured, and the guarantee of party-equality would be destroyed.

2. In the composition of litigation with accusation's system, the disadvantage of the accused in defense arising from decision of detention must be always taken into account. The meaning of limitation by which decision of detention as an idea of the present law makes its function a negative one as the said is based on the consciousness of accusation's system. It is necessary to consider in terms of institution that the disadvantage of the accused in defense with detention should be excluded to the possible extent. So our law provides the accused with a series of regulations of guarantee, namely the right to see and have the conversation with his counsel and a third person (Arts. 39, 79), the right to demand for bailment (Arts. 81-I, 89, 91), the right to demand for challenge of detention grounds (Arts. 82). But even with these regulations of guarantee, still we can not deny the disadvantage in defense from which the accused suffers by decision of detention in reality.

In the decision of detention in the process of investigation, the disadvantage in defense still more increases. The ideal way in decision of detention could not alter essentially also in the process of investigation, but we can not overlook the substantial alteration under the existing structure of investigation. As the said, the function of decision of detention is a negative one whose substance is pervention and perservation. The efficiency of its function can not be expected without being in relation with construction of accusation's system. When the construction of litigation is an inquisition's type, the function of a decision of detention as an idea can not but change in actuality its essential figure. In the investigation of inquisition's type, the possibility that decision of detention is utilized as a means of investigation because of necessity of investigation would arise. Its formula is such that an investigator directly interrogate a suspect in detention for the purpose of obtaining evidence and investigation, and by the interrogation we form for the first time conviction of the suspicion of offense.

We can not help admitting that the existing structure of investigation is substantially an inquisition's process. While it may be said that the dualism is adopted in the construction of organ, we can not argue that the separation of competence between a judicial police officer and a prosecutor will secure institutionary a heterogeneous competence-separation,<sup>9</sup> and it is not enough to strength the right of defense which is an essential demand in accusation's type.<sup>10</sup> Moreover, over the process, a discretion of an investigator operates powerfully, especially as to the disposition of a suspect, the powerful competence called as a discretion's system in prosecution is admitted. All of them belong to factors of inquisition's type, accordingly so as to name the present structure of investigation as the accusation type there exist

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<sup>9</sup> The situation and the role of the prosecutor in our criminal procedure is not so as the prosecutor in the Anglo-American system. The prosecutor is not only a trial counsel or "a house counsel" for the police, but has the power of investigation separately from the police department.

<sup>10</sup> An arrestee needs a most strongly lawyer who advices him at the arrest stage. Notwithstanding a suspect arrested has to stand before the police investigation without having a freely advice of his counsel.

too much abstracting causes.

Of course it can not be said that there is no danger of misuse of decision of detention in the investigation of accusation's type. In the Anglo-American legal system in which the accusation's method of investigation is adopted, the misuse of decision of detention in investigation has been dealt with as a real problem.<sup>11</sup> But we ought to bear in mind that the circumstance of problem-institution is dissimilar in the investigation of inquisition's type. While in the former the interrogation by the formula of so-called "third degree", forms a focus of the problem, in the latter inquisition's type the problem arises regardless of the step of investigation,<sup>12</sup> furthermore it becomes an issue in the form of abuse of compulsory investigation.

The guarantee of the existing writ system is important. To secure this substantial function (negative function) in decision of detention, strict limitations in procedure are imposed on every phase of demand, issue, and execution of writ, and a judicial control over them by judicial institution are strengthened. It must be kept in mind that in the present writ-system exist some limitations in the aspect of its function, and for their limitation are always there danger of abuse of the right of investigation. Above all the interrogation about a suspect in detention is legally permitted in the present law. The writ-system is admitted on such a construction of investigation. Although issue of writ has a function to secure the original function of detention, in the actual aspect of execution it can not deter the undue use of decision of detention in investigation. There is no relief for its illegality without expecting the judicial control on the procedure by judicial institution in *ex post facts* litigation.

This thesis has intended to survey the limitation to be permitted about the competence of interrogation of an investigator which the existing law admits for a suspect in detention and intended to point out the importance of judicial control on the procedure in that aspect.

### III. *Interrogation for a Suspect in Custody*

1. The present law invests officers with the capacity of interrogating also a suspect in-custody (Art. 198). However, a suspect has a freedom of choosing whether or not to accept the interrogation, not being obliged.<sup>13</sup> In obtaining statements, the officer is obliged to notify a suspect, beforehand, of the right of silence, it being of course forbidden to use such illegal means as threat or violence (Art. 319, par. 1). The law in force, nevertheless, gives as a principle the officer the capacity of interrogating a suspect in custody. As far as the statements, even of the suspect in-custody, do not conflict with the forbidden clause of Art. 319, par. 1 and satisfy the conditions of Art. 322, the record of the statements is granted with admissibility of evidence and possibility to be an evidence for guilt. This is important not only to a suspect himself but to the idea of the criminal procedure which should guarantee legality and reasonableness of process.

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<sup>11</sup> See, Wayne R. Lafave, "Arrest," p. 490 and "Opinions Announced June 13, 1966," *The United States Law Week*, 34, 4521-4554.

<sup>12</sup> In practice of our criminal procedure, the danger of "third degree" methods is not so clearly recognized as in the Anglo-American system. Police in-custody investigation takes place in a wide scope without having a special doubt.

<sup>13</sup> The prevailing theory holds an opinion that a suspect in the detention has a duty of attendance before the investigator in spite of freedom of statement against the investigator's questions.

Before we discuss the limits within the interrogation for a suspect in-custody, the significance of the interrogation in the course of investigation must be clarified.

We shall first discuss this problem from the viewpoint of the suspicion of crime. In the earlier stage of the detention, the suspicion of crime must be considered to have attained at least to the reasonable degree, because that is the qualification for the detention. Such a degree of suspicion of crime is not enough, however, for officers to determine the prosecution. In order that the process achieves the prosecution, must be obtained evidences sufficient enough to determine and sustain the prosecution, based upon the evidences already in hand. The evidences themselves obtained by the time of detention include some questionable and crucial points, therefore, it will be often necessary to supplement or correct those evidences through the direct interrogation for a suspect. In order to be convinced of an offender, it is most effective to interview directly the suspect who is supposedly a most probable offender, and to obtain from him statements on the criminal fact. It will also be necessary to confirm the identity of an offender by presenting the suspect to sufferers, witnesses and so on. It is a reality of investigation in the period of the detention that the more efforts and sufficient time are required to obtain evidences which form the ground of the development of the suspicion, from the reasonable suspicion to the suspicion for charging and further to the suspicion for guilt.<sup>14</sup> In some cases, of course, a suspect is already identified as an offender in the earlier stage of the detention, and this is most desirable. A general case, however, is that the convinced suspicion for guilt is obtained through the interrogation in the detention. Thus, from the viewpoint of the suspicion of crime, the interrogation for a suspect in custody can be classified as an important step for obtaining evidences to develop the reasonable suspicion up to the suspicion for guilt.

The fact that the burden of proof in a trial court is solely on the part of prosecutors naturally has an great influence on the structure of obtaining evidences in the investigation. The officers must obtain not only necessary evidences to decide the prosecution but also those sufficient to sustain it and to support a guilty judgment. This is quite different from the Anglo-American legal system which adopts the distribution of burden of proof and the rule of presumption. In the legal institution which imposes the burden of proof only on the prosecutors, it is impossible to take the accusation's type in the organization of investigation. Therefore, as to a suspect in-custody, too, investigating officers will be obliged to obtain as sufficient evidences as possible to sustain the prosecution against him and to be convinced of his guilt.

2. So far, we have clarified the significance of the interrogation for a suspect in-custody from the viewpoint of the suspicion of crime and obtaining evidences. Now we have to discuss, from the viewpoint of the right of defense, the character of the interrogation for a suspect. The important guarantees for the right of defense of a suspect are, of course, the right of silence and the right of communication with his lawyer, and we must make clear how restricted these two important rights of a suspect have been in the actual interrogation in-custody.

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<sup>14</sup> How to set necessary time for in-custody investigation is the most serious matter, concerning with balancing needs of investigation and defense interest of an arrestee. The normal rule of our criminal procedure is that detention for investigation shall not exceed ten days, but where a judge finds that "unavoidable circumstances" exist, the detention may be extend ten or, in the case of certain specified crimes, fifteen days. "Unavoidable circumstances" is determined by a judge's discretionary judgment in practice, prolongation of detention-period is permitted by a judge.

First, the environment of the interrogation. In most cases, the interrogation for a suspect is carried out in the particular spatial environment of the so-called investigating-room within the investigation agency. This room is, so to speak, my-home of investigation for the officers. They can freely converse with their colleagues and exchange each other the knowledges and techniques for interrogating a suspect under the direction of their senior officers. They have, above all, advantages in that they can interrogate the suspect at the time and in the circumstances as they wish. Adding to this easiness at my-home, they are in the reassured position as interrogators. To the contrary, a suspect is in a quite disadvantageous position. His freedom is, first of all, restricted by detention. His communication with outside, especially with his lawyer, the only advisor and protector of his, is limited,<sup>15</sup> therefore it possibly happens that he is forced to answer, without the advice of his lawyer, the officer's questions which he does not truly understand. While the investigation has the character of struggle for discovery of a crime, a suspect does not hold the means of defense effective enough to encounter with the aggressive inquiry of the officers. Nonetheless, tricky means (for example, leading questions) which may be used in the interrogation can not be blamed. A suspect, despite of notified of the right of silence, can not freely exercise the privilege during the interrogation in his shrunk inner state under the particular circumstances of the investigating room.<sup>16</sup> Even if a suspect could choose the way to state, his statements are apt to be influenced by the interrogator's will. Although not under the physical pressure, a suspect is undeniably in the situation which is under the control and discretion of the investigating officers. He is likely to make statements which are formally voluntary but substantially not truly intentioned, being influenced by the officers. Such particular inner state of a suspect must be necessarily considered in discussing the character of the interrogation for a suspect in-custody. As to the interrogation for a suspect in-custody, today, our attention must be paid more to the shrunk, particular inner state of a suspect caused by the special circumstances in which he is placed, to its influence over the dignity and personality of an individual and to the possibility of unfair interrogation than to the dangers of violation of personality such as torture and threat.<sup>17</sup> The disadvantages in defense in the earlier stage of procedure exercise greatly influence upon the after-status of a suspect in the procedure. Although the present law provides the strict regulation on the admissibility of evidence of the statements by a suspect, the advantages of a defendant guaranteed in the law are realized in poor efficacy because of the technical difficulties in proving.<sup>18</sup>

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<sup>15</sup> A suspect arrested has a right of access to a counsel, interviewing with a counsel directly without an observer (Art. 39), but prosecutor, when there is a reasonable ground of about needs of investigation, can appoint the day time, place and hours for access to a counsel (Art. 39). A suspect has not a right that he can have counsel present during the course of the questioning.

<sup>16</sup> In custodial interrogation, a suspect is questioned by polic officers, prosecuting attorney in a room in which he is cut off from the outside world, in a police dominated atmosphere. A suspect is placed in a psychological state where he has to answer against the investigator's question with a timid mind and can not select advantageous answers for him. In such an atmosphere, the privilege against self-incrimination is not effectively guaranteed.

<sup>17</sup> It can not be denied that custodial interrogation has a dangerous character contrary to the privilege against self-incrimination. The privilege against self-incrimination has its origin in a protest against the inquisitorial and unjust methods of interrogating accused person which injury the person's freedom and dignity. We ought to recognize clearly the illegality character of custodial interrogation.

<sup>18</sup> It is commonly difficult to prove that the accused's statement is caused by violence or coercion. In-custody interrogation by police is entirely prohibited in Scotland law system, because it is inherently coercive or because investigator's coercion is so difficult to prove.



Finally, the interrogation by policemen must be discussed. A usual place where a suspect is actually detained is a house of custody in the police-station. And it is the reality that most of the interrogation for a suspect in-custody have been carried out by policemen. This is important from the viewpoint of procedure.<sup>19</sup> In the present law, arrest and detention are originally different acts, being also in different steps of process. As to the detention, the prosecutor is responsible for its execution, being very different from Anglo-American process in which arrest and detention are unified and the period of detention is short. There is much possibility that the interrogation for a suspect in-custody is widely carried out by policemen other than the prosecutors who direct the execution of detention. In the course of process from arrest to detention is already loosened the dualistic organization of investigation which is the basic principle of the present legal institution. Here is implied the danger that the detention in investigation goes beyond its original function and is utilized for interrogation to a suspect.

From the above discussion, it is duly concluded that the interrogation for a suspect in-custody has the inquisitorial character with dangerous factors. However, the present institution still admits in principle the interrogation for a suspect as a method of investigation. After all, the idea of law must be interpreted that on the one hand, it excludes as much as possible dangerous factors of interrogation, and yet affirms, on the other, the interrogation permissible to a certain extent.

3. When we consider the limits of the interrogation for a suspect, with the above discussed points in mind and along with the idea, in the present law, of balance of interests between the investigation and the defense, the following criterion will be considered according to the kind of evidence obtained.

(i) Obtaining of the physical evidence

What is meant here by obtaining of the physical evidence is one which is carried out in close connection with a suspect's state of custody. Obtaining of the physical evidence without the direct connection with the state of custody is naturally admitted regardless of the detention, according to the necessity of the investigation under the only restriction of writ-system. Questions arise in case that there is close connection between the state of custody of a suspect and the obtaining of evidences. As to this point, the present law provides a certain criterion in relation to the arrest (Art. 218, par. 2 to par. 5). This is, while the warrant is required for a physical examination, no writ is necessary in principle for obtaining the physical evidences such as taking of finger or foot prints, measurements of height or weight, or a picture-taking of a suspect under physical restraint. And the general explanation for this is that these acts are substantially included in the disposition for physical restraints. But I have some doubts of this interpretation. Such acts as taking finger or foot prints, the measurements of height or weight, or picture-taking are done to obtain physical evidences for recognizing the identity of a suspect with an offender, and hold a special significance in that they are most effectively done on the occasion that a suspect is under restraint. That the detention of a suspect should not include, as the matter of course, the acts to obtain evidences is as already mentioned in the ideal function of detention. As I have repeated, these acts of obtaining evidences is indispensable for identifying a suspect with an offender. Besides, those acts can be carried

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<sup>19</sup> In the Kansai district of our country, it is said that seven days within ten days (a period for detention investigation) are spent at the police.

out with best effectiveness when a suspect is under restraint. Therefore, my interpretation is that these acts attached to the arrest may be admitted without a writ from the viewpoint of enriching evidences to prepare for the execution.<sup>20</sup>

A so-called "line-up" of presenting a sufferer or witnesses to a suspect or letting them observe him should be also admitted as a method of confirming the identity of a suspect with an offender. This kind of act to obtain evidences, which is generally done in the actual investigation, is essentially a kind of verification aiming at the observation of a suspect's appearance, and it is the most effective way to confirm the personal identity. This method, despite its character as a verification, must be considered to be legally done without a writ, as it is a personal observation carried out in connection with and attached to the physical restraint.

It is questionable, however, that walking a suspect to the spot of a crime is also permitted as a means for identifying a suspect with an offender.<sup>21</sup> Although this does not directly enforce a suspect to make statements, it is different from the above mentioned "identification" through the observation of the appearance of a suspect, etc., and is naturally related to the doctrine of right against self-incrimination in that the means of obtaining the evidences of criminal fact is here to observe the attitude of a suspect in the verification-spot. Therefore, the present law which firmly guarantees the right of silence must be interpreted to be prohibiting the 'walking' unless a suspect voluntarily approves. While in the former legal system, the 'walking' of this kind was undoubtedly done in reality, it should not be recognized in the investigation under the present law which provides a suspect in custody with a privilege against self-incrimination.

It is also a question if such tests of the inner state of a suspect as using a lie-detector, would be justified as a means to obtain evidence of a criminal fact. This kind of test is not directly related to the doctrine of right against self-incrimination, because it is not intended to obtain statements of a criminal fact itself, but because machines are utilized and questions are asked as means of observing the inner state of a suspect. This type of act of obtaining evidences, however, includes a positive experiment to examine by machines the mental and physical reaction of a suspect in-custody, and it is quite different in its character from already discussed acts accompanying the physical restraint such as taking of finger prints, photographs etc., although both are the means for physical observation. Therefore, this kind of act of obtaining evidences needs the voluntary approval of a suspect, and can not be a means for legal investigation recognized as a matter of course.

As to the physical observation, it will be necessary, for example, to examine the degree of drinking of a suspect under the physical restraint in such cases against the Road Traffic Law §65, §18-I-2 as intoxicated or drunkun drivings. Traffic cases require urgent solutions and special provisions are desired concerning those which need immediate examinations such as the degree of intoxication. It is a question whether the inspection in such cases could be considered in accordance with Art. 218, par. 2 of the Law of the Criminal Procedure or it should be interpreted to be a kind of physical examination for which a writ is needed. The degree of intoxication must be examined urgently and a writ-process will make the urgent and adequate measures difficult. So can such an inspection be classified as a special act legally carried out concurrently with the arrest?

<sup>20</sup> In practice of American jurisdiction, most process to obtain the physical evidence are made without warrant and incident to a lawful arrest. See, Wayne R. Lafave, *ibid.*, p. 311.

<sup>21</sup> See, Wayne R. Lafave, *ibid.*, p. 313.

(ii) Obtaining of statement-evidences

Under the present legal system, the capacity of officers to interrogate a suspect in-custody for the purpose of obtaining statement-evidences should be recognized. The same is true with policemen, too. Obtaining of statement-evidences from a suspect in-custody by policemen is prohibited in the Anglo-American legal system as so-called "third degree."<sup>22</sup> However, in our present law which does not take the accusation's type of investigation as in the Anglo-American system, we can not deny it so thoroughly.<sup>23</sup>

In fact, we should admit the necessity of direct interrogation for a suspect in-custody. Evidences obtained before the detention, in most cases, are insufficient for a prosecutor to charge a suspect, and statement-evidences already obtained from a suspect or a witness include unclear and questionable points, and so it will become necessary to supplement those evidences by directly interrogating a suspect. Besides, the present system of investigation is not possibly said to be in a technical stage sufficient enough to make the interrogation for a suspect unnecessary. If we completely deny the interrogation for a suspect, the effective investigation would be impossible in the present technical stage.

Although the interrogation for a suspect in-custody for the purpose of obtaining statement-evidences should be recognized, there is a strict limitation to it. Because obtaining of statement-evidences are done by officers to a suspect in secrecy (in the absence of his lawyer) and under the physical restraint, an unlimited interrogation should not be justified. The question is to what extent the interrogation for a suspect is permitted. To conclude first, the interrogation for a suspect utilizing his state of custody and solely intended to obtain confessions should be prohibited as illegal. Such an interrogation goes beyond the original function of the detention as a judgment done by judicial officers and abuses it as a means of obtaining confessions, and so it should be considered to substantially violate the privilege against self-incrimination of a suspect enforcing the confession. It will be practically difficult, though, to prove the intention on the part of officers of abusing the detention only as a means of obtaining confessions. Theoretically, however, we can not help concluding so.

As for obtaining statement-evidences to make sure the credibility of the confessions or the statements of a suspect obtained before the detention, or obtaining evidences to prepare for the prosecution by turning to a suspect for statements, based on the evidences previously obtained, I understand that there is no intention in them of abusing the detention and they are included in the legal interrogation for a suspect.

(iii) Personality-investigation

It is, of course, a legal interrogation for a suspect to directly ask a suspect for statements on the facts for the discretion of penalty such a suspect's career, his life environment, the motive of a crime, his situation after a crime, or his personality. In our legal institution, the principle of discretion in charging is adopted and the right of discretion is widely recog-

<sup>22</sup> Police in-custody interrogation is not prohibited generally in the state jurisdiction of America. All state courts agree that in-custody interrogation does not itself render a suspect's confession inadmissible. See, Wayne R. Lafave, *ibid.*, p. 385. We must pay attention to the principles of Escobedo Case—the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

<sup>23</sup> The process structure of the pre-trial course in our criminal procedure is the inquisitorial type rather than the accusatorial type, regardless of approaching the Anglo-American criminal procedure.

nized to a prosecutor as to whether to prosecute or not. In order to adequately exercise the right of discretion, it is necessary that a prosecutor has charges to make personal contact with a suspect and obtain sufficient basic data. It is compatible with the accusatorial character to carry out a discretionary criminal disposition against a suspect only according to the unilateral data on the part of investigators. This interpretation will be inevitable under the present legal system which recognizes the objective status to a prosecutor and adopts the principle of discretion in charging.<sup>24</sup>

#### IV. *Investigation to a Suspect for Another Crimes*

1. Can an investigator interrogate regarding a different crime to a suspect in detention, at the opportunity of the detention? This problem is also one of crucial boarder-line's problems as to an investigation of a suspect. This kind of problem has been already dealt with in a field of judicial business,<sup>25</sup> in addition, is a theme which has been tried to deplore.<sup>26</sup> However, there was left to be surveyed moreover.

The problem of whether an investigation for another crimes to a suspect in-custody is permitted or not, has been discussed as the most serious one concerning an investigation of a suspect in the field of American law, as well.<sup>27</sup> The raising of the problem has been, in general, done in the following contents. Though an investigator held a suspicion of a felony as to a person, adequate evidences to arrest the suspect do not exist. However, evidence for arrest so long as the minor crime concerned happens to exist about the suspect. In such a case, an investigator, at first, requires warrant as to the minor crime, and by that warrant, he carries out to interrogate regarding as the felony at the opportunity of the arrest of the suspect. Although the investigation for another crimes is different a little in a substance of the search, it could be classified mainly in above mentioned. Namely, the important point is that a lawful arrest-procedure for a minor crime has been utilized only as the mere instrument for the purpose of investigating of the felony.

It can be said that "arrest or detention for another offence," what we call, belongs mainly to a similar pattern. Regarding as the investigation to a suspect for another crimes, different

<sup>24</sup> A prosecutor is in a position to gather advantageous data as well as disadvantageous one for a suspect, and to require due application of law (Prosecution Bureau Law, Act. 4)

Personality-investigation to a suspect on the part of a prosecutor has not a particular significance under the legal system that an investigator is, like Anglo-Saxon law, preoccupied with the preparation of a prosecution, where data with regard to decision of sentence are treated as an object of an interrogation before judgment, as different from data for decision of guilty.

However, in the construction of investigation granting an objective position (Of course, is there a subjective position on the other side) to a prosecutor, at the same time, taking the form of discretion system, like our legal system, a prosecutor has on obligation to gather a vast extent of data regarding criminal-decision as well as criminal facts.

<sup>25</sup> As a well-known judgment in a lower court which pointed out the illegality of arrest for another offence—though a consideration of premise in the reason of judgment—, see, *Hanrei-jihō*, No. 369, p. 6, "Judgment in Urawa District Court, March 11, 1964."

<sup>26</sup> Tamiya, "Compulsory Investigation, *Sōgō Hanrei Sōsho*, No. 16, p. 210 ff.; Kamo, "Legal Problems of Arrest for Another Offence," *Hanrei-Jihō Hyōshaku*, p. 71 ff.

<sup>27</sup> In this respect, see, Wayne R. Lafave, *ibid.*, p. 354, 372, 376. There Lafave discussed that problem in detail.

points are included in the following.

(a) The crime as an object for arrest or detention, is not a realistic object, but the true purpose of the investigation is oriented to another crimes. This is clearly revealed in that with regard to the pattern of an investigation called "arrest or detention for another offence," two kinds of crimes—a minor crime and a felony—are the subject of the investigation, in addition, lawful procedure for arrest or detention as to a minor crime proceeds the arrest or detention regarding the felony. Observing it in part, the arrest or detention as to a crime is carried out because of adequate foundation, and even at an opportunity of detention of the suspect, competence of investigation for another crimes should be permitted. Then, when the adequate reason was gathered, a disposition through warrant of another crime should be required. It might be fairly said. Regarding as such a mode of investigation, however, it is important for us to observe it in its entirety. First, it must be noticed that felonies which does not satisfy the requirement of arrest or detention have been placed under the main object of investigation in a situation of in-custody. And yet, arrest or detention for minor crimes has been utilized as an only tempting means for enabling an investigation of felonies. We should pay attention to this fact. A procedural guarantee in compulsory disposition has been actually abused not as that of defense of interests for the prosecuted or the suspect, but as expedient means of investigation under a subjective intention of investigator. It must be realized that the real purpose of writ-system in the Constitution has been lost.<sup>28</sup>

(b) In the investigation of a suspect for another crime exists a doubt of going extremely beyond the essential function of arrest or detention as an idea. While the procedure is formally lawful, the arrest or detention has been done with an object of investigation for another crimes. In fact, investigations as to a suspect in-custody are carried out. Arrest or detention is an unavoidable disposition in order to prevent a danger of an unlawful escape of procedure and preserve the status of the prosecuted or the suspect. Hence, its original function lies in the negative one whose substance is prevention and preservation. Needless to say, the meaning that arrest or detention shall be restricted in such a negative function, lies in protecting its legitimate interest of defense of the prosecuted or the suspect, or in maintaining its equity of offence and defense of the concerned. In this sort of pattern of investigation, however, arrest or detention aims exclusively at investigating for another crime, so they go far beyond their original function. Judging from this fact, the restriction of compulsory disposition which intends the equity and maintenance of offence or defense has been broken down, in addition, carried out with an advantage only for one of the concerned. It must be kept in mind that in this kind of investigation-pattern a guarantee of due process in Art. 33 of the Constitution intending to restrict legally the discretionary decision of investigator and protect the human right, has been substantially vacant. Also in Anglo-American law, its illegality is strictly pointed out in respect to an arrest whose purpose is to investigate another crimes. In the present system of law that permits a comparatively long term of free-custody, it is necessary to interpret the restriction with regard to the interrogation under arrest or detention.

<sup>28</sup> The function of writ-system is to inquire into its reason and to restrict an extreme investigation beforehand through a concrete judgment when a prosecutor carries out a compulsory investigation.

In the case of arrest or detention which aims at investigation of another offence, it will bring about both consequence avoiding substantially its deterrence function beforehand in writ-system and arrest or detention of those who can not be arrested or detained.

2. In the former item, we described the illegal interrogation for another crimes. It is, in turn, necessary to point out an interrogation for another crimes to be permitted and to compare both of them.

(a) In the light of the substance of suspicious facts as an object of arrest or detention, there are similar crimes deemed to be committed in the past by the same person, or there are common crimes in respect to means and ways. And yet, when there are considerable reasons which would otherwise lose an opportunity for investigation, we can initiate to interrogate its crime even if it is another one. The case in which an interrogation for another crimes to a suspect in-custody is condemned as illegal one, is when its interrogation comes to be a latent and principal purpose for arrest or detention. In the case above mentioned, the principal end of investigation is persistently directed to the crime-suspicion being an object of arrest or detention, another crimes only happened to be an object of interrogation at the same opportunity because they have resemblance in substance and means of crimes. It, in particular, does not infringe upon interests of a suspect. Also in that case, however, there ought to be necessity and reasonable reasons for investigation. An unrestricted interrogation should, nevertheless, not be permitted because a suspect is under in-custody. There should be a considerable ground to infer that another crime has a specific substance, in addition, the one and the same person has committed its crime. It is a sort of investigation by prediction to interrogate a suspect under in-custody as to an unspecific crime-suspicion. Moreover, such an investigation will unlawfully intervene in an individual domain of private life, and substantially only compel a suspect to testify.

(b) Also when a suspicion arises in the process of interrogation of crimes to be a cause of arrest or detention that the same suspect committed another crime, we ought to understand that the interrogation for another crime shall be permitted. It would be, however, opened to question if its suspicion for another crime takes place in parallel with the suspicion to be an object of arrest or detention or has already taken place. We should, first of all, call for the decision of arrest or detention about crimes whose requirements were satisfied, because of lackness of requirements of arrest or detention regarding as another crime. Then we should interrogate another crime at its opportunity of in-custody, and as a result of its interrogation we should require a warrant. Thus, the above method will substantially approach to an interrogation to be an object of prohibition. But also in this case, when a main object of interrogation is not in another crime, and interrogation of another crime is merely done relatively attendant on the principal interrogation, it can not be said to be an abuse of the right of interrogation.

(c) In respect to a conspiracy-case, not only criminal facts by a suspect himself, but also those by other accomplice can be investigated. A conspiracy-case can not legally come into existence without being in relation to other co-offender's deed, so the investigation can not be realized. Even in a case which crimes as an object of arrest or detention are comparatively negligible accessory crime, and another crimes come to be principal offence, it could not be said to be an illegal interrogation if a main object of interrogation towards a suspect in detention were directed to an accessory crime, in conjunction with that, its interrogations extended to a principal crime relationship as another crime.

We, however, should pay heed to the fact that there are bounds regarding as an interrogation of accomplice-cases. In case that arrest or detention whose reason lay in suspicions

of slight accessory crimes is taken advantage as means for interrogating suspicions of grave principal crimes, and interrogations to a suspect of its accessory crimes are exclusively directed to another offence in principal crimes, it could be said an illegal interrogation that by arbitrary discretion with investigation, violates unlawfully a suspect's interests of defense, and exceeds the reasonable scope of investigation.