THE WIRE TAPPING LAW AND ITS CONSTITUTIONAL IMPLICATIONS *

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INTRODUCTION

The reconciliation of individual liberty with public welfare forms the supreme concern of constitutional law in a democratic society. Over the years, this has been the most interesting if not the most exciting battleground between those who would emphasize individual liberties and those who see in effective law enforcement the primary goal of a well-ordered society. It is a never-ending battle conducted in the courts, in the legislature and in the law enforcement agencies of the government, with society, as the ultimate beneficiary, a curious, sometimes indifferent, sometimes keenly interested, onlooker.

The struggle has been carried on in the field of communications. One side believes that wire tapping is necessary and vital in law enforcement and that if it were not employed, a great number of crimes would go unpunished. They assert that the real danger to society comes from the organized activity of groups, mobs and gangs of professional criminals and that when these organized criminals operate with their accustomed secrecy, there is no technique known to police science by which their criminal activities can with certainty be detected and the criminals brought to account except — wire tapping.[1]

On the other hand, there are those who argue that "twentieth century electronics developments provide us with some of the most awesome threats to the privacy of the individual and, hence, to the peace of mind of everyone. Wires can be tapped at considerable distances from the place in which a telephone is installed. It is no longer necessary to cut into the telephone wire directly. Wires can be coated with a paint which provides the necessary electrical connection; the impulses from the telephone wire can be picked up magnetically."[2] As Justice Felix Frankfurter succinctly stated in Harris v. United States:[3]

> It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured and used. On the

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[1] Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, THE PROBLEM OF ELECTRONIC EAVESDROPPING 72-73 (1961).

[2] *Id.* at 1.

[3] 331 U.S. 145, 173 (1947).

> other hand, it cannot be said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole. The dangers are not fanciful.

Awareness of the dangers of and the benefits to be derived from allowing law enforcement officers to tap has led to compromise measures. In at least five American states (Louisiana, Maryland, Massachusetts, New York, and Oregon), wire tapping under court order is expressly permitted by statute.[4] Australia, while prohibiting interception of communications passing over the telephone, at the same time recognizes two exceptions.[5] In the Philippines, the embodiment of this attempt at accommodating two seemingly irreconcilable policies is Republic Act No. 4200, approved on July 19, 1965. It is an act to prohibit and penalize wire tapping and other related violations of the privacy of communication. As a concession to the need for wire tapping in certain crimes, it allows its use subject to certain restrictions and only upon compliance with certain requirements.

Senate Bill No. 9, which later became R.A. No. 4200, was introduced by Senator Lorenzo Tañada, referred to the Committee on Revision of Laws, and sponsored on the floor by the author and Senator Raul Manglapus. The bill was long delayed. Filed in 1962, in was taken up for discussion only in March, 1964 and finally passed by Congress in 1965.

Admittedly, it is a compromise measure.[6] Its author made it clear also that "the proposed bill does not pretend to solve all the serious problems connected with wire tapping and eavesdropping by electronic means."[7] Sen. Manglapus, in his sponsorship speech, revealed that the urgency of the bill is dictated by political realities. He said:

> We have had recently many charges and counter-charges of political leaders accusing each other of watching each other's movements, of placing men to keep track of their movements even with Ground Forces. This bill would provide for further protection against such moves because movements can now be followed not only by the naked eye of hired individuals but, as I explained to you, by the superior means which are now provided by technology and electronics.[8]

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[4] SEMERJIAN, "Proposals on Wire Tapping in Light of Recent Senate Hearings," 45 *B. U. L. Rev.* 218 (Spring, 1965).

[5] Sections 5(2), 6(2)(b), and 7 of the Federal Telephone Communications (Interception) Act of 1960 as reported in "Eavesdropping: Four Legal Aspects," 3 *Melbourne U. L. Rev.* 364-380 (May, 1962).

[6] In the words of Sen. Tañada: "We are only taking a middle ground here." See *Original Transcript of Senate No. 31.* (March 10, 1964), Regular Session.

[7] *Ibid.*

[8] *Ibid.*

It was also disclosed by Sen. Tañada that the National Bureau of Investigation (NBI) tapped telephone wires during the height of the Stonehill investigations.[9] What was alarming was the revelation during the Stonehill hearings by Director Lukban of the NBI that Stonehill engaged in wire tapping.[10]

Clearly, R.A. No. 4200 was enacted by our Legislators to minimize the possibility of an Orwellian nightmare occuring in the Philippines. It is a timely attempt in the search for a total solution to the growing problem of proliferating electronic snooping and wire tapping gear.

How the Wire Tapping Law affects and is affected by the constitutional provisions relative to privacy of communication and freedom from searches and seizures will be the meat of this paper.

WHAT IS WIRE TAPPING

Wire tapping is not a modern phenomenon. As early as 1862, the State of California found it necessary to enact legislation prohibiting the interception of telegraphic messages.[11] The beginnings of telephone wire tapping occurred in the early and middle 1890's, a little less than two decades after the invention of the telephone.[12] Police agencies made extensive use of wire tapping as a covert means of securing information with the emergence of organized crime during the Prohibition Era in the United States.[13]

Wire tapping is a specialized form of eavesdropping. The latter was a crime in Blackstone's time[14] as it still is in some parts of the United States, and could be defined as the act of surreptitious fact-collecting affecting individual privacy. The objective in eavesdropping is to listen to and/or watch the victim unknown to him and to make a record of what is seen or heard. This could be accomplished by telephone tapping, hidden microphones, recording of speech and a number of special devices such as electrically triggered photographic cameras, television cameras, and the electronic automobile-trailing devices. One unique gadget is a transmitter disguised as an olive punctured with a toothpick, which serves as an

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[9] *Ibid.*

[10] This was disclosed by Senator Rodolfo Ganzon while interpellating Senator Tañada. *Ibid.*

[11] DASH, SCHWARTZ & KNOWLTON, THE EAVESDROPPERS 23 (1959).

[12] *Id.* at 25.

[13] DONNELLY, "Electronic Eavesdropping," 38 *Notre Dame Law.* 668 (Symposium, 1963).

[14] BLACKSTONE, 4 COMMENTARIES ch. 13, sec. 5(6): "Eavesdroppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and are punishable at the courtleet; or are indictable at the sessions, and punishable by finding sureties for their good behavior."

antennae, capable of broadcasting two or three blocks away whether or not immersed in alcohol.[15] More awesome electronic devices exist.

Punishable acts under R.A. No. 4200

Republic Act No. 4200 is not limited to wire tapping but prohibits and penalizes other forms of what we have previously called "eavesdropping." Under the law,[16] it shall be unlawful for any person, not being authorized by all the parties to any private communication or spoken word:

(a) to tap any wire or cable, or

(b) by using any other device or arrangement to secretly overhear, intercept, or record such communication or spoken word by using a device commonly known as a dictaphone or dictagraph or detectaphone or walkie-talkie or tape recorder, or however otherwise described.

It shall also be unlawful for any person:[17]

(a) to knowingly possess any tape record, wire record, disc record, or any other such record, or copies thereof, of any communication or spoken word secure before or after June 19, 1965 (the effective date of R.A. No. 4200) in the manner prohibited by this law;

(b) to replay the same for any other person or persons; or

(c) to communicate the contents thereof, either verbally or in writing, or to furnish transcriptions thereof, whether complete or partial, to any other person.

Any person who wilfully or knowingly does or who shall aid, permit, or cause to be done any of the acts previously mentioned shall upon conviction thereof, be punished by imprisonment for not less than six months or more than six years.[18] If the offender be a public official at the time of the commission of the offense, he shall also suffer the accessory penalty of perpetual absolute disqualification from public office.[19] If the offender is an alien, he shall be subject to deportation proceedings.[20]

Analysis of the punishable acts

In the first group of punishable acts (i.e., tapping, secretly overhearing, intercepting, or recording), the following requisites must be present to sustain conviction:

a) The punishable act shall consist either of tapping any wire or cable, or by the use of any other device or arrangement,

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[15] LONG, "The Right to Privacy: The Case Against the Government," 10 *St. Louis U. L. J.* 12 (Fall, 1965).

[16] Section 1, R.A. No. 4200.

[17] *Ibid.*

[18] Section 2, R.A. No. 4200.

[19] *Ibid.*

[20] *Ibid.*

of secretly overhearing, intercepting, or recording any private communication or spoken word; and

(b) The act must not be authorized by all the parties to the private communication or spoken word.

Thus, it shall not be unlawful to eavesdrop (*N.B.* We use this term to embrace all the punishable acts referred to in the first group) if it is done with the consent of *all* the parties to the private communication or spoken word. Neither shall it be unlawful if knowledge of the private communication or spoken word is acquired by means *other than* tapping any wire or cable or by using any other device or arrangement as a dictaphone, dictagraph, detectaphone, walkie-talkie, or tape recorder, or however otherwise described.

In connection with the second requisite, it may be asked what could be the necessity for eavesdropping if *all* the parties to the private communications or spoken word have given their consent? What appears to be an exception to the rule making unlawful eavesdropping is no exception at all. If all the parties give their consent, there won't be any secret overhearing or interception. Secrecy is the essence of eavesdropping and if there is no secrecy, if the acts of recording, interception and overhearing are not only overt but even with the approval of the parties, then there could not be any eavesdropping.

Manifestly, it is the intention of the statute to completely prohibit wire tapping even if one of the parties were to give his consent. In the discussion of the bill in the Senate, Senator Jose W. Diokno related a personal experience to illustrate one difficulty or disadvantage of this requirement of total consent.[21] It seems he was the victim of anonymous telephone calls threatening or else insulting the members of his household. To determine the source of these anonymous calls, it is necessary to record the calls and place ones own line under surveillance. In this case, obviously, the consent of the party calling cannot be obtained and, therefore, under the law any attempt to trace the origin of the calls by the use of any of the prohibited means would be illegal.

The stringency of the law is designed to avoid the creation of unwarranted exceptions which may weaken the prohibitive effect of the statute. At this point, it may be to our profit to compare this particular provision of R.A. No. 4200 with section 5(2)(a) of the Australian Federal Eelephone Communications (Interception) Act of 1960.[22] As stated before, the scheme of this Act is a complete prohibition on the interception of communications passing over the

[21] *Original Transcript of Senate Journal No. 33* (March 12, 1964), Regular Sessions.

[22] See note 5, *supra.*

telephone with two exceptions, one of which is found in section 5 (2) (a). Under said section, the offense of interception[23] is not committed by an officer of the Postmaster-General's Department who, in the course of his duties, has to listen in, whether it be in the course of installation, operation or maintenance of the telephone system or in the course of tracing the origin of a call where, for example, a subscriber complains that some person is telephoning him and using indecent, abusive, or threatening language. In Australia, then, Sen. Diokno's problem can be solved within legal bounds.

The law speaks of "the parties to any private communication or spoken word" in connection with the giving of consent to wire tapping and/or other related acts. The question immediately arises as to whether this, in the case of the telephone, refers to the subscribers or owners of the phones being used in the private communication or to the parties making use of the phones without regard to whether they are the owners of the phones or not. It is sufficient compliance with the law if authority to tap, etc. is given by the owners or subscribers only or is it necessary that the authority be given by the users of the phone? The law in this respect is vague and its vagueness can give rise to ticklish problems. Ordinarily, a phone is used only by the owner or subscriber and the members of his family. In this case, the authority should be given by the owner or subscriber. However, in companies and other establishments where the phone or phones may be owned by a single person or entity but used by several persons unrelated to each other except by the fact that they work in the same company or office the solution is not so simple. In this instance, the authorization of the particular phone user and the phone owner may be necessary to comply substantially with the requirements of the law. This would be in keeping with the spirit and policy of the law which frowns upon wire tapping and allows it only upon fulfillment of stringent conditions.

How about public pay telephones? These are owned by the telephone company and available for use by the public payment of a certain amount. Is the acquiescence of the telephone company sufficient to justify tapping? The answer must be in the negative for two reasons: first, because the consent of both parties is necessary under the statute and second, because the public, even assuming that the consent of only one party is necessary, is entitled to expect that utilities being offered for their use and convenience will not be the source of an infringement of their rights. The public must be

[23] "Interception" of a communication consist of listening to, or recording by any means, a communication in its passage over the telephone system without the knowledge of the person making the communication (Section 4(1)). The accidental overhearing of a conversation due to a crossed line or other technical defect, or in the use of a party line or regularly installed extension is excluded from the meaning of "interception" (Secs. 4(2) and (3)).

warned of the danger and absent such warning the telephone company may be held liable under the statute.[24]

The punishable acts in the first group is committed by tapping any wire or cable or by the use of devices or arrangements of the same nature as a dictaphone, tape recorder, etc. Applying the rule of *ejusdem generis* (i.e., where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest sense, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned),[25] the following cases will be excluded from the application of the law:

(a) Party lines — If A overhears the conversation between B, his party line and C, a third person, then it is submitted that A cannot be penalized for his act under the provisions of R.A. No. 4200 for the simple reason that he neither tapped the wires of B or C, not did he use any devices or arrangement of the same nature as a dictaphone, dictagraph, etc.

The author of the bill, Senator Tañada, intimated during the Senate deliberations that mere interception, mere wire tapping whatever may be the nature, unless authorized by the court, will constitute a violation of the law."[26] Later on, when directly asked to comment on the problem posed by party lines, he stated that they should be covered.[27] However, this interpretation of Senator Tañada goes beyond the words of the statute and if so taken may lead to absurd and unjust consequences. Surely, a party line who accidentally overhears some incriminating conversation cannot be accused of doing an illegal act. If the act was deliberate in the sense that the party line was fishing for information then perhaps he may be

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[24] The telephone company may also be held liable under Article 32 of the New Civil Code which states: "Any public officer or employee, or any private individual, who directly or indirectly obstructs, defeats, violates or in any manner impedes or impairs any of the following rights and liberties of another person shall be liable to the latter for damages:

(1)-(10) x x x x x x x x

(11) The privacy of communication and correspondence:

"In any of the cases referred to in this article, whether or not the defendant's act or omission constitutes a criminal offense, the aggrieved party has a right to commence an entirely separate and distinct civil action for damages, and for other relief. Such civil action shall proceed independently of any criminal prosecution (if the latter be instituted), and may be proved by a preponderance of evidence.

"The indemnity shall include moral damages. Exemplary damages may also be adjudicated.

"The responsibility herein setforth is not demandable from a judge unless his act or omission constitutes a violation of the Penal Code or other statute."

[25] GONZAGA, STATUTES AND THEIR CONSTRUCTION 117 (1957).

[26] *Original Transcript of Senate Journal No.* 31 (March 10, 1964), Regular Session.

[27] *Ibid.*

covered by the spirit of the statute; otherwise, the act of overhearing by a party line is beyond the scope of the prohibition.

(b) Extension phones — Some telephones have extensions and if the same situation as in (a) occurs, it is likewise submitted that the person making use of the extension phone to listen to the conversation between the user of the main phone and another person cannot be punished under the act. The same reasons apply.

In *Douglas v. United States*,[28] evidence gathered by a government agent by listening to a conversation between the accused and an informer over an extension phone was admitted. But such evidence was excluded when obtained by attaching a recording device to an extension phone.[29] Apparently, the mere act of listening to a conversation over an extension phone is not a violation of the statute. It may constitute an infringement of the law's prohibition if the extension was put in for this purpose alone.[30]

In the United States, Section 605[31] of the Federal Communications Act uses the word "intercept" which is also found in Section 1 of R.A. No. 4200. In one case,[32] the police with the consent of the person threatened of murder, listened in on a regularly used extension telephone and utilized the substance of the conversation as evidence. The Supreme Court held that this does not violate Section 605 and does not constitute "interception". It commented that "common experience tells us that a call to a particular telephone number may cause the bell to ring in more than one ordinarily used instrument. Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the communication. When such takes place, there has been no violation of any privacy of which the parties may complain."[33]

(c) The case of a company switchboard operator who listens to a conversation and overhears some incriminating communication.

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[28] 250 F. 2d 576 (4th Cir. 1957). The American cases cited in this paper may provide possible solutions to certain problems of wire tapping but are not meant as authorities since they are based on a different law than that being considered.

[29] United States v. Polakoff, 112 F. 2d 888 (2d Cir. 1940).

[30] Williams v. State, 109 So. 2d 379 (Fla. 1959).

[31] Federal Communications Act (47 U.S. C. S. 605): "...and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person...."

[32] Rathbun v. United States, 355 U.S. 107 (1957).

[33] *Ibid.* Justices Frankfurter and Douglas dissented, asserting that "intercept" is synonymous with "listen in". It means "an intrusion by way of listening to the legally insulated transmission of thought between a speaker and a hearer."

(d) The situation where one of the parties to the telephone conversation holds the phone in such a way that another person can hear what is being said.

An interesting case presents itself in a situation where the party line or the user of the extension phone or the switchboard operator tape records the conversation he overhears instead of merely listening to it. Is he within the coverage of the Act? Were it not for the provision of the statute specifically prohibiting the mere recording of communications between persons, it is submitted that this case would not have been covered by the Act for the reason that it would be logically an absurdity to hold him liable when he uses a tape recorder to *preserve* a conversation he overhears through permissible (or at least not prohibited) means and not to punish him when he does not use a tape recorder but merely relies on the power of his memory and sense of hearing. But as already stated the law makes it unlawful for any person without authorization from the parties to the conversation to record such communication. Thus, although the use of the tape recorder in our hypothetical case is *indirect* in the sense that it is not at all necessary for the purpose of overhearing or intercepting communication, the law makes the act illegal.

The punishable acts forming the second group (i.e., possession, replay, or communication of contents of tape records, etc.) are not difficult to understand. It is enough to emphasize that the tape record, wire record, etc. must have been secured in the manner prohibited by R.A. No. 4200. In a contrary case, no liability attaches.

Exception

There are two constitutional provisions which have a direct bearing on the law under consideration: the prohibition against unreasonable searches and seizures[34] and the provision on the privacy of communication and correspondence.[35] While the first appears in the American Constitution, the latter does not. It may be safely said, therefore, that our Constitution affords greater protection to the privacy of the individual. This difference is accentuated when we consider the fact that the constitutional provision on searches and seizures has been interpreted by the United States Supreme Court to refer only to searches and seizures of things tangible or

[34] PHIL. CONST. Art. III, Sec. 1(3): "The right of the people to be secured in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated..."

[35] PHIL. CONST. Art. III, Sec. 1(5): "The privacy of communication and correspondence shall be inviolable except upon lawful order of the court or when public safety and order require otherwise."

material.[36] The effect of the provision on the privacy of communication and correspondence found in our Constitution is to supplement and enlarge the constitutional prohibition against unreasonable searches and seizures.

The liberal and progressive thinking of Filipino lawmakers in so far as the protection of the right of privacy is concerned was not manifested only in the present Constitution but also in the fundamental charter of the short-lived Malolos Republic. Articles 12 and 13 of the Malolos Constitution, from which the present provision on the inviolability of the privacy of communication and correspondence was derived, provide:

> Article 12. In no case can correspondence confided to the post office be detained or opened by government authorities nor can those made by telegraph or telephone be detained.
>
> But, by virtue of a decree by a competent judge, any correspondence can be detained and that carried through the mails may also be opened in the presence of the accused.
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> Article 13. All decrees of imprisonment, for the search of domicile, or for the detention of correspondence, whether written, telegraphic, or by telephone, shall be for cause.
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> If the decree should lack this requisite, or if the causes on which it may be founded are judicially declared unlawful or manifestly insufficient, the person who may have been imprisoned, or whose imprisonment may not have been confirmed with the term prescribed in Art. 9, or whose domicile may have been forcibly entered into, or whose correspondence may have been detained, shall have the right to demand the liabilities which ensue.

Thus, as early as 1899, the dangers of "detaining" communication and correspondence have been realized by our legislators.

Some countries make similar mention of the inviolability of communication and correspondence in their constitutions like the following: Chile (1925, as amended; Ch. III, art. 10(13)); Colombia (1866, as amended; Title III, art. 38); Costa Rica (1949; Title IV, art. 24); Denmark (1953; Part VIII, art. 72); Dominican Republic (1947; Title II, sec. I, art. 6(8)); Eduador (1946; Second Part, title II, section II, art, 187(7)); El Salvador (1950; Title X, art. 159); Finland (1919; Chap. II, art. 12); Federal Republic of Germany (1955; Art. 10); Greece (1952; Art. 20); Honduras (1936; Title III, chap. II, art. 51); Italy (1948; Part I, title I, art. 15); Japan (1946; Chap. III, art. 21); Switzerland (1874, as amended and revised; Art. 36); Uruguay (1951; Section II, chap. I, art. 28; and Venezuela (1953; Title III, chap, III, art. 35(4))).[37] Other nations provide for the protection of the right of privacy, particularly the secrecy of

[36] Olmstead v. United States, 277 U.S. 438.
[37] PEASLEE, CONSTITUTION OF NATIONS (1956).

communication, in their criminal or penal codes like Turkey,[38] for example.

Republic Act No. 4200 provides for an exception to the general prohibition against wire tapping and other related violations of the privacy of communication. It shall not be unlawful or punishable according to Section 3 of the Act, for any peace officer, who is authorized by a written order of the Court of First Instance within whose territorial jurisdiction the acts for which authority is applied for are to be executed, to execute any of the acts declared to be unlawful in Sections 1 and 2 in cases involving the crimes of:

(a) treason,
(b) espionage,
(c) provoking war and disloyalty in case of war,
(d) piracy,
(e) mutiny in the high seas,
(f) rebellion,
(g) conspiracy and proposal to commit rebellion,
(h) inciting to rebellion,
(i) sedition,
(j) conspiracy to commit sedition
(k) inciting to sedition
(l) kidnapping as defined by the Revised Penal Code, and
(m) violations of Commonwealth Act No. 616, punishing espionage and other offenses against national security.

Such written order shall only be issued or granted upon written application and the examination under oath or affirmation of the applicant and the witness he may produce. There must be a showing that:[39]

(a) there are reasonable grounds to believe that any of the crimes enumerated in Section 3 has been committed or is being committed or is about to be committed. In cases, however, involving the offenses of rebellion, conspiracy and proposal to commit rebellion, inciting to rebellion, sedition, conspiracy to commit sedition, and inciting to sedition, such authority shall be granted only upon prior proof that a rebellion or acts of sedition, as the case may be, have actually been or are being committed;

(b) there are reasonable grounds to believe that evidence will be obtained essential to the conviction of any person for, or to the solution of, or to the prevention of, any of such crimes; and

(c) there are no other means readily available for obtaining such evidence.

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[38] TURKISH CRIMINAL CODE Arts. 195 and 200 (1926), as amended).
[39] Section 3, R.A. No. 4200.

To further protect the citizen from any act of arbitrariness on the part of the peace officers, it is required that the order should specify:[40]

(a) The identity of the person or persons whose communications, conversations, discussions, or spoken words are to be overheard, intercepted, or recorded and, in the case of telegraphic or telephonic communications, the telegraph line or the telephone number involved and its location;

(b) The identity of the peace officer authorized to overhear, intercept, or record the communications, conversations, discussions, or spoken words;

(c) the offense or offenses committed or sought to be prevented; and

(d) The period of authorization which shall not exceed sixty (60) days from the date of issuance of the order, unless extended or renewed by the court upon being satisfied that such extension or renewal is in the public interest.

To avoid tampering with recordings made under court authorization, it is required that all such recordings be deposited with the court in a sealed envelope or sealed package, within forty-eight hours after the expiration of the period fixed in the order. It shall be accompanied by a affidavit of the peace officer granted such authority stating:[41]

(a) The number of recordings made,

(b) The dates and times covered by each recording,

(c) The number of tapes, discs, or records included in the deposit, and

(d) Certifying that no duplicates or copies of the whole or any part thereof have been made, or if made, that all such duplicates or copies are included in the envelope or package deposited with the court.

The envelope or package so deposited shall not be opened, or the recording replayed, or used in evidence, or their contents revealed, except upon order of the court, which shall not be granted except upon motion, with due notice and opportunity to be heard to the person or persons whose conversations or communications have been recorded.

Any person who violates the provisions of Section Three or of any order issued thereunder, or aids, permits, or causes such violation shall, upon conviction thereof, be punished by imprisonment for not less than six months or more than six years and with the acces-

[40] *Ibid.*
[41] *Ibid.*

sory penalty of perpetual absolute disqualification from public office if the offender be a public official at the time of the commission of the offense, and, if the offender is an alien, he shall be subject to deportation proceedings.[42]

The exception analyzed

The right of privacy, in the words of Lord Nathan, is the privilege "to shut one's door upon the world and to do or to say what one will secure in the knowledge that one is alone."[43] But the progress of science has furnished man with means of "espionage" which pose a distinct danger to this right. As Justice Brandeis has so picturesquely put it in his dissenting opinion in Olmstead v. United States[44] "discovery and invention have made it possible for the government by means far more effective than stretching upon the rack to obtain disclosure in court of what is whispered in the closet." One of these means of "espionage" is the wire tap. Cogent objections to it have been made by innumerable lawyers, judges, and writers[45] but the need for stability and security in the political and social structure has impelled a like number of men to take a moderate posture and argue for exceptions to otherwise totally prohibitive statutes. This moderate position was succinctly stated by Jose P. Laurel, delegated to the Constitutional Convention and chairman of the Committee on the Bill of Rights in his answer to an interpellation from one of the delegates.

> We state the fundamental principle that a person is entitled to the privacy of communication; that he is entitled to his secrets, but in those cases where a secret involves public questions which the State should and ought to know, the State may infringe that privacy of communication by some process or by appealing to the Court for the purposes of determining whether or not the privacy should be maintained.[46]

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[42] Section 2, R.A. No. 4200.

[43] Quoted in "Electronic Eavesdropping: A New Approach," 52 *Calif. L. Rev.* 142 (March, 1964).

[44] 277 U.S. 438, 471.

[45] One writer, referring to the "unreasonable searches and seizures" provision of the American Constitution, concluded that wire tapping would be *per se* unconstitutional under the following rationale: (1) a wire tap can never be "reasonable" because it is uncheckable by the victim. Any such uncontrollable intrusion is "unreasonable." (2) Any wire tap amounts to a general search. Since many people will converse with the victim, all of them are subject to an indiscriminate "search" and scrutiny of their words. (3) A warrant for wire tap amounts to no more than a prediction that police will get evidence. This is never a proper basis for a warrant, which cannot be issued for evidence at large. It is permissible only for specified things, "particularly describing... the things to be seized." The police can never be sure what the victim will say. Even if they were, they would never be certain *when* he would say it. A screening of *all* the victim's conversations would be required. (4) The unique alterability of wire tap recordings in the hands of police lends a dangerous aspect of evidentiary unreliability to this mode of "search and seizure." SEMERJIAN, *op. cit. supra* note 4, at 227.

[46] III JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE PHILIPPINES 1120 (Francisco ed. 1963).

Thus, the Constitution resorts to a compromise to provide a reasonable solution to an intractable problem. Similarly, Republic Act No. 4200 resolves the issue by offering a compromise between the need to protect individuals from what Justice Holmes called the "dirty business" of wire tapping[47] and the right of the State to be protected from subversion.

In Section Three, the crimes enumerated as permissible subjects of wire tapping and related acts, with the exception of kidnapping, are either crimes against national security and the law of nations or crimes against public order (as classified by the Revised Penal Code). They are offenses with a political color. This is specially true with sedition which, as a crime, is itself fraught with danger to freedom of speech. This difficulty inherent in the crime of sedition is aggravated when police officers are empowered to pursue subversive talk even on the privacy of the wires. As one author puts it, "evanescent anti-Government remarks taken out of context can easily be made to sound more frightful than their true import."[48]

Originally, robbery was included as one of the exempted crimes. The author's reason for the inclusion was his "personal predilection against robbery because of the force that accompanies the acquisition of a property belonging to another."[49] However, it was later on removed from the exempted category.

To insure that the authority granted to peace officers to wire tap and to commit the otherwise punishable acts in Section 1 are not abused, provisions were inserted to avoid this danger. First, it is necessary that the peace officer be authorized by a written order of the court. Second, such order shall be issued only upon application, examination of applicant and his witnesses, and a showing of its necessity. Third, the order itself is required to specify against whom it will be used, by whom, for what offense and for how long.

The court authorized to issue the order is the Court of First Instance[50] within whose territorial jurisdiction the acts for which authority is applied for are to be executed. The authorization has a maximum lifetime of only sixty days counting from the date of issuance. This may be extended or renewed by the court upon being satisfied that such extension or renewal is in the public interest. Under the Australian Federal Telephonic Communications (Interception) Act of 1960, the maximum period is six months, revokable

[47] Justice Holmes, dissenting in Olmstead v. United States (see note 36).
[48] SCHWARTZ, "On Current Proposals to Legalize Wire Tapping," 103 *U. of Pa. L. Rev.* 166 (1954).
[49] See note 26 *supra.*
[50] The original draft of the bill also empowered the Solicitor General, city fiscal, or provincial fiscal to issue authorizations but this was removed by the Committee on Revision of Laws.

at any time during the specified period by the Attorney General (the issuing authority), or by the Director-General of Security (the requesting authority) if he is satisfied that the grounds on which the warrant was issued have ceased to exist.[51]

If there is any deficiency in the protection of individual rights, it may exist in the requirement or non-requirement that recordings be made of official tapping. It is not clear whether or not recordings should be made of all intercepted or overheard communications. To depend on the recollection of the peace officer respecting the content of intercepted messages appears unjustified and dangerous. The better policy is to require that recordings be made of *all* intercepted or overheard communications. But as indicated, there is no express requirement that recordings be made. All that the law provides is for recordings made under court authorization to be deposited with the court. It is submitted that it is possible and permissible under the law to make no recordings but that it would be better judicial practice to require them to be taken. In this way, the rights of an individual will not be threatened by the treachery of the peace officer's memory.

Inevitably, a certain amount of material will be intercepted that will have no bearing on the felony or crime for which the authorization was issued. No provision is made for their destruction unlike Section 10 of the Australian Federal Telephonic Communications (Interception) Act which requires such material to be destroyed.[52] Can conversations which relate to a crime not described in the request for the order be intercepted and subsequently used in evidence? The statute is explicit in requiring that the offense or offenses committed or sought to be prevented must be specified in the order granted or issued. It seems to imply that only those communications relating to the designated offense or offenses should be intercepted. However, by its nature, a wire tap requires a scrutiny of *all* the conversations passing through the line, thus, difficult problems may arise. For example, a wire tapping order was issued to intercept conversations concerning the crime of kidnapping but the conversations overheard and recorded were of an unrelated crime — that of espionage. Can these be used in evidence and be admitted in court? Considering the requirement of particularity (that offense or offenses committed or sought to be prevented must be specified) and the general policy against fishing for evidence inherent in the nature of the warrant or authorization, the answer must be

[51] Sections 6(4) and 9. See note 5 *supra*.
[52] See note 5 *supra*.

in the negative.[53] The inadmissibility of such evidence shall be discussed more extensively later.

Turning now to Art. III, Section 1(5) of our Constitution, which provides that "the privacy of communication and correspondence shall be inviolable except upon lawful order of the court or when public safety and order require otherwise", we readily notice the exceptions to the general rule of inviolability of private communication and correspondence. At this point, it is best to remember that the American Constitution contains no similar provision and that, therefore, the decisions of the American Supreme Court in cases involving wire tapping and similar acts would have little persuasive effect in this jurisdiction. In those cases, the provision in the American Constitution relative to unreasonable searches and seizures was involved and interpreted. This provision of our Constitution exempts a violation of the guaranteed right:

(a) when there is a lawful order of the court, and

(b) when public safety and order require otherwise.

Upon lawful order of the court, which may take the form of a search warrant or an authorization similar to that provided in Section 3 of R.A. No. 4200, the right of a citizen to privacy of communication and correspondence is temporarily curtailed on grounds which would justify the court in issuing the warrant or authorization. In this case, the permissible infringement of the right occurs only after *previous* court action. In other words, previous judicial intervention is necessary.

It is the second exception which provides much difficulty. In the absence of a law such as the one under consideration, it may be safely stated that under the second exception previous judicial action is not required (otherwise, what would distinguish it from the first?) and, in the absence of an express legal requirement, even subsequent judicial ratification may not be necessary unless the action of the public officers is questioned. With the enactment of R.A. No. 4200, however, the safety of the above assertion is put in doubt in so far as wire tapping and other related violations of the privacy of communication are concerned. The problem may be stated this way: Taking into consideration the provision of Section 1(5) of the Bill of Rights and the provisions of R.A. No. 4200, can wire tapping and the other related acts be committed without criminal liability being incurred by those responsible therefor? During the deliberations in the Senate on the bill, three senators (i.e., Senators Tecla San Andres Ziga, Juan Liwag, and Estanislao Fernandez) expressed their belief that when public safety and order re-

[53] See People v. Grossman, 45 Misc. 2d 557; 257 N.Y.S. 2d 266 (Sup. Ct. 1965).

quire otherwise, no order of the court is necessary to infringe the privacy of communication and correspondence.[54] Thus, government agents can engage in wire tapping and the other otherwise prohibited acts if in their opinion the same is demanded by public safety and order. Who is to determine the existence of this condition has not been made clear by those who hold to this view.

On the other hand, the author of the bill asserted that "when public safety and order require otherwise" are merely grounds for the issuance of an order of the court.[55] The disjunctive "or" in the exception found in Section 1(15) of the Bill of Rights should not be taken literally as creating two distinct exemptions but as more in the nature of a conjunctive. Obviously, the argument is based in the seemingly contradictory nature of the exception and the difficulty and danger in accepting "when public safety..." as an exception. To the contention that in case of an emergency involving national security, where time is pressing and where action must be taken immediately, there is no time to go to the courts, the author answered that "it is not so hard to obtain orders from the court. These judges hold their office every day. And even in their homes they can issue the orders."[56]

The strongest objection to considering "public safety and order" as a legitimate exception is the danger it poses to the right of privacy. Who shall determine when "public safety and order" demand violation of the privacy of communication and correspondence? If taken literally any government agent may take it upon himself to safeguard public security. It is worthwhile to note at this point that the phrase "or when public safety and order require otherwise was not included in the original draft version of the Bill of Rights as submitted by Delegate Laurel to the Constitutional Convention.[57] It is submitted that with the passage of R.A. No. 4200 none of the acts therein prohibited can be undertaken without complying with the requirements of Section Three. With the enactment of R.A. No. 4200, Congress has provided the way by which "public safety and order" is to be determined and Congress has left this vital task to the court. This is, of course, limited only to the acts mentioned in R.A. No. 4200. Other acts in violation of the privacy of communication and correspondence not covered by R.A. No. 4200 may be performed when "public safety and order" so require it.

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[54] See note 21 and 26 *supra*.
[55] *Ibid.*
[56] See note 26 *supra*.
[57] FRANCISCO, *op. cit. supra* note 46, at 1119.

INADMISSIBILITY OF ILLEGALLY SEIZED EVIDENCE UNDER R.A. NO. 4200

Under the prevailing rule in the Philippines, unlawfully obtained evidence may be received in the courts provided the same is relevant and otherwise competent.[58] This rule has been the object of much criticism for it gives the law enforcement agencies an undeserved advantage over the defendant. However, the enactment of R.A. No. 4200 has whittled down somewhat the scope of this rule.

Section 4 provides that:

> Any communications or spoken word, or the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or any information therein contained or secured by any person in violation of the preceding sections of this Act shall not be admissible in evidence in any judicial, quasi-judicial, legislative or administrative hearing or investigation.

In brief, evidence secured in violation of this law is inadmissible in the courts and in quasi-judicial, legislative or administrative hearings or investigations. The problem is whether this prohibition is absolute in the sense that it cannot be waived or whether it is a qualified prohibition, that is, one that is waivable.

It is submitted that it cannot be waived. A right or privilege granted to a person can not be waived by him if it would be contrary to public policy or where the public interest may be affected thereby. The legislative policy permeates the entire law — that of safeguarding the privacy of the individual from the prying eyes and ears of government agents. R.A. No. 4200 is one more link in the chain of rights and privileges that protect the individual from arbitrary governmental action, a link that the law and the public will not allow the individual to destroy. To construe Section 4 as providing only for a qualified prohibition would be to encourage violations of the law for evidence may be illegally seized in the hope that through inadvertence, mistake or negligence it may be admitted.

A problem was previously touched upon concerning the admisibility of conversations which relate to a crime not described in the order of the court. We answered that they cannot be admitted. The authorization issued by the court under Section Three is in the nature of a search warrant which must specify in advance the matters to be "seized" or intercepted. Only such communication as refer to the specified matters enjoy the protection of the law and they may, therefore be admitted in evidence. Those which refer to a different crime not specified in the Court order should be considered as beyond the reach of the otherwise valid authorization. To conclude differently is to encourage the odious practice of

[58] Moncado v. People's Court, 80 Phil. 1.

"fishing" for evidence and give legal color to what is otherwise a reprehensible policy.

CONCLUSION

The preoccupation of constitutional law with the balancing of individual interests and government needs is well exemplified in Republic Act No. 4200. Its enactment is a most significant step in the effort of some of the country's liberal legislators to withstand the beginnings of encroachment of the right of privacy. Its passage came a few years after the notorious Stonehill scandals and the starling revelation that Mr. Stonehill and his associates have engaged in the tapping of telephones, not to mention other forms of "espionage". Its approval was assured by the sympathetic attitude of several members of Congress who have themselves experienced the evils which the bill (then being proposed) sought to cure and prevent.

Compared with the more technologically progressive countries of the Western World, the equipment, gadgets, and methods of eavesdropping in the Philippines do not seem to be as numerous and as advanced; but our lawmakers have acted rightly in enacting the Wire Tapping Law even before the danger has reached unmanageable proportions. So far no case has yet reached Philippine courts involving the new law. Perhaps cases should be welcomed rather than shunned as they will help clarify certain doubtful points in the law. Who are the parties to the private communication who should give the authorization to wire tap? Are recordings required in all instances of official wire tapping? Is the inadmissibility of evidence obtained in violation of the statute absolute? Are situations involving party lines and extension phones within the coverage of the act? Can a government agent engage in wire tapping on the ground that the Constitution permits it when "public safety and order" require it? Should intercepted material which has no bearing on the crime for which authorization was issued be admitted in evidence? A lot more questions may be asked and the answers can only be educated and logical guesses. Not only is the statute new but there is a dearth of Philippine jurisprudence on the matter. It is in this vein, therefore, that the hope for cases relating to the new law was made — in the expectation that they will clear up a number of doubtful points raised by the law.