ARREST AND DETENTION IN NORWAY *

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I. PREREQUISITES

In Norway the prerequisites to arrest and detention¹ are strictly regulated by the Criminal Procedure Act of 1887. This is a necessary consequence of article 99 of the Norwegian Constitution, under which arrest and detention may take place only by virtue of written law.² The most important provisions are found in chapter 19 of the act; they may be divided into material and formal prerequisites. The material prerequisites deal with the requirements to be met as regards the punishable act and the person of the accused; the formal prerequisites refer to the procedure to be followed when arrest and detention are ordered.

The Material Prerequisites

The material prerequisites to arrest and detention may be divided into general and special prerequisites. Normally, arrest and detention may take place only when the general and at least one of the special conditions are met.

General

Custody of an accused may normally be effected only when there are reasonable grounds to suspect that he has committed an offense for which the maximum statutory penalty is a term of imprisonment longer than six months.³

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* This Article is based on a recent study by the author which was published in Norwegian as *PAGRIPELSE OG VARETEKTSFENGSEL (ARREST AND DETENTION)*, Oslo University Press, 1957, Norwegian kr. 16,-, \$2.50.

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¹ *Arrest* may be defined as a brief deprivation of liberty precipitated by decision of the court, the police or, in certain cases, private individuals. As a rule it may not last for more than twenty-four hours. Criminal Procedure Act of 1887 [hereinafter cited as CPA] §§ 235-36. *Detention or remand in custody* will be used to refer to a deprivation of liberty before trial, usually of longer duration than arrest, ordered by a court after a hearing at which the accused has been present and has had an opportunity to speak. The term *custody* is used generically to comprehend any pre-trial incarceration of an accused.

² "No one must be arrested and committed to prison except in the cases determined by law and in the manner prescribed by laws." NOR. CONST. art. 99 (1814).

³ Under several provisions of the act arrest and remand may be authorized even though the suspected offense does not carry a statutory maximum penalty in excess of six months' imprisonment. Of great practical importance is the rule allowing arrest and detention of a person not permanently domiciled in the country when there is a danger that he may try to escape. Conversely, specific provision is also made for certain instances in which the right to arrest and detain is limited: cases which may only be prosecuted at the request of the offended party (*e.g.*, libel), cases against pregnant women and nursing mothers, cases against members of the parliament.

Special

Danger of escape

If the general prerequisite is satisfied, custody may be ordered whenever "in consideration of the magnitude of the punishment or on other grounds there is reason to fear that [the accused] will evade the prosecution or the execution of the punishment."⁴ "Reason" should probably be understood as requiring a real probability of flight; calculation of the danger of escape must depend upon a weighing of the motives for and against evasion and this assessment must be concrete. There is no basis in the act for constructing a rule that makes an order of custody obligatory in the case of especially serious charges. Yet the principle of concrete assessment is not always adhered to in practice: when a serious breach of the law is charged, remand in custody is practically inevitable whether or not there is occasion to fear that the accused will evade punishment. This has been pointed out by Andenaes: "In our country [Norway] the practice has now become . . . that when a serious crime is committed, where the term of imprisonment may extend to several years, immediate remand follows almost automatically, even if sound human reasoning would tell one, for example, that this peasant fellow, living on his farm, has no intention whatever of escaping."⁵

Danger of collusion

The accused may also be remanded "when in the circumstances there is special reason to fear that by destroying the traces of the act or by agreement with witnesses or fellows in crime or in any other way, he will destroy the evidence."⁶ The wording seems to demand that there be concrete circumstances indicating that the accused will destroy evidence. In practical fact, however, this requirement is not very closely adhered to. Usually custody is ordered on the basis of only hypothetical danger of loss of evidence; and in some of the cases a danger of even this nature has not been present.⁷

Danger of repetition

According to this provision custody may be prescribed "when there is special reason to believe that [the accused] will repeat the

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⁴ CPA § 228(2).

⁵ ANDENAES, *NORDISK KRIMINALISTISK ARSBOK 1948-49* 103 (1950).

⁶ CPA § 228(3).

⁷ ANDENAES, *op. cit. supra* note 5, at 103. Although not expressly stated in the act, it must nevertheless be presumed that it is only a danger of the accused tampering with evidence in his *own* case that may constitute the requisite danger of collusion. The accused should not, for example, be remanded if there is danger only that he will tamper with evidence in a case against a fellow accused, although instances of such remand have in fact been reported.

criminal offense or complete a criminal offense which he has tried to commit or threatened to commit.”⁸ The provision must be construed as envisaging a danger of commission of *the same kind* of crime as that stated in the charge. The general danger of criminal activity is not sufficient. In addition, the danger of repetition must be of a certain magnitude. In actual administration, however, there is a tendency to stretch this provision beyond the scope of the wording.

Security measures

Under this provision remand may be applied when “the question may arise of applying security measures under section 39 of the Criminal Code, or when a judgment calls for security measures.”⁹

Discretion

The court is not bound by the police application for remand in custody even though the prerequisites may be met. It is the task of the court to assure that detention is both necessary and reasonable in the individual case. A decisive factor in the granting of an application for remand is the question whether the same aim may be achieved by less drastic means than physical restraint. If, for example, escape or repetition of the crime may be prevented by ordering some substitute measure for detention, such measure should be applied.¹⁰ But even if the aim cannot be achieved in any other way than the deprivation of liberty, the

⁸ CPA § 228(4).

⁹ CPA § 228(5). Section 39 of the Criminal Code of 1902 provides in part: “(1) If an otherwise punishable act is committed during insanity or unconsciousness, or if an offense is committed during unconsciousness due to wilful intoxication . . . or during temporarily reduced consciousness or by someone with underdeveloped or permanently impaired mental capacity, and there is danger that the perpetrator because of his condition will repeat such an act, the court may decide that the prosecution, for purposes of safety shall (a) assign or deny him a certain place of residence, (b) place him under the supervision of the police or a specially appointed probation officer and order him to report to the police or the probation officer at designated intervals, (c) forbid him to consume alcoholic beverages, (d) place him in reliable, private care, (e) place him in a mental hospital, sanatorium, nursing home or workhouse, where this is possible according to general provisions promulgated by the King, (f) keep him in custody.” If such a defendant is criminally responsible (not legally insane) he will, as a rule, be sentenced at once to both a prison term and security measures: the convict has first to serve his prison time, and thereafter the security measures go into effect. Security measures have a maximum limit—usually five years, although it may be prolonged. In most cases the measures imposed are those authorized by §§ 39(1)(a)-(c). If the convict is a menace to society he will generally be held in a special institution for abnormal, but not insane, offenders under § 39(1)(e). A few especially dangerous escape risks will be held in an ordinary prison. Section 39(1)(f). Persons not criminally responsible may be adjudicated *only* to security measures. And it may be added that in fact many of the criminally responsible who are sentenced both to prison and to security measures are subsequently pardoned so far as the former goes.

¹⁰ Cf. Norsk Retstidende (Nor. Law Rep.) 822 (1894); Norsk Retstidende (Nor. Law Rep.) 250-51 (1908) (Sup. Ct. decisions).

court should abstain from the use of the coercive force of detention if it is out of proportion to what one wants to achieve.

The Formal Prerequisites

Arrest may normally take place only upon a warrant,¹¹ but when waiting for a warrant entails danger, *e.g.*, of escape or tampering with evidence, the arrest may be made on the orders of a police official or—when even more pressing circumstances make dangerous the procurement of such an arrest order—by a policeman without warrant or order.¹² This rule that a judicial decision must normally intervene before an arrest may be made is not, however, adhered to in practice. Arrest by warrant hardly exists. This discrepancy between law and fact led some years ago to a strong rebuke by the Supreme Court,¹³ but the decision has not succeeded in altering the practice.

Anyone arrested must as soon as possible be brought before a magistrate; at the latest he must appear within the next day if the police have not by then released him.¹⁴ On occasion the police exceed this time limit without reason. The magistrate before whom the accused appears is normally competent to decide the question of detention after hearing the accused. The accused may be represented by defense counsel, although he rarely is at this stage of the prosecution. In special cases the court may appoint counsel for the defense at public expense, but this also is done very infrequently.

The public prosecutor may be represented during the hearing;¹⁵ but normally he is content to submit a written application for detention, referring to the police depositions of interrogation and other investigation documents. Although the hearings are public unless the court decides otherwise,¹⁶ the court's deliberations are not to be reported by the press or radio without the consent of the court. The accused is not compelled to answer questions from the police or the court concerning the charges against him,¹⁷ and if his answers are false he must not be punished for them.¹⁸ The court will as a rule pronounce its findings

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¹¹ CPA § 231.

¹² Under some circumstances a private person may also arrest a suspect without a warrant or an order.

¹³ Norsk Retstidende (Nor. Law Rep.) 567 (1936).

¹⁴ See note 1 *supra*.

¹⁵ CPA § 278.

¹⁶ Code of Courts of 1915, § 124. Cf. § 126.

¹⁷ CPA § 255. However, the accused is obliged to tell his name, occupation and address.

¹⁸ Criminal Code of 1902, § 167.

before the hearing is adjourned. The decision may be appealed to a higher tribunal.¹⁹

In its order for detention the court must, according to the act, state its reasons.²⁰ Originally, the requirements as to reasons were rather strict, but today a reference to the relevant provisions of the act will usually suffice.²¹ This laxity in court practice has several unfavorable consequences: the non-reasoned decision is as a rule less thoroughly considered than one for which reasons are given; it will be easier than it would otherwise be to detain for reasons not recognized by the act; judicial laxity can spread with consequences which may lead—and in fact have led—to a lack of uniformity in the administration of justice; and, when the court does not have to reason its decision, important points of law may not be discussed. In some magistrate's courts the remand application procedure has become a matter of wholesale rubber stamping: in the Oslo police court, for example, blanket reference is frequently made to escape, collusion and repetition-danger provisions without regard to whether all three grounds are in fact applicable to the given case.

If the order is issued before the indictment has been preferred, a time limit is to be placed on the detention.²² In practice the limit is usually about three or four weeks. If the accused is to be examined by psychiatrists, it is usual to extend the limit to between six and eight weeks. If the investigation has not been completed before this period has elapsed and the public prosecutor does not find it expedient to release the accused, application may be made for an extension.²³ In such a case the accused must appear in court in the usual way.

II. DETENTION USAGE

A recent statistical study made by the author will serve to illuminate how the institution of detention legally structured by the Criminal Procedure Act functions in actual practice, and will lay the basis for an evaluation of the system. It reveals that detention is resorted to in a surprisingly large number of cases in Norway, and that the period of remand in custody is generally unwarrantably long. The usage, however, is not uniform in the various districts.

The incidence of detention is highest for those persons who are later convicted and sentenced to an unconditional term of imprisonment.

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¹⁹ CPA § 407.

²⁰ CPA § 168.

²¹ See *Norsk Retstidende* (Nor. Law Rep.) 348 (1946) (Sup. Ct. decision).

²² CPA § 239.

²³ *Ibid.*

In round figures, about seventy per cent of those persons who are given an unconditional term of imprisonment²⁴ for a felony have been remanded in custody while their cases were being investigated. Remand is common, too, in the case of accuseds who are subsequently to be let off with suspended sentences²⁵ for felonies committed: about one-third of those who received a suspended term for a felony in Oslo in 1955 had been detained during the period of investigation. On the other hand, detention is comparatively rare in cases which are later disposed of by conditional suspension of the prosecution²⁶ or dropped for lack of evidence.²⁷ And in general, where accuseds are charged with petty offenses,²⁸ remand is much less often ordered than in felony cases.

As to the duration of remand in custody, the average periods of detention before conviction for male prisoners committed to the central prison ("Botsfengslet") in 1952 to serve their term for felonies and who had been detained during the investigation, were, in cases of stealing and similar offenses, 72 days; acts of violence, 101 days; sex

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²⁴ An *unconditional term of imprisonment* is an unqualified prison sentence as opposed to probation or suspended sentence, the latter two—in which if a convict fails to fulfill the conditions imposed he has, as a rule, to serve his sentence—being called conditional terms of imprisonment. Any offender can be placed on probation or given a suspended sentence, but those who commit serious crimes are normally given unconditional terms of imprisonment.

²⁵ Criminal Code of 1902, § 52(1): "Where someone is found guilty of an offense the court may provide in its judgment that the enforcement of the punishment shall be suspended, so long as concern for general law-abidance or concern for restraining the convict from further offenses does not require enforcement of the punishment. The court may also defer pronouncing sentence if that is considered to best serve the purpose. If a substantial part of the sentence is considered served by time spent in custody, the court may decide to suspend enforcement of the remaining punishment." But this is limited by § 52(2): "If the convict has been in confinement in the course of five years preceding the offense, the court may decide for suspension only under special circumstances. The same applies when the convict is sentenced to be kept in confinement for more than one year, or the law provides a minimum punishment of more than one year's imprisonment for the felonies of which the convict is found guilty." When the court decides on suspension, it shall in its judgment stipulate a probation period (usually 2 years) and it may set other special conditions for suspension.

²⁶ The district attorney (public prosecutor) may suspend prosecution though the guilt of the accused appears to be beyond doubt. As a rule conditions will be attached to such a suspension, and if the offender does not fulfill the conditions (*e.g.*, if he commits another crime), the district attorney will issue an indictment to criminal court, where both offenses will be tried.

²⁷ In Norway it is the prosecuting authority (usually the district attorney) who decides if he has sufficient evidence to issue an indictment (prosecute). The class of cases referred to are those in which prosecution is abandoned. Although comparable statistics are not available for cases of accuseds exonerated at judicial trial, it may be stated that it happens very infrequently that an accused who has been remanded in custody is subsequently so exonerated. In a study by the author in Oslo only 3.4% of persons subjected to detention were later acquitted.

²⁸ Felonies may be generally defined as offenses punishable by more than three months imprisonment or dismissal from public office. Criminal Code of 1902, § 2(2). Those offenses not felonies are petty offenses (misdemeanors). Criminal Code of 1902, § 2(3).

offenses, 175 days; other offenses, 75 days: in the main, these are prisoners who have more than six months remaining on their terms after deduction of the whole amount of time spent in pre-conviction custody.²⁹ Periods of remand for offenders sentenced to short terms struck substantially shorter averages, varying between forty and fifty days.

A study of the whole population of sixty-eight youthful offenders imprisoned in the "Borstal" ³⁰ during the four years 1952-1956 shows that fifty-eight were remanded in custody during investigation. The average duration of confinement between arrest and the date of incarceration in the "Borstal" was 119 days. Even more frequent and longer detention rates were recorded for the total number of persons sentenced to both imprisonment *and* security measures³¹ during the two-year period 1954-1955. Of 201 such prisoners, only seven had not been remanded in custody during investigation; for the remaining 194 the average remand period was 144 days. It is interesting to note, finally, that for persons receiving suspended sentences for felony not only was the incidence of detention less—about one-third of the total number of accused—but the average duration for those detained was also shorter than in the case of persons incarcerated after conviction. Of the Oslo suspended-sentence group discussed above, remand averaged twenty-seven days. Investigation showed that quite a number of these had already served a considerable part of the suspended term through their detention in custody.³²

A comparative statistical investigation of the frequency of pre-trial confinement in Norway, Denmark and Sweden indicated that in Norway remand was ordered to a somewhat greater extent than in Denmark; in Oslo it was ordered significantly more frequently than in Copenhagen. Comparison with Sweden shows an even greater difference in the percentage of cases remanded than is evident in the Norway-Denmark comparison. In Norway, prisoners are remanded three or four times as frequently as in Sweden; the difference is even greater

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²⁹ Criminal Code of 1902, § 60: "If the convict has been kept in custody which he had not incurred by his behavior while the case is pending, this should in the sentence be deducted entirely or partly from the punishment imposed, so that the latter may even be considered as completely served." In practice virtually every accused who has been remanded in custody before trial receives a deduction for the entire time he has spent in custody.

³⁰ A reformatory for offenders from ages eighteen to twenty-three years. Confinement in the "Borstal" (an "arbeidsskole" or work school) ranges from one to three years (depending on behavior in the institution, prognosis, and other factors) and can be ordered only for commission of a felony. It is considered to be a kind of treatment, rather than punishment in the legal sense.

³¹ See note 9 *supra* and accompanying text.

³² This may be one reason *why* their sentences were suspended. See note 25 *supra*.

between Oslo and Stockholm. On the basis of information available it is not possible to determine whether the higher frequency of remand in Norway is due to the fact that physical restraint is more often appropriate in the circumstances of the Norwegian than in the Danish and Swedish cases. It seems, however, that only a part of the difference might be explained in that manner. The substantive legal principles governing remand are generally coincident in the three countries.³³ Probably explanation for the more extended use of detention in Norway must be sought in the tendency of Norwegian courts and police to exploit the institution for purposes not recognized by the Criminal Procedure Act.

III. THE PURPOSE OF ARREST AND DETENTION

The purpose of an act is usually understood to be the purpose or the aim the legislative body wishes to further by the act, as it appears in the act itself, in the introductory notes to the act, and in the interpretive practice of the courts—primarily the Supreme Court. But the act may also be used for other purposes than the ones intended and recognized. It is the hypothesis of the writer that in practice arrest and detention in particular are often employed to ends that are not recognized by law.

As we have seen, under the Norwegian Criminal Procedure Act arrest and detention may take place in order to prevent the accused from evading trial or punishment, tampering with evidence or repeating the criminal offense.³⁴ Arrest and detention may also be resorted to in order to permit inquiry into the mental condition of an accused when security measures are being considered, provided the observation cannot take place while the accused is at liberty.³⁵ These are the *recognized purposes of confinement*, firmly vested in the act. Beyond these a number of *non-recognized purposes* may, however, motivate any given police or judicial decision to arrest or detain. It is of course not possible to state with certainty the frequency with which such non-recognized purposes determine decisions in practice, but investigations made by the writer indicate that they are far from unimportant. This impression is based, *inter alia*, on interviews with a great number of judges, police officers and other experts who have been willing to state their opinions,

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³³ CODE OF PROCEDURE (RETSPLEJELOVEN) § 780 (Den. 1916); CODE OF CRIMINAL PROCEDURE §§ 228, 240 (Nor. 1887); CODE OF PROCEDURE (RATTEGANGSBALKEN) ch. 24, § 1 (Swed. 1942). See BRATHOLM, PAGRIPELSE OG VARETEKSFENGSEL (ARREST AND DETENTION) 46-59 (1957).

³⁴ CPA §§ 228(1)-(4). Cf. § 240. See notes 4-8 *supra* and accompanying text.

³⁵ CPA § 228(5). Cf. § 240. See note 9 *supra* and accompanying text.

on a thorough study of police court practice, and on the perusal of a wide range of documents.³⁶ While the extent and direction of influence of these various tacitly operative forces are peculiarly affected by such factors as the fluctuating incidence of criminality and the individual idiosyncracies of police officers, judges and officials, it seems characteristic of the more or less systematically appearing non-recognized purposes that they are closely akin to the avowed policy ends of the act—the recognized purposes—in that the former also serve, wholly or in part, the suppression of crime.

These non-recognized purposes seem particularly significant to the police, who, feeling a special responsibility for suppressing crime, intentionally or unintentionally tend to place efficiency above the rules limiting their authority. And though the courts are in a somewhat different posture as regards the exploitation of detention for aims which are unauthorized by law—since the judicial function, *inter alia*, is impartially to prevent the police from overstepping the fixed bounds by which law circumscribes their power—the courts, nevertheless, also play a role in the suppression of crime and may consequently tend more or less intentionally to identify themselves with active law-enforcement policy. For this reason a court, despite attempts to be objective, may incline to accept non-recognized purposes of detention. And, in any event, in view of the largely discretionary character of the judicial determination supporting an order of arrest or detention, and especially of their very often superficial knowledge of a case, the courts do to a large extent rely on the statements of the police. The fact that as a rule the police neglect to substantiate their application for detention, apart from an abstract reference to one or more of the conditions of the act, makes it none the easier for a court to form an independent opinion. To this it must be added that the individual magistrate, and especially the inexperienced one who as a rule hears the applications in the magistrate's court,³⁷ will not infrequently be sensitive to the pressure put on him by the police and, for this reason as well, is little inclined to reject the public prosecutor's application.

Distinction may be made among three principal non-recognized purposes of remand: *investigation*, *punishment*, and *protection*.

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³⁶ Some 25,000 court decisions in remand cases during a period of approximately twenty years have been reviewed by the author.

³⁷ In Norway certain recent law graduates are given positions as deputy judges (assistants to judges). These young lawyers often hear applications in the magistrate's court and, after some experience, will be given the authority to pronounce judgments (in the first instance). Although this system has received criticism, there has as yet been no reform. Since there is heavy competition for these assistantships, most are well qualified.

Investigation

Statements originating from police officers, judges and others show that remand is to some extent utilized to obtain confessions; indeed many detention orders would be quite incomprehensible if their purpose were not to make the accused confess.³⁸ What primarily causes confession during remand is the strong psychological effect which deprivation of liberty has on most people, together with the circumstance that a full confession often seems to bring about release, because the danger of collusion is eliminated. Many prison doctors, prisoners and others³⁹ have attested to the heavy strain that confinement really represents, especially on persons who have not been previously imprisoned.

Punishment

Confinement prior to conviction for an offense is sometimes used as a punishment. One may distinguish here between two types of punishment purposes, retributive and preventive; the latter may be *special prevention* (individual deterrence) or *general prevention* (exemplary deterrence).

Retribution

For some time it was a primary aim of criminal administration to exact retribution (avenge the criminal act), but this punishment purpose has gradually slid into the background. However, it still makes its imprint felt on criminal legislation and, in the writer's opinion, to some degree influences sentencing practice. If it is in fact still extant, there is strong reason to believe that it operates with some force in rulings on remand, immediately after the crime has been committed and while

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³⁸ There is in Norway no constitutional or statutory mandate excluding coerced confessions or confessions given after prolonged detention.

Many foreign experts have written on the use of illegal arrest to procure confessions. Hurwitz criticizes the occurrence in Denmark of "remands in custody, with the real but not declared purpose of making the accused confess. There is evidence to show this which can hardly be refuted." HURWITZ, RESPEKT FOR MENNESKET 186 (1951). For criticism of this unlawful use of arrest in Germany see ALSBERG, JURISTISCHE WOCHENSCHRIFT 1436 (1925); CROMWELL, NEUE JURISTISCHE WOCHENSCHRIFT 378 (1954); HENTIG, MONATSSCHRIFT FÜR KRIMINALPSYCHOLOGIE UND STRAFRECHTSREFORM 280 (1932); ROESEN, NEUE JURISTISCHE WOCHENSCHRIFT 1733 (1953). For French criticism see Garcon, in SOCIÉTÉ INTERNATIONALE DE CRIMINOLOGIE, 1952 *Bulletin* (1er semestre) 25 (1952); Bouzat, in *La protection de la liberté individuelle durant l'instruction*, 24 REVUE INTERNATIONALE DE DROIT PÉNAL 109, 119 (1953); Garcon, *id.* at 176. Concerning Switzerland see Waiblinger, Lang & Jatón, *id.* at 234. Williams states that in England the police use the threat of opposing bail as a means of procuring information from a prisoner. G. WILLIAMS, THE REFORM OF THE LAW 188 (1951).

³⁹ See MARX, DIE AUFGABEN EINER PSYCHOLOGIE DER UNTERSUCHUNGSHAFT, VIERTELJAHRSSCHRIFT FÜR GERICHTLICHE MEDIZIN UND ÖFFENTLICHES SANITÄTSWESEN, DRITTE VOLGE, XXXII BAND. 315, 318 (1906); SIEVERTS, DIE WIRKUNGEN DER FREIHEITSSTRAFE UND DER UNTERSUCHUNGSHAFT, HAMBURGISCHE SCHRIFTEN ZUM GESAMTEN STRAFRECHTSWISSENSCHAFT, HEFT 14, 27 (1929); LEPPMANN, DER GEFANGNISARTZ 68 (1909).

society's moral indignation and desire for retribution are most strongly felt. Retributive attitudes are especially to be expected in the case of serious crimes, the more so when the individual police official or judge considers mores of major societal value to have been offended, or when he is persuaded that a failure to confine may well give the public the impression that justice is lax. In actual fact, remand in these cases will often be a concession to the retributive desires of the public and of the individual official who requests or orders it.

Prevention

Special prevention

It must be presumed that remand in a number of cases is employed in the aim of special prevention—particular deterrent or shock effect—and that this aim is to some extent realized in the event. At the Oslo police headquarters, where it is rather openly admitted that remand is used for shock purposes, it seems to be the general opinion that this practice has had a favorable effect. In recent theory too it is maintained that individual deterrence should be considered a legitimate aim of detention. Beckman⁴⁰ in Sweden maintains that remand in custody should be available to give a sufficient pedagogic effect to an offender's subsequent reaction to his punishment. Similar views have been aired in our country.⁴¹ The American Judge Leibowitz⁴² has advocated remand for predicative shock purposes in cases of young law-breakers. In England remand has long been utilized for the purpose of giving the accused a "taste of prison,"⁴³ and although some years ago a court refuted the principle,⁴⁴ Mannheim⁴⁵ writes that the practice may still be found.

General prevention

Arrest and detention, as well as ultimate sentence to imprisonment after conviction, may be used to effect a desired exemplary or warning impact on the community at large. In fact, as remand usually follows immediately and automatically after the crime, its general deterrent effect is probably rather strong. Certainly there can be little doubt that

⁴⁰ SVENSK JURISTTIDNING (Swedish Journal of Jurists) 666 (1945).

⁴¹ See L'ABEE-LUND, NORDISK KRIMINALISTISK ARSBOK 78 (1955); HELI, NORDISK TIDSSKRIFT FOR KRIMINALVIDENSKAB 334-35 (1951).

⁴² Newsweek, Sept. 6, 1954, p. 51.

⁴³ See GILES, THE MAGISTRATES COURTS 69 (Rev. ed. 1951); Mannheim, Short Term Imprisonment and Its Alternatives, Preparatory Papers III, 9, 12 (12th International Penal and Penitentiary Congress, The Hague 1950).

⁴⁴ R. v. Brentford Justices: *Ex parte* Muirhead, 106 J.P. 4 (K.B.D. 1941). Cf. GILES, *op. cit. supra* note 43, at 69.

⁴⁵ Mannheim, *op. cit. supra* note 43, at 9, 12.

pre-trial custody as a preventive measure is practiced. Leading police officials in Oslo have repeatedly stated that to some extent arrests are made and detention requested for purposes of general prevention. Andenaes⁴⁶ has also pointed this out and is of the opinion that the practice should be legalized to a certain extent. Similar views have been put forward by Beckman⁴⁷ in Sweden. Bouzat⁴⁸ states that in France detention is actually used to set an example, although he does not condone the practice.

Protective Purposes

Although a remand in custody ordered in the interest of the accused—to protect or to guard him—does not share with other detentions motivated by non-recognized remand purposes the principal aim of vindicating the claims of society against criminal behavior, it cannot be said to have no connection whatever with the underlying ends of penal sanction. The criminal law is not merely preventive and retributive, but curative as well; in many of its aspects a protective purpose envisaging the welfare of the accused is combined with its more salient preventive purpose. Similarly, both principles might operate to urge detention where there is a danger that an accused will commit fresh crimes. Remand for protective purposes is especially prevalent in instances where the accused himself expresses the wish to be detained or by his whole attitude shows that he does not object to his detention. He may, for example, feel himself threatened or an outcast from his social sphere, or he may suffer from strong feelings of guilt. But sometimes his motive may also be practical: expecting unconditional imprisonment after conviction and knowing that it is the practice to make allowance in the sentence for the duration of the remand period, he may be anxious to serve his term and have done as quickly as possible.

IV. ALTERNATIVES TO DETENTION

Instead of detaining the accused, the court may, in certain cases, order measures in lieu of custody: bail, a duty of periodically reporting to the police, confiscation of the accused's passport, and the like.⁴⁹ While a number of such measures are specifically enumerated in the

⁴⁶ ANDENAES, *op. cit. supra* note 5, at 104. For an excellent exposition in English of Andenaes' views see generally Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L., C. & P.S. 176 (1952).

⁴⁷ SVENSK JURISTIDNING (SWEDISH JOURNAL OF JURISTS) 666 (1945); NORDISK KRIMINALISTISK ARSBOK 1952-53 48 (1954).

⁴⁸ Bouzat, *supra* note 38, at 117.

⁴⁹ CPA § 245. One may compare the situations in Denmark, England, Sweden, Norway, Western Germany and the United States. In all of these the courts may, within limits, set the accused free upon condition. Apart from Sweden the release

Criminal Procedure Act, the list is not exhaustive, and it seems that the court may impose upon release whatever conditions it deems fit, so long as those conditions are suited to preventing escape or the commission of fresh crimes by the accused.

In practice, these substitute measures have not achieved the expected results. This applies especially to bail, which is only rarely used—probably, indeed, no more than once or twice a year. The same fate has, by the way, befallen the institution in many other countries, such as Western Germany and Denmark. In Sweden bail is not recognized, as it is considered to lead to inequality before the law. However, in the Anglo-Saxon countries it plays a great part. It is difficult to explain why there is such a great difference between practice in the Anglo-Saxon countries on the one hand and in Norway on the other. It is sometimes argued that the rather modest part played by the institution of bail is due to the inability of most criminal "clientele" to provide bail,⁵⁰ and the court's unwillingness to accept bail as being effectual in achieving the explicit purposes provided for detention.⁵¹ More probably the restricted use of bail in Norway must be seen as tied to the Norwegian tendency to employ detention for the non-recognized purposes of retribution, prevention and protection—purposes which cannot be realized through bail. The practical problems attaching to bail may constitute a further reason: it is simpler to detain an accused or to order him to report periodically to the police than to administer the setting and collecting of bail.⁵² This may well explain why the *duty to report*, although less effective than bail, is undoubtedly the most frequently used detention substitute in this country. For example, of a sample of 177 cases brought before the magistrate's court of Oslo, 166 were remanded in custody, and of the 11 released, 10 were ordered to report to the police.

By law, the condition for imposing substitute measures to detention is that the prerequisites for detention itself be met.⁵³ In consideration,

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may in all countries be effected on bail, although bail is seldom used in Western Germany and in Denmark. In England, and especially in the United States, where the accused has a constitutional right to release on bail (except in the case of crimes punishable by death), release on bail is, of course, frequent. In Sweden and in Denmark release on duty to report to the police or release under a ban on travel is employed to a certain extent.

⁵⁰ HURWITZ, *DEN DANSKE STRAFFERETSPLEJE* 691 (2d ed. 1949). This fact undoubtedly serves to explain why bail is not *always* used, but it does not explain why, in Norway, bail is *almost never* used. Certainly there exist a considerable number of persons who are able to provide amounts of bail adequate to constitute a substantial guarantee against their escape. Other circumstances than impecuniosity must be significant in the atrophy of the institution.

⁵¹ HURWITZ, *supra* note 50, at 691.

⁵² For greater detail see BRATHOLM, *op. cit. supra* note 33, at 92. Concerning the infrequency of bail, see *id.* at 298 n.8.

⁵³ CPA § 245.

however, of the fact that substitute measures infringe less on the fundamental rights of the individual than does detention, there is much to be said for not attaching quite such stringent conditions to the application of the substitutes. One might, for example, modify the requirement concerning the requisite degree of suspicion, danger of escape or of repetition. This is undoubtedly done in practice, although not apparent from the court order. When the requirements for detention are met, the court may at its discretion order the conditional release of an accused, so long as there is no danger of collusion.⁵⁴ There is no absolute ban on substitute measures in cases of grave charges, as is the case in many other countries. But where danger of collusion exists, the court has no power to order detention substitutes, and must either unconditionally release the accused or remand him in custody.

When a decision regarding conditional release is to be made, here as elsewhere, the principle must be applied that a stronger measure must not be resorted to if a milder one will suffice.⁵⁵ If, for example, there is reason to believe that the danger of escape will be countered by bail, this substitute rather than detention must be applied. Even if the danger may not be wholly met by applying a substitute measure, the substitute must nevertheless be applied if the danger after its application can no longer be considered of a magnitude requiring detention.⁵⁶ The question, then, is not whether the substitute is equally effective, which it often will not be, but whether it will be sufficiently effective to reduce the danger below the minimum required for detention.

The formal requirements for applying a measure substituted for detention are, in the main, the same as for detention. There is, however, an important difference. While detention in prison may be ordered only by the court,⁵⁷ the police, too, may order the accused to comply with a substitute measure.⁵⁸ But if the accused objects to the police order he may demand to be heard by the court.⁵⁹

V. SOME OBSERVATIONS AND SUGGESTIONS FOR REFORM

One may ask what the practical effect of current remand usage is, especially as regards the somewhat extensive use of confinement without

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⁵⁴ *Ibid.*

⁵⁵ See Norsk Retstidende (Nor. Law Rep.) 822 (1894); Norsk Retstidende (Nor. Law Rep.) 250-51 (1908) (Sup. Ct. decisions).

⁵⁶ See STANG, RETTERGANGSMÅTEN I STRAFFESAKER 109 (2d ed. 1951). For foreign law see SCHMIDT, LEHRKOMMENTAR ZUR STRAFPROZESSORDNUNG UND ZUM GERICHTSVERFASSUNGSGESETZ 278 (1952); HURWITZ, *op. cit. supra* note 50, at 612-13.

⁵⁷ CPA § 240.

⁵⁸ CPA § 238. Thus, the police may itself set bail, order the accused to report periodically, etc. CPA § 245.

⁵⁹ CPA § 249.

foundation in law. The question is difficult to answer. In the first place, practice has not to any appreciable extent had an adverse effect on the good reputation of the police or the courts—not, in any case, so far as the more law abiding part of the population is concerned. This, it can be surmised, may be due primarily to the fact that it is not generally known to what extent practice deviates from law. But it is significant, as well, that the offensive remand practice has only to a very small extent hit *innocent* people. Most of the people who are arrested or detained illegally are later proven guilty of the offense charged; and evidently people then assume that the requirements for arrest and detention were met.

A positive side to the existing practice is its favorable preventive effect, creating the paradox that illegal practice maintains respect for the law. But however efficient its immediate results, it is clear that the practice should not be maintained. Such proceedings by the police and the magistrate's court will in the long run disrupt the relationship between the citizenry and the state, particularly when it becomes known to what extent the rules of the Criminal Procedure Act, designed to protect the accused, are being over-ridden. And there is not only the question of more or less tangible damaging effects to be considered, but also the maintenance of a basic principle of law. For it is a leading constitutional precept that deprivation of liberty may take place only when founded in law.⁶⁰

The present condition of the arrest and detention usage, unworthy of a constitutional state, consequently must cease. This may be brought about either by amending the rules of the act to make them conform to the practice followed, by modifying the practice to make it conform to the rules of the act, or by the intermediate means of bringing about a compromise between law and practice. This intermediate solution is probably the one that should be chosen: there seems to be reason to extend the legal availability of arrest and detention beyond the somewhat over-narrow current rules.

In the first place, the right to arrest should probably be somewhat wider than the right to detain—an arrangement which is current in Sweden and in Denmark, and which may be justified by the slighter infringement on liberty involved in arrest. The Swedish rule that the police may without formal arrest hold a suspect for as long as twelve hours for questioning, seems to have much to recommend it.

Second, there may be a case for giving some of the act's express prerequisites of confinement a somewhat wider application than does

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⁶⁰ See NOR. CONST. art. 99 (1814).

current theory. This should apply especially to the collusion detention rule, which is now obviously too narrow if it is to be construed in the way indicated by the statutory wording and the introductory notes. Too restrictive a collusion rule might prevent the prosecution of many crimes; but, on the other hand, if the right of collusion custody were too wide—and especially since the rule is most useful in cases where evidence is weak—its extension would clearly entail a great danger of applying detention to obtain confession. One should therefore require a fairly substantial measure of danger that the accused will tamper with the evidence, but definite evidence of collusion should not be required. (Of course, by the time such evidence is available, detention is, generally speaking, already too late!) As regards the other causes of remand provided by the act, minor adjustments may seem called for. Thus, it might be justified to give the escape and prevention rules a somewhat wider application in cases where the likelihood of guilt is very strong and it is probable that the accused will be sentenced to an unconditional term of imprisonment.⁶¹ The objections attaching to deprivation of an accused's liberty seem to be of less consequence in these cases.

Finally there may appear reason to introduce several new statutory justifications for detention which would make some concession to the system as currently practiced: detention for the protection of the accused ("protective detention"), detention on general preventive grounds, and preventive "shock" detention in individual cases. To support such detentions, of course, clear evidence of the guilt of the accused would be required; to detain for preventive reasons persons whose guilt is doubtful would be to punish on suspicion in contravention of the principle *in dubio pro reo*. But even with this qualification, substantial objections can probably be made against the recognition of detention as a means of prevention: thus, on several grounds, it seems a doubtful undertaking to detain the accused until the need for deprivation of liberty has been thoroughly investigated and reported on and the question of guilt has been finally decided. Especially as regards shock detention, we know too little today about the preventive effects of deprivation of liberty to let ourselves in for legislative experiments in this field. Admittedly, penal reforms have often been carried through based on rather uncertain presumptions as to the effects caused, but this has in more recent generations generally involved reforms bringing

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⁶¹ The court has before it at this time the police report of the case, including the statements of the accused and witnesses. In many cases the accused has confessed, and in these cases it is, as a rule, quite obvious that he is guilty. The accused has opportunity to present argument and, if he wishes, to be represented by counsel. In most cases it is not very difficult at this stage to say whether the accused will get a suspended sentence or whether he will get an unconditional term.

about a more gentle treatment of law breakers. When discussing amendments which reverse that trend there seems to be reason to demand a rather high degree of probability that amendment will have the desired effect. The evolution toward a constantly growing respect for individual liberty has carried with it so many advantages both socially and individually, that very weighty arguments are required to extend provisions curtailing this liberty. Even if extension should nevertheless appear necessary, it is arguable that such extension should not in any case be brought about by the introduction of dubious new reasons for detention, but rather by an increased use of the ordinary criminal law remedial measures—if necessary by expansion of the existing system of remedies.⁶²

But if it does not seem to be justifiable to extend the availability of detention itself on individual preventive grounds, no real objection can be raised against ordering an accused whose guilt is beyond doubt⁶³ to comply with certain limitations on his liberty (detention substitutes). Admittedly, even under the present rules, the court has some power in this regard, but the measures which it can impose are not to exceed what is necessary to prevent the accused from committing fresh offenses.⁶⁴ Certain measures may, however, be needed even though there is no immediate danger of repetition. Often it will be urgent to take steps to rehabilitate the accused personally or societally through various forms of medical treatment, social support, and the like. Experience shows that the period when the accused is awaiting his trial is very critical for him, and a practical effort to help him rehabilitate socially may decisively influence his prognosis.

Probably no substantial objections to protective detention can be raised, provided that the guilt of the accused is clear. It is reasonable to require that the accused himself agree to being detained. Protective detention will be of particular significance in cases where the accused expects a sentence of unconditional loss of liberty and wishes to get through with the term as quickly as possible.⁶⁵

A revision of the Criminal Procedure Act on the lines sketched here would mean a certain extension of the legal availability of arrest

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⁶² Note the institution of the English "Detention Center" and the German "Jugend-arrest," both providing short-term deprivations of liberty as a "shock" remedy in the case of juvenile delinquents.

⁶³ As in cases where the accused has confessed in court and there is no indication that the confession is false. (In Norway the police very seldom attempt to induce confessions through coercion.)

⁶⁴ The court may also, of course, impose conditions appropriate to prevent the accused from escaping. See text below note 49 *supra*. But we are here concerned only with its power to order detention substitutes on preventive grounds. See also the discussion in text above and below note 54 *supra*.

⁶⁵ See note 29 *supra*.

and detention but would probably—if the new rules were adhered to in practice—also lead to a certain reduction in the actual use of detention. It should be noted that the important question is not how many persons are detained, but who is detained. Amendments to the act should in the first place carry with them an extended availability of arrest and detention in cases where there seems to be no objection; the pressures for remanding an accused in contravention of the material requirements of the act would thus be lessened. But such amendments themselves cannot of course be expected to guarantee continuing propriety within the system. There would still remain a danger of misuse, and strict formal rules in the nature of protective guarantees are necessary. The following guarantees seem most significant:

(1) It must be presumed of major importance for strict adherence to the rules of the act that the accused be provided with counsel during his appearance in court following arrest.⁶⁸ The presence of counsel would permit meaningful adversary argument upon the application for detention and facilitate judicial weighing of its merit both in law and fact, whereas at present, the judge usually receives a biased presentation of the case through prosecution documents which the accused as a rule has not even read. The importance of counsel for the defense can hardly be exaggerated. His very presence would serve to alert the court and the public prosecutor to a more conscientious awareness of their duties and to prevent the procedures from slipping into a mere routine prejudicial to the interests of the accused. In Sweden, counsel for the accused is appointed immediately after the arrest, and the fact that prisoners in that country are detained far less often than in Norway is significant.

(2) The court should be compelled to state its reasons in support of a detention order instead of merely referring to the rules of the act. The magistrate would then be forced to consider whether all conditions of the law have in fact been fulfilled, and the danger of emphasis being placed, intentionally or unintentionally, on other considerations than those recognized by the act would be reduced. A demand for statement of the court's reasons would also mean that the public prosecutor would have to show proper grounds in his application for remand, a requirement which might well reduce the filing of such applications. And finally, such a provision would exclude the use of a rubber stamp in remand cases—an unsatisfactory practice which should cease in any case.

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⁶⁸ CPA § 99 provides: "The accused has a right at all stages of the prosecution to be represented by counsel." At trial in felony cases he must, as a rule, have counsel, and in such cases the state will normally pay the fees.

(3) More effective guarantees are needed to assure that the accused will be released immediately whenever those conditions prerequisite to detention which supported the court's order of remand no longer exist in fact. It seems clear that under present usage many prisoners are detained long after the requirements for their detention cease.

(4) It should be possible to expedite action in criminal cases in which the accused is in custody without losing any of the thoroughness necessary to proper trial.

(5) Administrative supervision of the police's exercise of authority should be augmented. If the parliament passes a presently pending bill providing for the office of an arbiter ("ombudsmann") answerable only to the parliament and authorized to control all administrative practice, an important safeguard will have been achieved. Experience from Sweden, where the office of such an arbiter has long been established, indicates that the very knowledge that he may intervene and impose responsibility for abuse upon offending officers has contributed in some degree to a strict compliance with the rules for arrest and detention.