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LW4635 Independent Research

A comparative commentary and review of the methods and consequences of police interrogation of citizens

Brar Harprabdeep Singh
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I. Introduction

‘Interrogation... takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation room’

Police officers have sworn to protect and serve society. However, the performance of such duties is not always lawfully performed. In the United States, sometimes police officers might ‘assume the defendant’s guilt’ going against the concept of ‘innocent until proven guilty’. The police may confuse, deceive and lie in order to obtain an incriminating statement. The methods employed by the police raise serious concerns as to the voluntariness of any obtained incriminating statement.

The purpose of this paper is to analyze the methods and consequences of police interrogation of citizens’. Part II begins by providing the backdrop in which the methods of police interrogation originated and how police officers viewed these methods as effective tools for obtaining evidence. Part III provides a comparative review of the police interrogation methods in a number of jurisdictions i.e. US, UK, People’s Republic of China (PRC), Germany and Japan. Part IV looks at the consequences of ‘improper’ police interrogations and what the effects are of such interrogations on the obtained evidence. Part V explains the psychology behind such police interrogations and how such methods impact the obtained incriminating statement. The paper concludes by observing that a balanced approach is generally sought but not always attained between investigating and protecting citizens’ fundamental rights.

During the writing of this paper I have relied on several articles and books which were written in a foreign language. As such, I had to rely on the translation of those works which were found in English-written journals in the writing of my comparative commentary. Any mistakes found

1 Fred Inbau, John Reid, Joseph Buckley & Brian Jayne, Criminal Interrogation and Confessions (4th ed 2004, Jones & Bartlett)
2 People v Fitzgerald 152 NE 543
in the application of those works are solely mine.
II. History of Police Interrogation Methods

A. Initial interrogation methods

Author Münsterberg states that acts of torture and threats to one’s life have not only been used globally but have also been practiced by law enforcement bodies for centuries.\(^4\) The general public was against such practices since it was persuaded that such methods were ineffective in discovering the truth.\(^5\) However, as there were few alternatives available, until the 1930’s in the United States, police interrogation techniques were generally based on the principle of coercion.\(^6\)

B. Decline in the use of coercion

In the United States, from the 1930’s to 1940’s, as courts began to give little weight to and excluded confessions obtained by coercive interrogations, the use of coercive interrogation methods began to decline.\(^7\) However, the use of coercive methods in police interrogation was not a universal practice. In Sweden, the police interviews had adopted an inquisitorial approach and the interviewer merely asked questions.\(^8\) Such a practice was similarly adopted in Brazil.\(^9\)

With a decline in the use of coercive methods, police officers began relying on more psychological techniques. One of the more common ones was the method of trying to win the suspect’s trust. The process was simple – the suspect would provide his side of the story entirely without interruption before the police would ask open-ended questions.\(^10\) However, this method would only work if the police officials understood the interviewee’s personality.\(^11\) According to Gerbert, the ability to give a statement is easily affected by the surrounding circumstances.\(^12\)

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\(^5\) Ibid
\(^7\) Leo (n6) 35
\(^8\) Åke Hassler, *Föreläsningar över den Svenska kriminalprocessen*, (1930) Stockholm: A.B. Nordiska Bokhandeln
\(^9\) A Peixoto ‘The interrogation and confessions in the judiciary process’ (1934) Vol. 21 Revista de Criminologia Buenos Aires 383
\(^10\) E Leche, V Hagelberg, *Förhör i brottmål* (1945) Stockholm: PA Nordstedt & Sönners Förlag
\(^12\) K Gerbert (n11) 85
example, tense suspects who appear to be guilty were tense not because they were culpable but were reacting to the interview process. Only when they were assured that the interview would be impartial did the suspects become relaxed.13

C. Modern interrogation techniques

From the 1960’s, the popularity of these techniques in the United States was increasing and methods of deception and trickery, with a foundation in psychology, had become the ‘contemporary American interrogation’ method.14 The problem though was that the methods were primarily based on untested and selective knowledge of psychology.15 Moreover, the internal interrogation manuals were mostly written by law enforcement officials or members of the crime laboratories16 who had little experience in the science of psychology.

One of the most prominent books that became a manual of psychological interrogation techniques for law enforcement agencies is the book by Inbau et al.17 The manual adopts a persuasive strategy by first creating a connection with the suspect in order to win his/her trust and then obtains the suspect’s confession as if it’s in his/her best interest. Inbau illustrates the steps in detail:

…the interviewer leads the suspect into an atmosphere of confidence, and shows sympathy and understanding for the actual criminal behaviour. The interviewer sells the advantage of a confession, cajoling the suspect to a point where close rapport is established. Then, the interrogator puts the suspect in the position of choosing between two possible positions, both of which are incriminating. The suspect may be asked whether this was the first time it happened or whether the acting had occurred before. Whatever alternative the suspect chooses, it will lead to an incriminating confession.18

13 Ibid
16 Philip Zimbardo, ‘The psychology of police confessions’ (1967) Vol. 1(2) Psychology Today 17
17 Fred Inbau, John Reid and Joseph Buckley, Criminal Interrogation and confession (1962, Williams and Wilkins)
18 Ulf Holmberg (n15) 13
Such interrogation technique has proved to be effective but several authors have found that the use of this method may generate false confessions.\textsuperscript{19} The majority of incriminating statements are subjected to the test of voluntariness in context of deception and trickery and whether the interrogation method adopted by the police were in breach of either or both the police internal guidelines and the statutory guidelines on the taking of evidence. The comparative analysis of the statutory framework for determining the voluntariness of such confessions is discussed in the next section.

\textsuperscript{19} Gisli Gudjonsson, ‘Investigative interviewing: Recent developments and some fundamental issues’ (1994) Vol. 6 International Review of Psychiatry 237; Zimbardo (n1616) 17
III. Comparative Review of Interrogation Guidelines

In both civil and common law jurisdictions, it has been established that only confessions obtained voluntarily could be admitted as evidence. The law of England had settled on the voluntariness test as the standard by the early 18th Century.20 It appears that in Europe, although the use of torture was authorized as a legal means for obtaining confessions, such methods were banned with the criminal law revolution that took place across the entire European continent, inspired largely by the French Revolution.21 In the past 50 years, there has been a significant change in the criminal justice system around the world. This section analyzes the statutory framework regulating the interrogation activities of police and how local courts treat such evidence from these interrogations.

A. The United States of America

1. Pre-Miranda standard

The US courts had adopted the voluntariness test in determining the admissibility of confessions.22 However, in the 1960’s, the US Supreme Court held that the test of voluntariness was insufficient to protect suspects from coercion. There had to be procedural protections as well. In the landmark case of Miranda v Arizona,23 the US Supreme Court established procedural protections which became known as the Miranda warnings. The Miranda warnings, further explained below, if breached provided the courts with an exclusionary remedy.

2. Miranda warnings

The US Supreme, through its Miranda decision, had discarded the old-common law test of voluntariness. It now required law enforcement officials to read a suspect his/her rights when he/she is arrested. The exact wording was not specified but the Court did set certain guidelines. Police officials were required to inform the suspect his/her right to silence, the right to consult with an attorney and to have that attorney present during interrogation and any statements

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21 C. Bar, A history of continental criminal law (1916 Little, Brown) ; A. Esmein, A history of constitutional criminal procedure (1913, Little, Brown)
22 Brown v Mississippi (1936) 297 US 278
23 (1966) 384 US 436
having been made could be used against him/her in a court of law. Failure to give this warning will generally lead to the exclusion of any incriminating statements made by the suspect regardless of whether it was by coercion or not.

After the *Miranda* judgment, subsequent courts have tried to narrow the effect of *Miranda*. In *Harris v New York*, the court held that although incriminating statements obtained by breaching *Miranda* directions could not be used by the prosecution to prove its case against the defendant, yet it could be used for impeachment purposes. Further, the New York Court of Appeals had created another exception – public safety. The court held that law enforcement officials could interrogate suspects without giving the *Miranda* warnings if interrogation is immediately required to protect the public’s safety.

Authors Leo and Malone argue that the judicial activism in restricting *Miranda* is setting a bad trend. They state that by restricting the scope of Miranda, police officials will be given more room for evading the Miranda warning. In order to provide the maximum procedural protection for suspects, they emphasize that courts should apply the complete *Miranda* without any exceptions.

3. Removing Miranda

An attempt was made by the US Congress to revert the US Federal Courts back to the pre-Miranda standard of voluntariness. In 1968, the US Congress had passed a law which in effect required all Federal trial judges to admit incriminating statements from defendants as long as the statement made was voluntary, without regard to whether the Miranda warnings were given. In *Dickerson v United States*, the US Supreme had the struck down the law. The court held that the mandatory *Miranda* warnings had ‘become part of our national culture’ and it must not allow legislation to abandon *Miranda*. The *Dickerson* judgment indicates that although the

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28 *18 USC 3501*  
29 (2000) 530 US 428  
30 Ibid 443
court was looking to the legislature for a solution to the problems in police interrogation, anything less than the *Miranda* standard would not meet the court’s standards.

**B. United Kingdom**

1. Introduction of PACE

Since 1912, England required its police officers’ to caution suspects with the right to silence and then the right to legal counsel in line with the Judge’s Rules.31 The problem with the Judge’s Rules was that it had no statutory backing and its compliance was not compulsorily required on either the courts or police.32 In 1984, the United Kingdom government statutorily regulated police interrogation through the Police and Criminal Evidence Act 1984 (PACE).33 In trying to maintain equilibrium between the constitutional rights of citizens and police powers, PACE was enacted to regulate the powers of the police and provides the structure for the exercise of such powers. The Act embodies some of the common law principles and has new sections which deal with a broad range of issues from arrest to interviewing.34

Since the Act could not cover every conceivable problem during interrogation, the Act gave the Home Secretary powers to issue a Codes of Practice.35 The Codes of Practice provide detailed guidelines on police procedure but a breach of the Codes by law enforcement officials is not a criminal act.36 Although a breach of the Codes does not entitle the defendant to a legal remedy under PACE, its breach is a relevant consideration which the court must take into account when deciding the admissibility of incriminating statements.37 With regards to interrogation, Code C on Detention, Treatment, and Questioning of Persons by Police Officers is most relevant.

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31 R v Voisin [1918] 1 KB 531
34 Ibid 4
35 Part IV, Police and Criminal Evidence Act 1984
36 Section 10, Part IV Police and Criminal Evidence Act 1984
37 Section 11, Part IV Police and Criminal Evidence Act 1984
2. Operation of PACE

A breach of the Codes does not automatically translate into a legal breach although courts are required to take into account its provisions to determine questions of admissibility. Furthermore, a breach of the Code may amount to a relevant breach of the disciplinary code of the police force regulations. If evidence is obtained by the police in breach of the Codes, the court has discretion to exclude such evidence.

Depending on the type and gravity of breach, a breach of the Codes may be sufficient to rule a confession to be inadmissible. Alternatively, it can at least be a considering factor taken together with other facts/breaches which may lead to the exclusion of such evidence.\footnote{John Sprack (n33) 7} Since the enactment of PACE, judges have actively exercised\footnote{Irina Khasin (n85) 1051} their residual discretion to exclude confessions obtained in violation of the Codes of Practice.

Section 76 of PACE provides the standard for compliance required for police conduct during interrogations. Courts determine the admissibility of confessions in tandem with the Section 76 requirement. The key elements of Section 76 are fairness and reliability. Section 76 of PACE states that:

If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.
Looking at the language of Section 76, courts considers acts or speech that induced the suspect to confess in determining whether the confession made by that *individual suspect* would likely be unreliable. In such a case, questions which might be deemed acceptable to an average suspect may still cast aspersions on the reliability of a statement made by, for example, a child. Nonetheless, the discretion granted to judges under Section 76 is broad enough to exclude confessions on the basis of reliability.40

Section 78 of PACE further bolsters the court’s powers by allowing it to exclude confessions through the exercise of its discretion which would ordinarily be admissible but for the unfairness to the defendant if offered at trial. Each case is fact sensitive which is why any legislative constraint would be inappropriate and would limit the exercise of such discretion.

3. Subsequent application of PACE

English courts have actively excluded confession evidence obtained through the use of unfair interrogation tactics, for example, deception or trickery on the suspect.41 Even prior to PACE, English common law provided the courts with the discretion to exclude confessions if it had been elicited by the police through misrepresentations to the suspect.42 Since PACE came into force, defendants have been challenging confessions as having been obtained through deceit or trickery for which it should be excluded under Section 78 to maintain fairness.43 In one case, the defendant was able to establish that the police had acted in bad faith by making an intentional dishonest representation. The Court of Appeal held that the trial court should have exercised its discretion in the defendant’s favor to exclude any evidence obtained by such methods.44

Some forms of police deception are still acceptable and do not lead to the exclusion of evidence obtained by such acts, for example, lawful secret tape recording.45 Unlike the US or other legal systems, UK has now imposed a strict standard on the video-taping of interrogations. Code C and E provide the detail procedure which the police must follow. In order to ensure successful

40 Irina Khasin (n85) 1051
42 Peter Mirfield, ‘Silence, Confessions And Improperly Obtained Evidence’ (1997, Claredon Press) 199
43 Ibid 205
44 R v Mason (1988) 1 WLR 139
45 R v Bailey [1993] 3 ALL ER 513
compliance, courts have excluded confessions that have been obtained in contravention of PACE by excluding it as unreliable evidence under Section 78 of PACE.\textsuperscript{46}

C. People’s Republic of China (PRC)

1. Interrogation regime before 2012 reform

A legal system only began to develop in China in the 1970’s after the Chinese Communist Party (CCP) understood that economic development could not occur without a stable legal system.\textsuperscript{47} In 1979, the Criminal Law and the Criminal Procedural Law (CPL) was promulgated. Although it was China’s first Criminal Procedural Law, it was heavily criticized for not containing enough safeguards for its citizens. In 1996, the National People’s Congress (NPC) amended the law to a large extent. The 1996 CPL had more statutory protections for suspects during police interrogation.

To prevent the abuse of interrogative power, the CPL explicitly states that an interrogation cannot turn into detention of the suspect. The duration of interrogation is limited to 12 hours and the police are not allowed to repeatedly interrogate a suspect. Moreover, before an interrogation can begin, the police are required to give the interviewee an opportunity to make a statement with regards to his innocence or guilt. This prevents the police from proceeding on the assumption that the suspect is guilty.

Regardless of the CPL, studies show that law enforcements officials in China routinely ignore procedural safeguards.\textsuperscript{48} Suspects are not allowed to make their statements of guilt or innocence and in certain cases police use coercive measures to make the suspects talk. One of the more common tactics is telling the accused that there is strong evidence against him/her and it would be best for them to confess.\textsuperscript{49}

\textsuperscript{47} R. Keith, China’s struggle for the rule of law (1994, St. Martin’s); T. Lee, Law, the state, and society in China (1997, Garland)
\textsuperscript{48} Yue Ma (n20) 21
\textsuperscript{49} C. Liu, Interpretations of provisions of the new Criminal Procedure Law (2001, People’s Court Publishing House); C. Liu, New interpretations and new explanations of the Criminal Procedure Law and relevant regulations (2001, People’s Court Publishing House)
2. 2012 reformed law

In March 2012, the NPC amended the CPL for the second time. The new CPL will come in force in Jan 2013. It has 111 revisions ranging from issues of investigation to execution. With regards to interrogation, the new CPL has made it clear for the first time that any confessions obtained through coercive measures such as torture ‘should be excluded during trials’. In order to prevent confessions from being obtained by torture, the new CPL requires that suspects be sent to detention facilities for custody after being detained or arrested and interrogations should be done there. Moreover, the process of interrogation must be audio or video taped. Although the new provisions have been welcomed yet, Wang Jiancheng, Deputy Dean of Peking University’s Law School, has pointed out that confessions are still being obtained through torture. In addition, such bans have not been well implemented for the simple reason that ‘confession obtained through illegal means can still be evidence’.

3. Comments

When compared to Russian law on civil rights, China is far behind in the protection of its citizens against the excesses of the police. The Constitution of Russia recognizes the presumption of innocence and the protection against self-incrimination while the CPL has none of both. The prohibition against self-incrimination contains the right to remain silent which goes against Chinese law. Conversely, the CPL requires that when interrogated, suspects must tell the truth. The new CPL has made an effort to provide the right to counsel at a stage of police investigation. However, the right is a limited one. The right to counsel can only be exercised after the suspect has completed his first police interrogation.

When compared to the first CPL promulgated more than 30 years ago, great progress has been made to provide greater procedural safeguards for its citizens. However, mere promulgation of

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51 Ibid
52 Articles 49 and 51, The Constitution of Russia
53 Yue Ma (n20) 21
54 Article 93, Chinese Procedural Law
55 Yue Ma (n20) 21
laws is insufficient. Police officials open flouting of the law\textsuperscript{56} poses a major problem for the successful implementation of the CPL. In addition, without recognizing the presumption of innocence and the protection against self-incrimination, the CPL cannot be truly implemented in its full spirit. When the CPL imposes a mandatory obligation to tell the truth on the suspect, even though the use of torture is prohibited, police officials naturally resort to such measures as they justify such acts as their fulfillment of the legal obligation.\textsuperscript{57} Unless the law is implemented in its true spirit, subsequent amendments will have little change in the application of the law on the ground level.

\textbf{D. Germany}

1. Informal questioning

At the police investigation stage, German law provides protection to suspects. The important transition point in the investigation stage is when suspect’s status is changed from an ‘individual under investigation’ to an ‘accused person’. Police can informally ask questions from witnesses or potential suspects prior to beginning a formal interrogation. During the informal questioning, the police are not required to issue any cautionary warnings. However, after evidence linking the suspect to the crime is found, the suspect becomes an accused and he/she is required to be informed of their rights.\textsuperscript{58}

The suspect has the opportunity, under law, to explain any suspicions surrounding him/her and be informed that he/she has the right to require the prosecutor and police to take any evidence which may exonerate him/her.\textsuperscript{59} Under German law, once an individual is read his/her rights, he/she can consult their legal counsel at any time.\textsuperscript{60} In contrast to French law, French police are not required to inform the suspect his/her right to silence and can deny the suspect his/her right to counsel for the first twenty hours of detention.\textsuperscript{61}

\textsuperscript{56} X. Zheng, \textit{A history of the Chinese legal system} (2000, China’s People’s University Press)
\textsuperscript{58} Section 114b, German Code of Criminal Procedure
\textsuperscript{59} Section 136, German Code of Criminal Procedure
\textsuperscript{60} This is similar to the Hong Kong interrogation regime. See Direction 8, Rules and Directions for the Questioning of Suspects and Taking of Statements Issued by the Secretary for Security 1992
\textsuperscript{61} Yue Ma (n20) 16
2. Interrogation

At different periods of the adjudication process, a suspect can be questioned by a police officer judge or prosecutor. The suspect is required to be informed of his/her rights every time when they are questioned for the first time by a new individual. Once the suspect requests counsel, the police are required to make reasonable efforts to locate one. The extent of the right of counsel is restricted depending on the interviewing actor. If the interrogator is a judge or prosecutor, the suspect can talk with his/her counsel before interrogation and can have him/her present during interrogation. However, during a police interrogation, the suspect can only consult with his/her attorney before interrogation but cannot have him/her present during the interrogation.62 This is unlike the interrogation regime in Hong Kong where the lawyer can be present during the interrogation of the suspect regardless of the type of interrogator.63

3. Breach of guidelines

German law does not legally require the police to stop questioning a suspect after he/she has requested a lawyer. In certain situations, the police can continue the questioning, for example, where it would not be a breach of the suspect’s right to counsel by having him/her talk without the presence of his/her attorney. However, such a determination is a very fine line. German courts have held that police interference with the suspect’s attempt to gain legal counsel may lead to the exclusion of any evidence obtained prior to the counsel’s arrival.64

There is no compulsory exclusionary rule under German law. Section 136a of the German Code of Criminal Procedure (CCP) was added shortly after the collapse of the Nazi regime in reaction to the acts committed under WWII.65 Section 136a states that:

The accused’s freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis. Coercion may be used only as far as this is

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62 Yue Ma (n20) 16
63 Direction 8, Rules and Directions for the Questioning of Suspects and Taking of Statements Issued by the Secretary for Security 1992
permitted by criminal procedure law. Threatening the accused with measures not permitted under its provisions or holding out the prospect of an advantage not envisaged by statute shall be prohibited.

If the police use any of above the proscribed methods during its interrogation then the evidence will be automatically excluded even if it is shown to be voluntary.66 Other than a Section 136a breach, the use of exclusionary power is discretionary. The courts would, looking at the facts of each individual case, determine whether such evidence should be excluded for a violation of the CCP. Being an inquisitorial system, Germany attaches significant weight to finding the objective truth.67 The courts are therefore more willing to exclude evidence obtained in violation of the established procedure since any departure from procedure reduces the reliability of such evidence and thus creates a hurdle in finding the ‘objective truth’.68

E. Japan

1. Shaping of interrogation regime

Japan has a unique interrogation system that is unlike the United States or any of the European countries. It has been said that the two main ‘parts’ of Japan’s legal regime is the country’s criminal justice system and its connection to terrorism.69 The justice system in Japan is largely shaped by its prosecutors. Prosecutors in Japan possess a lot of discretion in handling criminal suspects which results in their being able to shape and control Japan’s interrogation procedures.70 The second factor is the lack of any threat or terrorist attack on Japanese soil. As Japan is a not a target for terrorists, it ‘follows then that Japan would not have extensive procedures’ with regards to interrogation.71

70 Ibid 21
71 Ibid
2. Scope of the rules

Japan’s Code of Criminal Procedure plays a large part in its procedure for interrogation. Criminal cases are dealt by two codes: the Penal Code, which addresses issues of substantive law and Code of Criminal Procedure, which addresses procedural issues. Several procedural guidelines exist for the interrogation of suspects but prosecutors wield the most power in Japan’s legal system and retain most of the power when dealing with suspects.72

Both the police and prosecutors can arrest a suspect once they have obtained the requisite writs or arrest permits. If a suspect is arrested by a police officer, then custody of the suspect must be transferred to a prosecutor, together with any evidence, within 48 hours otherwise the suspect may be released.73 Generally, a permit is required before arrest however flagrant offenders and emergency arrests can be executed without a permit.74

There are many rules which administer the acts of prosecutors once suspects have been detained. Until recently, suspects had no right to a state defense counsel until after charges had already been filed by the prosecution. The new Code of Criminal Procedure has been amended to give the right to counsel immediately.75 When the charges are actually filed is up to the prosecutor’s discretion.76 Suspects are not allowed to have their counsel present during questioning.77 These procedures are in place prior to the filing of charges. Once the charges are filed, the prosecution cannot interfere with the suspect’s right to counsel and the communications he/she has with him/her. In addition, it is expressly provided that the prosecutor’s authority shall not interfere unduly with the defendant’s right to prepare his case.78

Suspects have the right to refuse to answer any particular question during an interview79 but the prosecutor can continue his questioning despite the silence. Generally, interrogations are not

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72 National Security Research Group (n6970) 22
73 Article 203, Japanese Code of Criminal Procedure
74 Articles 199, 213 Japanese Code of Criminal Procedure
75 Article 37, Japanese Code of Criminal Procedure
76 Article 256, Japanese Code of Criminal Procedure
77 This is unlike the Hong Kong system where the attorney can be present at all times and the German regime where the lawyer can stay with the suspect unless it is a police interrogation
78 Article 39(3), Japanese Code of Criminal Procedure
79 Article 311, Japanese Code of Criminal Procedure
recorded or taped in any form.\textsuperscript{80} Once the prosecutors have gotten the relevant information from
the suspect, the suspect’s statement is paraphrased by the prosecutor before being placed before
the court.

3. Coercion and use of torture

Interrogations in Japan are conducted in accordance with the Code of Criminal Procedure and
there is little deviance from the Code. Torture is not used in any way during the interrogation
process. Professor Ramseyer explains that torture just does not happen in interrogations in
Japan. Although torture occurred frequently in interrogations during WWII,\textsuperscript{81} torture is illegal
now in Japan and Professor Ramseyer states that if torture did occur it would become public
knowledge since the majority of Japan is against it.\textsuperscript{82} Additionally, Japan’s Code of Criminal
Procedure is already broad and strong enough to deal with any interrogation issue which is why
it does not require new or additional interrogation tactics.

\textsuperscript{80} National Security Research Group (n6970) 22
\textsuperscript{81} I. Walker, Japanese Methods of Prisoner of War Interrogation (June 1946) <
\textsuperscript{82} National Security Research Group (n6970) 23
IV. Consequence of ‘Improper’ Police Interrogation

There is no question that police officers secure confessions through the use of deception, lies and concocted evidence.\textsuperscript{83} Although such tactics may have approval from the law enforcement agencies since it helps to ‘solve crime’, yet such interrogation techniques raise issues of grave concern. Using deception in gaining confessions not only affects the incriminating suspect but the interrogator and the entire criminal justice system as well. The use of such interrogation tactics has impact on four main areas: (1) Obtaining false confessions; (2) Curtailing development of police interrogation tactics; (3) Diminished evidential value; (4) Erosion of institutional structure

A. Obtaining false confessions

Modern interrogation techniques although largely non-reliant on physical pain to obtain confessions achieve the same result with the use of intense psychological pressure.\textsuperscript{84} Whether the confession was obtained because of an inducement from the interrogator or the suspect believes it is in his/her ‘self-interest’ to do so – such confessions may be obtained as a direct result of the deceptive police tactics employed by interrogators. The pressure of such interrogation is so strong that ‘Even a guilty person may confess falsely in response to deceptive police practices, changing the details of his story to fit the suggestion of his interrogator’.\textsuperscript{85}

Even if the confession was true, the statement will be unreliable if the statement was found to have been prejudiced by the interrogation tactics – this defeats the very purpose of the interrogation.\textsuperscript{86} Just over a period of two decades, several dozens of cases have been found which involved wrongful convictions which were the result of false confessions.\textsuperscript{87} Although specific data is not available as to how many of these confessions were induced by

\textsuperscript{83} Laurie Magid (n3) 1169
\textsuperscript{86} Welsh White (n84) 109
psychological tactics yet researchers have held that it occurs enough to raise an alarm.\textsuperscript{88} A confession is almost a guarantee for the prosecution in obtaining a conviction, which is why some innocent individuals even though they have not committed any crime accept an earlier lenient punishment to avoid long periods of incarceration.\textsuperscript{89} The injurious effects of a false confession are amply clear – illegal arrest, prolonged prosecution followed by the unjustified imprisonment of the innocent.

\textbf{B. Curtailing development of police interrogation tactics}

Deception has become such an integral part of interrogation that studies show that ‘law enforcement officers rely heavily on the deceptive practices taught in interrogation manuals’ exclusively without reference to any other method of interrogation.\textsuperscript{90} The Criminal Justice System requires that the prosecution bear the burden to prove its case not by ‘interrogation of the accused even under judicial safeguards, but by evidence independently secured through skilful investigation’.\textsuperscript{91} By allowing the use of bogus evidence to elicit a confession implicitly creates a risk that skilful investigation is no longer the priority.

Additionally, open lying by the police to suspects may also create a ripple effect of causing law enforcement officials to use lies to achieve certain objects in other situations.\textsuperscript{92} Interrogators justify the open use of deceit on the notion of maintaining public justice.\textsuperscript{93} However, this would mean that interrogators would have a blanket defense on any lie told as long as societal benefit could be evidenced. This may mean lying to a judge to obtain a warrant which probably would not have been granted but for the lie. The fact that courts provide ‘legal support’ to such deception sends an inconsistent message to police community and hinders the development of more ethical and legally sound interrogation tactics.

\textsuperscript{89} Richard Leo & Richard Ofshe (n6) 494
\textsuperscript{91} Watts v Indiana, (1949) 338 U.S. 49
\textsuperscript{93} Ibid
C. Diminished evidential value

The use of deception and trickery poses a danger that any ensuing confession, regardless of its truthfulness, might be excluded. There is a fine line between the use of deception and overstepping that line to make any statement from an accused involuntary. Courts have the power to exclude forced confessions from trial, which is why confessions obtained without deception have more weight than those obtained with deception.94 With the use of deception in interrogation, police officials are risking the loss of a crucial confession which may seal a case especially if there is only tenuous evidence against the accused.

Not only that, acts of deception may also result in the loss of other vital evidence through non-cooperation from important informants/sources who feel they can no longer trust police officers who had deceived them. If the accused refuses to answer any of the questions, the only disadvantage suffered by the police is time.95 However, if the accused is innocent, the deceptive interrogation techniques would eliminate any established trust between themselves.96 This would make them reluctant in revealing any decisive evidence they may have now or in the future.

D. Erosion of institutional structure

Deceptive interrogation not only affects the evidential value of a case or the law enforcement’s credibility, it runs deeper to the essential values which uphold the criminal justice system. The presumption of innocence and statutory guidelines on the questioning of suspects ensures the public that the law treats everyone fairly, including suspects. With the use of psychological and deceptive interrogation techniques, this may no longer be true. It seems that the police are now in the business of speedy justice. They may assume culpability from the beginning, use coercive techniques to get a confession and convict individuals based on that confession.97

It may be the police official’s perspective that the summary conviction of an individual is effective justice yet such pursuits endanger the integrity of the entire criminal justice system.

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94 Deborah Young (n92) 462
95 Ibid 457
96 Ibid 458
97 Fred Inbau, John Reid, Joseph Buckley & Brian Jayne (n1) 67
Newly graduated police officers have ‘admitted their dismay at being expected to lie as part of their jobs’. Although over time such officers may become accustom to such interrogation techniques yet the preliminary feelings of consternation show that even the law enforcement themselves view such techniques with disappointment. Trust in the police can still be regained but if the entire criminal justice system loses its integrity it may never regain it back.

98 Deborah Young (n92) 468
V. Psychology of Interrogation Methods

This section examines and explains the psychology behind the interrogation process and how it affects the obtained confession by the police. Although the police are able to obtain a confession yet the process of interrogation, more often than not, begins with the interrogator already judging the suspect to be guilty\textsuperscript{99} which may lead to a false confession. The problem of false confessions is significant and will continue to be since the legal profession is not well-versed in the psychology behind the methods of interrogation which can cause an innocent man to confess to a crime he/she did not commit.

The analysis in this section will primarily be based on the interrogation manual \textit{Criminal Interrogation and Confessions} written by John Reid and Fred Inbau. This manual has served as a basis for many law enforcement officials around the world\textsuperscript{100} and its psychological techniques have not only been adopted but abundantly been cited in numerous cases.\textsuperscript{101} This manual provides the most in-depth coverage needed to analyze the psychology behind interrogations.

A. The Initial Interview

During police interrogations, the ‘interview’ is different from the ‘interrogation’.\textsuperscript{102} The interview takes place before the interrogation and is more informal. During the interview, the interviewee does most of the talking while the interrogator takes notes and asks only open-ended questions.\textsuperscript{103} The purpose of the interview is to allow the police officer to determine the truthfulness of the suspect’s statement. Once the interrogator determines that the suspect’s statement is untruthful, although how exactly this determination is made is unclear, the interview then transitions into an interrogation. An interrogation is entirely different in its operation and in no way represents a continuation of an interview:

An interrogation is confrontational in nature, which means the suspect will be directly confronted with his involvement in the offense ... An interrogation is not

\textsuperscript{100} Ibid 26
\textsuperscript{101} Miranda v Arizona 384 US 436; United States v Whitehead 26 MJ 613
\textsuperscript{102} Fred Inbau, John Reid, Joseph Buckley & Brian Jayne (n1) 5
\textsuperscript{103} Ibid
an open two-way communication. If the suspect is allowed to interrupt and provide false denials, he will be entrenched into his lie, making it progressively more difficult to obtain the truth during the interrogation.104

The interrogator terrorizes the suspect and dominates the conversation to show to the interviewee who is in charge of the situation.

B. The Behaviour Test

An interrogation is only supposed to begin when the ‘investigator is reasonably certain of the suspect’s guilt’. 105 In reality, however, interrogations begin even where the evidence is weak and the suspect is unlikely to be charged.106 The reason why such interrogations continue is that the judgment as to whether to interrogate a suspect is primarily based on the interviewee’s behavioural responses:

Through observation of the suspect's verbal and nonverbal responses, the investigator can assess if any indications of deception are present, which may cause the investigator to transition to an interrogational setting.107

Sometimes interrogations also continue because securing a confession becomes essential with the lack of evidence:

… most investigations do not come gift wrapped … All too often a confession is needed to develop the evidence necessary for a conviction and frequently, absent a confession, there is little admissible evidence to support the suspect's guilt. Through … Behavior Analysis … the investigator may have little doubt regarding a suspect's involvement. But when it comes to producing evidence admissible in court, the confession oftentimes makes or breaks a case.108

104 Fred Inbau, John Reid, Joseph Buckley & Brian Jayne (n1) 4
105 Ibid 8
106 Richard Leo (n27) 266
107 Fred Inbau, John Reid, Joseph Buckley & Brian Jayne (n1) 4-7
108 Brian Jayne and Joseph Buckley, The Investigator Anthology (1999) 204
The weaker the evidence the interrogator has against the suspect the more likely he is to employ greater psychological pressure in order to obtain a confession.\textsuperscript{109} So much so that interrogators sometimes even use concocted evidence to incite fear in order to make the suspect confess.\textsuperscript{110} Thus, behavioural traits are for twofold use. First, to determine whether to switch from interview mode to interrogation. Second, to use to assess whether the suspect is guilty and if the evidence is weak against him/her to increase the psychological pressure in order to obtain a confession.

However, the interpretation of the suspect’s behavior is not an exact science. This is more so true when the interrogators are not experienced in the field of psychology. Naturally, the process becomes counter-productive when the suspect’s responses are interpreted as acts of deception.\textsuperscript{111} The same is true for spiked blood pressure which may sometimes indicate innocence.\textsuperscript{112} In such a situation, even though the suspect is telling the truth, the interrogator may increase the psychological pressure through its interrogation.\textsuperscript{113} As such, an innocent person, not being able to withstand such pressure and tactics, agrees to a confession.

1. Behaviour Analysis Elucidated

Behaviour Analysis has been defined as the ‘systematic observation of a suspect’s behavioural responses’ during an interview.\textsuperscript{114} The interviewee’s behaviour is observed in three key areas: verbal, nonverbal and paralinguistic.\textsuperscript{115} Verbal describes the suspect’s use and arrangement of words in response to questions; Nonverbal refers to the facial expressions, eye contact, body posture and upper body movements; Paralinguistic refers to those aspects of the suspect’s speech that are outside the actual spoken words.

\textsuperscript{110} Brian Jayne and Joseph Buckley (n108) 227
\textsuperscript{111} Richard Leo and Richard Ofshe (n109) 986
\textsuperscript{112} R Arther, ‘Blood pressure rises on relevant questions in lie-detection – sometimes an indication of innocence not guilt’ (1955) Vol. 46 Journal of Criminal Law and Criminology 112
\textsuperscript{113} Ibid.
\textsuperscript{114} Brian Jayne and Joseph Buckley (n108) 67
\textsuperscript{115} Fred Inbau, John Reid, Joseph Buckley & Brian Jayne (n1) 125
During the interview, the interrogator observes each area of the suspect’s behaviour and draws inferences about the truthfulness of his/her statements.\textsuperscript{116} For example:

Deceptive suspects generally do not look directly at the investigator; they look down at the floor, over to the side, or up at the ceiling, as if to beseech some divine guidance when answering questions. They feel less anxiety if their eyes are focused somewhere other than on the investigator; it is easier to lie while looking at the ceiling or floor.\textsuperscript{117}

According to the Behavioural Analysis theory, deceptive suspects are not interested in helping, are unconcerned and try to prevent the interrogator from reaching the truth by creating unnecessary hurdles.\textsuperscript{118} There is no single behaviour which provides definitive evidence of a suspect’s guilt which is why the Behaviour Analysis can only be effectively used if it involves ‘evaluating clusters of behaviour’.\textsuperscript{119}

2. Behaviour Analysis: Is it guesswork?

John Reid & Associates, Inc has stated that research indicates that interrogators trained in Behaviour Analysis ‘can correctly identify the truthfulness of a person 85% of the time’.\textsuperscript{120} Certain studies support the contention that Behaviour Analysis works by showing that investigators are able to detect deception above chance levels.\textsuperscript{121} At the same time, other studies have held that Behaviour Analysis does not aid in the detection of deception.\textsuperscript{122}

In an interesting development, the United States Court of Appeals for the Armed Forces (CAAF) has expressed reservations with regards to interrogator’s ability to correctly interpret a suspect’s body language.\textsuperscript{123} Overturning a conviction which was based on an alleged admission

\begin{itemize}
\item\textsuperscript{116} Ibid
\item\textsuperscript{117} Fred Inbau, John Reid, Joseph Buckley & Brian Jayne (n1) 151
\item\textsuperscript{118} Ibid 128
\item\textsuperscript{119} Major Peter Kageleiry (n9999) 31
\item\textsuperscript{120} Fred Inbau, John Reid, Joseph Buckley & Brian Jayne (n1) 123
\item\textsuperscript{121} Frank Horvath, Brian Jayne & Joseph Buckley, ‘Differentiation of Truthful and Deceptive Criminal Suspects in Behavior Analysis Interviews’ (1994) Vol. 39(3) Journal of Forensic Sciences 793, 794
\item\textsuperscript{122} Saul Kassin and Christina Fong, ‘“I’m Innocent!”: Effects of Training on Judgements of Truth and Deception in the Interrogation Room’ (1999) Vol. 23 Law and Human Behavior 499
\item\textsuperscript{123} United States v Datz (2005) 61 MJ 37, 44
\end{itemize}
by the suspect, the court explained its rationale for distrusting the interrogator’s use of Behaviour Analysis:

[The] admission rested upon a law enforcement officer's interpretation of body language. Without some additional written, verbal, or video confirmation, this amounted to a confession by gesture of a critical element of the offense—and the only contested element of the offense. Gestures and reactions vary from person to person under the pressure of interrogation. As a result, the military judge’s decision to admit evidence of Appellant's head nodding without adequate foundation was prejudicial error.124

The CAAF’s holding defeat’s Behaviour Analysis’s crucial assumption i.e. a police officer can judge whether a particular gesture or reaction indicates truthfulness or deception. Inbau et al assert that an ‘innocent person will … sit upright, appearing more relaxed…In most cases, he will go so far as to lean towards the interviewer inviting questions … and demonstrating an eagerness to resolve the issue…’125 However, if the gestures and reactions differ from person to person under the particular circumstances of the interrogation, then how can they be accurate indicators of truthfulness? Behaviour Analysis may seem to be at the most guesswork and the only reason it is continually used is that it gets confessions; but again, the courts lack an understanding of how Behaviour Analysis works which ultimately leads to a false confession. The sequence of operation is further explained below.

C. Behaviour Analysis and Partiality of the Interrogator

1. Guilty before proven

Studies have actually held that Behaviour Analysis is counter-productive since it creates hurdles for the interrogator in discovering the truth by contributing to his/her bias.126 Some even went as far as to show that interrogators trained in Behaviour Analysis were less precise in determining

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124 United States v Datz (2005) 61 MJ 37, 44
125 Fred Inbau, John Reid, Joseph Buckley & Brian Jayne (n1) 4-20
whether the suspect was telling the truth or not.\textsuperscript{127} Although those who received training in Behaviour Analysis could more easily explain their reasoning, they were not however more accurate in the actual determination of whether a statement/reaction was a deception or the truth.\textsuperscript{128}

Professor Kassin described the effect of bias in an interrogator:

\begin{quote}
Compared to others, [experienced police officers] also exhibited a deception response bias, leading them to commit an abundance of false positive errors. Thus the pivotal decision to interrogate a suspect may well be based on prejudgments of guilt ... [R]esearch suggests that once people form a belief, they tend unwittingly to seek, interpret, and create information in ways that verify that belief.\textsuperscript{129}
\end{quote}

Police officers start off an interrogation with a bias of guilt towards the suspect which is the first decisive step towards an eventual false confession. Since the interrogator is overconfident in his assessment of guilt of the suspect he will ‘create information in ways to verify that belief’.\textsuperscript{130}

Then comes the next step of erroneously affecting the suspect’s statement:

\begin{quote}
In most documented false confessions ... the statements ultimately presented in court are highly scripted by investigators’ theory of the case; they are rehearsed and repeated over hours of interrogation; and they often contain vivid details about the crime, the scene, and the victim that became known to suspects through secondhand sources.\textsuperscript{131}
\end{quote}

By the end of the interrogation, the suspect is writing down a confession of a crime which he probably did not commit and is writing about events he found out through the course of the interrogation itself.

\begin{flushleft}
\textsuperscript{127} Saul Kassin and Christina Fong (n122) 512
\textsuperscript{128} Ibid
\textsuperscript{129} Saul Kassin et al (n126) 189
\textsuperscript{130} Ibid
\textsuperscript{131} Ibid 224
\end{flushleft}
2. Suspects have some reason to be guilty

Overconfidence is emphasized as the key to a successful interrogation. Interrogators must have great confidence in their ability to detect the truth, draw out confessions and have the conviction to stand behind its decisions of truthfulness.\textsuperscript{132} The police officer is not allowed to recognize that Behaviour Analysis led him/her to wrongly conclude that a suspect is guilty even where the suspect is innocent.\textsuperscript{133}

By adopting such an approach, every suspect is deemed to be guilty for some reason. Inbau et al state that when the interrogator senses that the suspect might be innocent he should ‘diminish the tone and nature of the accusatory statements’.\textsuperscript{134} Instead of apologizing to the suspect for the stress of the interrogation, the interrogator is instead required to blame the suspect for misleading the police officer which led the latter to conclude that the suspect was guilty.\textsuperscript{135} The interrogators overconfidence ultimately leads him/her to refuse to accept that errors exist within the interrogation process and instead increase the intensity of the psychological tactics against the innocent. The use of those tactics is the final step in obtaining a false confession. The next section briefly explains those interrogation tactics.

\textit{D. Psychological Tactics}

Psychological interrogation in the 21\textsuperscript{st} Century has progressed to a very different stage than what it originally was. Modern interrogation is a slow process which involves several steps each building on each other. The aim is to project the State’s case as being air-tight and to convince the suspect the futility of his/her continued denials.\textsuperscript{136} The interrogation begins with the isolation of the suspect in a small soundproof room within the police station.\textsuperscript{137} The purpose of such a setting is to detach the suspect from his/her familiar settings and to increase his anxiety

\begin{footnotes}
\item[132] Fred Inbau, John Reid, Joseph Buckley & Brian Jayne (n1) 78
\item[133] Ibid 320
\item[134] Fred Inbau, John Reid, Joseph Buckley & Brian Jayne (n1) 320
\item[135] Richard Leo and Richard Ofshe (n109) 986
\item[137] Fred Inbau, John Reid, Joseph Buckley & Brian Jayne (n1) 51
\end{footnotes}
thereby increasing the likelihood of his/her accepting a deal which would involve him/her being able to leave the room.\textsuperscript{138}

After isolation, the interrogation starts with a series of confrontational accusations. Once the suspect is startled, the interrogator feeds the suspects with material details about his/her life, family and livelihood. This information, if provided at a crucial stage of the interrogation process, ‘is extremely beneficial in increasing [the suspect’s] anxiety’ which makes it nearly impossible for the suspect to deny the interrogator’s accusations.\textsuperscript{139}

Noted interrogation expert Professor Leo has portrayed the interrogation process as a ‘two-step process of social influence’.\textsuperscript{140} In the first step, ‘the interrogator accuses the suspect of committing the crime and lying about it, cuts off the suspect’s denials, attacks his or her alibi, and often cites real or fabricated evidence to buttress these claims’.\textsuperscript{141} The step is used to breakdown the suspects confidence and to immerse him in a ‘state of hopelessness and despair and to instill the belief that continued denial is a not a means of escape’.\textsuperscript{142} Once the interrogator has achieved the first step, the interrogator tries to act as the suspect’s friend in the second step by offering him/her incentives to confess.\textsuperscript{143} The incentives range from moral satisfaction of admitting guilt, promising leniency in sentencing to implying severe consequences should the suspect fail to confess.\textsuperscript{144} If all these steps are properly executed, even an innocent person could eventually confess to any crime.

Deception is an important tool in the successful use of psychological interrogation techniques.\textsuperscript{145} However, this interrogation model is not without fault. The issue becomes problematic when the interrogator uses the Behaviour Analysis to deceive an innocent person, whom he/she believes to be guilty into signing a false confession which he/she believes to be in their ‘self-interest’. Since 1992, the Innocence Project has exonerated 208 wrongfully convicted

\textsuperscript{139} Major Peter Kageleiry (n99) 37
\textsuperscript{140} Richard Leo and Richard Ofshe (n109) 989
\textsuperscript{141} Saul Kassin & Gisli Gudjonsson (n138) 46
\textsuperscript{142} Saul Kassin & Gisli Gudjonsson (n138) 46
\textsuperscript{143} Ibid
\textsuperscript{144} Ibid
\textsuperscript{145} Fred Inbau, John Reid, Joseph Buckley & Brian Jayne (n1) 427
people of which more than 25% of these convictions involved false confessions which were a major contributing factor to their sentence. Behaviour Analysis plays a key role in the interrogation of citizens. If the occurrence of false confessions is to be eliminated, the current rules of interrogation have to be understood by the legal profession and properly regulated to reduce the incarceration of the innocent.

146 Innocence Project, False Confessions <http://www.innocenceproject.org/understand/False-Confessions.php> 12 April 2012
VI. Conclusion

Interrogation tactics are in a constant state of evolution. Originally, pain was the key to any successful interrogation. The only question was how long the suspect would take to break, not if he would. Torture and other coercive methods were actively and openly used in the interrogation of suspects, even if it ended up using such measures against innocent individuals. Although torture had been successful in obtaining confessions, such methods were against public opinion and with the increased consciousness of human rights, interrogations tactics which involved pain were being outlawed.

As such, police officials had to resort to other methods. With the advent of many interrogation manuals using psychological tactics, use of psychology in obtaining confessions became popular. As the success rate in using psychological techniques for obtaining evidence was high, it became the norm for police interrogation. With law far behind on the use of psychology in interrogation, the police could deceive, lie and use fabricated evidence with a free hand in obtaining confessions. These methods were not only convicting innocent individuals, but were also attacking the criminal justice system.

From the 1960’s, the US took the lead in increasing procedural safeguards for suspects during interrogation. With the introduction of the Miranda warnings, courts were given discretion to exclude evidence which breached mandatory police procedure. Europe started following the trend. The UK enacted the PACE which gave its police procedural rules statutory backing. For civil law jurisdictions, they are still behind in providing suspects with procedural safeguards. Although China, Japan and Germany have the black letter law yet the law enforcement agencies possess too much discretion in the conduct of interrogations. Discretion is necessary to maintain flexibility but too much discretion leads to abuse and a breach of the suspect’s fundamental rights.

Interrogation is necessary but the tactics adopted are not. Not all suspects are criminals. Until an individual has been determined to be guilty by a court of law, he/she is entitled to all the procedural safeguards necessary to protect their fundamental rights. The right to interrogate must not trample the fundamental rights of the suspect. By balancing both rights, the state can still carry out their investigation and suspects can be ensured that they will be treated fairly. If
one takes precedence, there will always be excesses and in the end both parties – the state and citizens would suffer.
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