



Third Study Commission
Criminal law and procedure

Meeting in San Juan (Puerto Rico), 13-16 October 1997

Conclusions

THE ROLE OF THE ACCUSED IN THE PROOF OF GUILT:
CONFESSIONS AND THE RIGHT OF SILENCE

The general report was based on answers to questionnaires of: Argentina, Australia, Belgium, Brazil, Canada, Czech Republic, Denmark, England, Estonia, Finland, France, Germany, Iceland, Ireland, Israel, Japan, Latvia, Liechtenstein, Luxembourg, Netherlands, Norway, Portugal, Puerto Rico, Slovakia, Slovenia, Spain, Sweden, Switzerland, Taiwan, Tanzania, United States, Uruguay. Other member countries participated in the general discussion.

1) The protection of the suspect when questioned by the Police, the Public Prosecutor and the Examining Magistrate.

The Police

In almost all jurisdictions the initial interrogation of the suspect will be carried out by the police. Argentina, where police interrogation is forbidden, is a notable exception. If the suspect admits his guilt at this stage, the subsequent task of investigating the facts and proving guilt at the trial is likely to be rendered much easier. A confession may even enable the adoption of an expedited procedure. The balance between protecting the rights of the individual and the public interest that criminals should be brought to justice without unnecessary delay or expense is a delicate one, and not all jurisdictions adjust that balance in the same way.

Almost all jurisdictions recognize that the suspect has two basic rights:

- the right to refuse to answer questions (“the right of silence”) and the right to consult a lawyer. The latter right is not recognized in Senegal and Switzerland. The value of those rights will depend, however, on whether the suspect is informed of them and upon the stage at which and the manner in which the suspect is able to avail himself of legal representation. In most jurisdictions the suspect must be informed of both these rights before he is interrogated by the Police.

In a minority of jurisdictions the Police do not have to advise the suspect that he has a right to decline to answer their questions. The role of the lawyer also differs from state to state. In the extreme example (France) the suspect can be held by the Police for interrogation without access to a lawyer, for an initial period of 20 hours. In most countries the suspect is entitled to consult with a lawyer before interrogation. In some countries the lawyer is not entitled to be present during the interrogation whilst in other jurisdictions the lawyer may be present.

In the former countries the police will sometimes permit, or even invite, a suspect to have his lawyer present in order to procure the co-operation of the suspect and to render more credible any statements made by the suspect.

Professional criminals are aware of their rights and will not normally provide the police with any assistance. The majority of crimes are not, however, committed by professionals.

Suspects frequently decline to exercise both the right to remain silent and the right to consult a lawyer. In such circumstances questions sometimes arise as to whether statements made to the Police have been voluntary, or induced under some form of duress. Because of this it is now the practice in some jurisdictions to video or audio record police interviews.

The Public Prosecutor

In most countries which have a public prosecutor it is not part of his role to question the subject during the process of investigation of the crime. In those countries where he can do so, the suspect has the same rights as when interrogated by the Police.

The Examining Magistrate

In those countries which have an examining magistrate, the accused has to be told of his right of silence, his right to a lawyer and (usually) the nature of the case against him.

WHAT PROTECTION DOES THE ACCUSED HAVE IN THEORY AND IN PRACTICE AGAINST PRESSURE TO ANSWER QUESTIONS AT THE TRIAL?

In no jurisdiction is an accused under legal obligation to answer questions at his trial, so in each state he has protection against being forced to answer questions. In practice, however, if he is submitted to questioning before the tribunal which has to decide upon his guilt or innocence there will be considerable psychological pressure to answer those questions.

THE WEIGHT IN PROVING GUILT OF A CONFESSION, REFUSAL TO ANSWER QUESTIONS DURING THE INVESTIGATION AND REFUSAL TO ANSWER QUESTIONS AT THE TRIAL

Confessions

In France a confession used to be described as "*la reine des preuves*" - the queen of proof. This reflects the fact that a confession by the accused will usually be treated as cogent evidence of guilt - even more so if the confession is made in the face of the Court. In the common law jurisdictions such a confession, i.e. a "plea of guilty", obviates the need for a trial altogether. In the civil law jurisdictions an admission of guilt made in the course of the trial will simply be treated as overwhelming evidence of guilt. Confessions made in the course of interrogation, but retracted at the trial will, in most jurisdictions, be given such weight as the Court thinks that they deserve, bearing in mind the principle that it is the evidence which is given at the trial that carries the most weight.

In many jurisdictions a conviction cannot be based on a confession alone i.e. the confession must be corroborated.

Refusal to answer questions during interrogation

In some jurisdictions, no adverse inference may be drawn from this.

In other jurisdictions, silence during interrogations can be given such weight as the tribunal thinks that it deserves. In England and Ireland refusal to answer questions by the Police usually carries no adverse inferences, subject to statutory exceptions - e.g. where the accused relies upon a fact at the trial which it would have been reasonable to expect him to have mentioned to the Police.

Refusal to answer questions at the trial

A French delegate said that a refusal by the accused to answer questions at his trial would be "suicidal", but it seldom happens. This is likely to be the reality in those jurisdictions where the accused is exposed to questioning by the Court or the prosecution in the course of the trial. Even in those countries, where failure to testify or to answer questions put at the trial carries no prejudice in theory, it is likely to be prejudicial in practice.

DOES THE ACCUSED HAVE TOO LITTLE, TOO MUCH OR THE APPROPRIATE PROTECTION?

In most cases, delegates consider that under their system the accused has the appropriate degree of protection.

In Europe, at least, the degree of protection against self incrimination afforded to the suspect has grown steadily, no doubt due, in part, to the influence of the European Convention on Human Rights. Outside Europe, and not least in the United States, there has been a similar trend, though it is notable that the right of a suspect to a lawyer has not yet been established in Senegal and has only just been

established in the Ivory Coast. In some of the new democracies there is a considerable gulf between the protection that the law decrees that the suspect should receive and the protection that the suspect receives in practice. In some countries it is felt that the balance has swung too far in favour of the suspect, especially where organised crime is concerned, and in some cases the law has been altered to allow adverse inferences to be drawn in some circumstances from the failure of the suspect to answer questions put by the police. These changes have yet to be tested before the European Court of Human Rights.