# REFLECTIONS ON THE CONSTITUTIONAL LAW OF ARREST, SEARCH AND SEIZURE*

*Vicente V. Mendoza***

The use of the term "constitutional law" in the title of this Article reflects the distinction between constitution and constitutional law: A constitution is the document which serves as the fundamental law of the state, while constitutional law designates the law embodied in the constitution and the legal principles growing out of the interpretation and application of its provisions by the courts in specific cases.[1]

Recent scholarly and popular debate in the United States has focused on this distinction, as Reagan's Attorney General, Edward Meese III, took issue with the U.S. Supreme Court's dictum that its desegregation decision interpreting the constitution is the "supreme law of the land."[2] Meese argued that "[such decision] binds the parties in a case and also the executive branch for whatever enforcement is necessary. But [it] does not establish a supreme law of the land binding on all persons and parts of government henceforth and forevermore."[3]

One may in turn take issue with Attorney General Meese, as many in the United States have and many more perhaps in the Philippines will, especially given our respect for the rule of law, let alone Catholic orientation with the Pope as the infallible interpreter of dogma, but, surely, as Professor Sanford Levinson observed, there is "truly [something] positive about the strain of protestantism that Meese is invoking – the emphasis on the constitution as a public source of social understanding and the concomitant ability of all citizens to share in the debates about the meaning of our tenuously shared life."[4] The distinction between the constitution and constitutional law is thus useful

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**Associate Justice, Court of Appeals, and Professorial Lecturer, UP College of Law; LL.B., 1957, UP College of Law; LL.M., 1971, Yale Law School.

[1]V. SINCO, PHILIPPINE POLITICAL LAW 66-67 (1962).

[2]Cooper v. Aaron, 358 U.S. 1 (1958) (holding the U.S. Supreme Court's desegration decision binding on the States and their officials).

[3]Meese, *The Law of the Constitution*, 61 TULANE L. REV. 979, 983 (1987).

[4]Levinson, *Could Meese Be Right this Time?*, 61 TULANE L. REV. 1071, 1077 (1987). *See also* Stick, *He Doth Protest Too Much: Moderating Meese's Theory of Constitutional Interpretation*, 61 TULANE L. REV. 1079 (1987).

in emphasizing that even after the Supreme Court has spoken, the citizenry should not cease thinking about the constitutional problem because they have an ultimate moral responsibility for what the government does. I have discussed this role of the citizenry elsewhere[5] and, in line with that role, I here urge that we seriously think about the Constitutional Law of Arrest, Search and Seizure.

My aim in this Article is threefold: (i) to set forth in as clear and brief a manner as I can the rulings of the Supreme Court on the search and seizure provisions of the Constitution; (ii) to elucidate the grounds of such decisions as aid to their true understanding, and (iii) in some cases, to discuss alternative viewpoints, including my own, in order to invite public discussion of one of the most abiding concerns of our constitutional order -- the extent to which a free society may allow arrests, searches and seizures to be made consistent with the right of the individual to be free from unwarranted intrusions by the government, in order to secure the peace of the community.

It may be that this exercise will end in the affirmance of these rulings, in which case we shall be fortified in relying on them. Or it may crystallize public opinion against them so that if the questions are raised again to the Supreme Court there will be grounds for reexamination of doctrines -- and not simply because a party, finding himself at the losing end, finds it expedient to ask for the overruling of a contrary decision.

*The Constitutional Guarantee and its Basis*

It will be helpful to begin by quoting the search and seizure provisions of the fundamental law.

Art. III, sec. 2 declares:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.

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[5]Mendoza, *The Constitution and the Office of Citizen*, 4 LAWYERS REV. 41 (1990).

Sec. 3 of the same Article states:

> (1) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court or when public safety or order requires otherwise as prescribed by law.
>
> (2) Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding.

Back of this guarantee is the recognition that the individual is entitled to the security of his person and the privacy of his home and papers against unwarranted intrusions by the government. As Landynski has pointed out, to value the privacy of home and person is no less than to value human dignity.[6]

*The Scope of the Guarantee*

In what is generally regarded as a landmark case, the U.S. Supreme Court rejected the notion that the search and seizure provisions guarantee the security of places. In *Katz v. United States*,[7] the Court said:

> [T]he Fourth Amendment [the equivalent of Art. III, Sec. 2 of our Constitution] protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . .But what he seeks to preserve as private, even in area accessible to the public, may be constitutionally protected. . . .

Accordingly, it was held that evidence gathered by attaching an electronic listening and recording device to the outside of a telephone booth without a warrant was illegally obtained.

Indeed, the maxim "a man's house is his castle"[8] is intended only to emphasize the sanctity of home as the seat of one's affection and the center of one's family life. But it is not intended to suggest that the right to security ceases when one leaves one's home. For wherever one may be, one is entitled to be free from all unreasonable searches and seizures. As subsequently formulated by the U.S. Supreme Court, the rule is that "Wherever an individual may harbor a reasonable expectation of privacy . . . he is entitled to be free from unreasonable governmental intrusion."[9]

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[6]SEARCH AND SEIZURE AND THE SUPREME COURT 47 (1966), *quoted* in Villanueva v. Querubin, 48 SCRA 345, 350 (1972).

[7]389 U.S. 347 (1967).

[8]United States v. Arceo, 3 Phil. 381, 384 (1904).

[9]Terry v. Ohio, 392 U.S. 1 (1968).

Would the seizure of personal records violate an individual's privilege against self-incrimination?[10] Yes, it would, according to the Philippine Supreme Court, if the purpose of the search is to use the records and papers seized as evidence of a crime.[11] No, if the purpose is merely to prevent their further use to commit a crime.[12]

In holding that the seizure of records and papers for use as evidence of a crime violates an individual's privilege against self-incrimination, the Philippine Supreme Court relied on the dictum in American cases, particularly that of *Gouled v. United States*.[13] The rule has since been changed, however. In *Andresen v. Maryland*,[14] it was held that the seizure of personal records does not involve a compulsion to say or do anything and that whatever is contained in the record cannot be untrustworthy because it is something that was written before the search. As Justice Blackmun, writing for the Court explained:

> [P]etitioner was not asked to say or do anything. The records seized contained statements that petitioner had voluntarily committed to writing. . . . [T]here is no chance in this case of petitioner's statements being self-deprecatory and untrustworthy because they were extracted from him -- they were already in existence and had been made voluntarily.

Neither does the constitutional guarantee prohibit a search simply because the thing to be seized is in the possession of third parties, not even if the latter might be a newspaper. In *Zurcher v. Stanford Daily*,[15] a warrant was issued to search the *Stanford Daily's* editorial offices for films and photographs which would identify those responsible for causing injuries to policemen during a demonstration at the Stanford University Hospital.

The newspaper sued for declaratory relief. The district court held that the Fourth Amendment forbade the issuance of a search warrant for materials in the possession of one who is not suspected of crime, except upon showing of probable cause that a subpoena duces tecum would be impracticable, and that the Free Speech Clause of the

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[10]CONST., art. III, sec. 17.

[11]Rodriguez v. Villamiel, 65 Phil. 320 (1937).

[12]People v. Rubio, 57 Phil. 384 (1932); Yee Sue Kuy v. Almeda, 70 Phil. 141 (1940).

[13]255 U.S. 298 (1921) (Search warrant "may not be used as a means of gaining access to a man's house or office or papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding."). The rule is said to have been derived from the decision in Boyd v. United States, 116 U.S. 616 (1886), limiting searches to the instruments or the fruits of crime or to contrabands.

[14]427 U.S. 463 (1976). *Accord*, Warden v. Hayden, 387 U.S. 294 (1967).

[15]436 U.S. 547 (1978).

U.S. Constitution barred the search of newspaper offices except upon a showing that important papers would be destroyed and that a restraining order would be futile. But the U.S. Supreme Court reversed. Through Justice White, it held that "the seemingly blameless third party in possession of the fruits or the evidence may not be innocent after all; and if he is, he may nevertheless be so related to or so sympathetic with the culpable that he cannot be relied upon to retain or preserve the articles that may implicate his friends, or at least not to notify those who would be damaged by the evidence that the authorities are aware of its location." As for the fact that it was a newspaper office which had been searched, the Court said: "Aware of the long struggle between Crown and press and desiring to curb unjustified official intrusions, the Framers took the enormously important step of subjecting searches to the test of reasonableness and to the general rule requiring search warrants issued by neutral magistrates. They nevertheless did not forbid warrants where the press was involved, did not require special showings that the subpoenas would be impractical, and did not insist that the owner of the place to be searched, if connected with the press, must be shown to be implicated in the offense being investigated."

Finally, does the Search and Seizure Clause cover arrests or is it limited to searches? In *Amarga v. Abbas*,[16] Justice Montemayor dissented from the ruling that the determination of probable cause for the issuance of warrants of arrest is a judicial function which only a judge can make. He contended that the Search and Seizure Clause of the 1935 Constitution (Art. III, Sec. 1(3)), providing that "no warrant shall issue but upon probable cause, to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce," did not apply to warrants of arrest but only to search warrants because the Search and Seizure Clause merely incorporated the provisions of the then Code of Criminal Procedure (G.O. No. 58) on search warrants. He explained that the framers of the Constitution found widespread abuses in the issuance of search warrants. Violations of the privacy of persons, houses, papers and effects are serious, with no remedy being immediately available. In contrast, abuses in the issuance of warrants of arrest, apart from the fact that they are not as flagrant, could easily be remedied by means of the writ of *habeas corpus*. Montemayor argued that throughout history, since the adoption of the American system of justice in this country, the preliminary investigation of crimes, for the purpose of determining whether there is probable cause to believe that an offense has been committed and that the accused is probably guilty so that he may arrested, has been vested in prosecuting officers.

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[16] 98 Phil. 739, 752-755 (1956) (dissent).

But what of the phrase "and particularly describing the place to be searched or the *persons* or things to be *seized*"? Did this not refer to the arrest of individuals? Justice Montemayor said it did not, because the phrase was taken from Sec. 97 of the then Code of Criminal Procedure which referred to the sufficiency of search warrants. What was contemplated was the seizure of persons in whose custody the goods or articles seized might be found. In support of this view he cited Judge Cooley's *locus classicus, Constitutional Limitations.*[17] This view is contrary to the ruling in *Terry v. Ohio*[18] in which it was held that "the Fourth Amendment governs [even] 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime -- 'arrests' in traditional terminology [and] that whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person." On this ground it was held that the Fourth Amendment applied to a "stop and frisk" made by police.

Anyway, to remove any doubt on the matter, the framers of the 1973 Constitution made the Search and Seizure Clause (Art. IV, Sec. 3) apply to warrants of arrests. These provisions were carried over, with modification, in Art. III, Sec. 2 of the present charter. This textual amendment has led some lawyers to conclude that the same limitations with respect to the procedure for the issuance of search warrants now apply to warrants of arrest.

*Determining Probable Cause for the Issuance of Search Warrants and Warrants of Arrests*

Even the original Search and Seizure Clause of the 1935 Constitution applies, I believe, to arrests as well as to searches, in the sense that no person can be arrested or subjected to any search unless there is probable cause to believe that he has committed a crime. However, the question is whether the existence of probable cause as basis for the issuance of a warrant of arrest must be determined by the same procedure for determining it in cases of search warrants. More specifically, the question is whether before issuing a warrant of arrest the judge must himself examine the complainant and the witnesses.

Those who contend that the judge is duty-bound to do so are likely to point out that, unlike the 1973 Constitution,[19] which provided for the determination of probable cause by judges or by "other responsible

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[17] 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 622 (1927).

[18] *Supra* note 9. *See also* Justice Powell's concurring opinion in United States v. Watson, 423 U.S. 411 (1976) ("[A]n arrest, the taking hold of one's person, is quintessentially a seizure.").

[19] Art. IV, sec. 3

officers authorized by law," the present Art. III, Sec. 2 deleted the latter phrase. To be sure, because of this change, Art. 38(c) of the Labor Code, which empowered the Secretary of Labor and Employment to order the arrest or the search of any person for violation of the provisions on overseas employment, was held to be unconstitutional.[20] It was for this reason also that Presidential Decree No. 2002, which authorized a task force to issue similar orders for violations of laws against "dollar salting" was invalidated on the ground that under the present, as under the 1935 Constitution, only a detached and neutral magistrate can authorize an arrest or a search and seizure.[21]

However, the rulings only mean that only judges may issue warrants of arrest because of the constitutional amendment. They do not address the question of procedure for determining probable cause. For the fact is that beyond the common provision, that in the issuance of a warrant of arrest or a search warrant there must be a finding of probable cause by a judge, lies a difference in the procedure for making this determination.

With respect to the issuance of search warrants, Rule 126, Sec. 4 of the 1985 Rules of Criminal Procedure requires that the judge personally examine the complainant and witnesses. Accordingly, it was held that he cannot delegate this task to anyone, such as the clerk of court.[22] The judge must take care that the witnesses, on whose testimony he relies for a finding of probable cause, have personal knowledge of the matters as to which they testify, in such a way that they can be charged with perjury or held liable for damages should their testimony turn out to be false.[23] No such requirement is imposed with respect to warrants of arrest. Consequently, it has been held that the judge issuing the warrant is not required to conduct the examination of the complainant and his witnesses himself. He may simply rely on the certification of the prosecutor that he has personally examined the complainant and his witnesses and that there is reasonable ground to believe that a crime has been committed and the accused is probably guilty thereof.[24]

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[20]Salazar v. Achacoso, G.R. No. 81510, March 14, 1990.

[21]Presidential Anti-Dollar Salting Task Force v. Court of Appeals, 171 SCRA 348 (1989).

[22]Bache & Co. (Phil.), Inc. v. Ruiz, 37 SCRA 823 (1971).

[23]Prudente v. Dayrit, G.R. No. 82870, Dec. 14, 1989; Burgos v. Chief of Staff, AFP, 133 SCRA 800 (1984); Rodriguez v. Villamiel, 65 Phil. 230 (1937); Alvarez v. Court of First Instance, 64 Phil. 33 (1937).

[24]Amarga v. Abbas, 98 Phil. 739 (1956); Placer v. Villanueva, 126 SCRA 463 (1963).

The result is a dichotomy in procedure which imposes on the judges the duty of *personally examining* the complainant and the witnesses with respect to the issuance of search warrants,[25] but does not demand the same duty of the judge in the issuance of warrants of arrest. Instead, the law places the duty of examining personally the complainant and witnesses on those who conduct preliminary investigations, *i.e.*, on prosecutors and Municipal Trial Court judges.[26]

Can this dichotomy be justified under Art. III, Sec. 2, the text of which makes no distinction? The truth of the matter is that, in case of arrests, logic and the longing for *elegantia juris* must yield to history and experience which demonstrate the difficulty of applying the requirement to personally examine the complainants and witnesses to warrants of arrest. Thus, it has been explained that to require judges to make the examination themselves in the case of warrants of arrest would unduly burden them with the preliminary investigation of criminal complaints and leave them little or no time for the hearing of cases. [27] This explanation of course does not justify the dichotomy of procedure because the second sentence of Art. III, Sec. 2 has been made to apply both to warrants of arrest and to search warrants.

*Sufficiency of Search Warrants*

The Constitution requires that the warrant must describe "the place to be searched and the persons or things to be seized." It thus outlaws general warrants. The description must be as specific as the circumstances will allow. However, where, by the nature of the goods to be seized, their description must be rather general, it is not required that a technical description be given. Consequently, in a prosecution under the internal revenue laws the description "fraudulent books, invoices and records" was held to be sufficient.[28]

But the description "subversive documents, pamphlets, leaflets, books and other publications" is not sufficient. A warrant which contains such a description is a general warrant and, therefore, is invalid.[29] The reason for this is that when books, documents and papers are seized in prosecutions for rebellion, sedition or subversion, they are seized for the ideas they contain and not for their own sake. Were they seized because

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[25]Rule 126, sec. 4.

[26]Rule 112, secs. 4 and 6 (b).

[27]Soliven v. Makasiar; Beltran v. Makasiar, 167 SCRA 393 (1988); Ponce Enrile v. Salazar G.R. Nos. 92163-64, June 5, 1990.

[28]People v. Rubio, 57 Phil. 384 (1932).

[29]Burgos v. Chief of Staff, AFP, 133 SCRA 800 (1984); Corro v. Lising, 137 SCRA 341 (1985); Nolasco v. Cruz Paño, 139 SCRA 152 (1985).

they are the things embezzled or stolen or the subject of an offense, for example, a general description would suffice. For this reason, the constitutional requirement has been applied with the "most scrupulous exactitude," to preclude those enforcing the warrant from using their own notion of what is and what is not subversive.[30]

*Warrantless Searches*

*(a) As incidents of valid arrests*

Under Rule 126, Sec. 12, a search without a warrant may be made as an incident of a lawful arrest. The search must be limited to the search for "dangerous weapons or anything which may be used as proof of the commission of an offense." As held in *Chimel v. California,*[31] it is reasonable to search a person arrested to remove any weapon and to seize any evidence on the arrestee's person and the area "within his immediate control," that is to say, the area from which he might gain possession of a weapon or destructible evidence. Accordingly, in *Nolasco v. Cruz Paño,*[32] the Supreme court reconsidered an earlier ruling and held that the search of the petitioner's residence, located several blocks away from where she had been arrested and more than thirty minutes after her arrest, was illegal. In a separate concurring opinion, Chief Justice Teehankee explained that the contrary ruling would allow the military or police to search the dwelling of a person arrested simply on the strength of a warrant of arrest.

In addition, the arrest, of which the search is an incident, must be a valid arrest. In *People v. Burgos,*[33] the appellant, while plowing his field, was arrested on the basis of information that he had unlicensed firearms and subversive documents in his possession. He admitted that he owned the gun and subversive documents seized. He was found guilty of illegal possession of firearms in furtherance of subversion and sentenced accordingly. On appeal, his conviction was reversed. It was held that his arrest without a warrant was illegal; the seizure of the gun and documents was illegal, not being the incident of a valid arrest; and his confession that he owned the gun and documents was inadmissible in evidence because it was obtained in violation of the Miranda rule.

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[30]*See* Marcus v. Search Warrant, 367 U.S. 717 (1961); A Quantity of Books v. Kansas, 378 U.S. 205 (1964).

[31]395 U.S. 752 (1969).

[32]147 SCRA 509 (1987).

[33]144 SCRA 1 (1986).

*(b) Other cases of warrantless searches*

Under Sec. 2211 of the Tariff and Customs Code, Customs agents can examine imported goods whenever they have reasonable cause to suspect the presence of dutiable articles introduced into the Philippines. For this purpose they can stop, search and inspect moving vehicles suspected of conveying such articles.[34] In *People v. Court of First Instance*,[35] the Court upheld the seizure of wrist watches from the car of an American serviceman whom customs agents had apprehended after a chase on the expressway. The agents acted on the basis of a tip received by them from an informant.

*(c) Checkpoints and "Areal Target Zonings" and the Appropriateness of Prohibition as a Remedy*

In *Valmonte v. De Villa*,[36] the Supreme Court was asked by residents of Valenzuela, Metro Manila to declare checkpoints in that town to be illegal and to order their removal. They complained that their cars and vehicles were being subjected "to regular searches and check up . . . without the benefit of a search warrant and/or court order."

The Court dismissed the petition on the ground that "a general allegation . . . that [the petitioner] had been stopped and searched without a search warrant . . . without stating the details of the incidents which amount to a violation of his right against unlawful search and seizure is not sufficient [because] not all searches and seizures are prohibited." The Court held that the establishment of the checkpoints was justified in view of attempts of rightist elements to destabilize the government and the shift of the insurgent attacks to the urban centers. The Court said: "Between the inherent right of the State to protect its existence and promote public welfare and an individual's right against a warrantless search which is however reasonably conducted, the former should prevail."

Justices Cruz and Sarmiento dissented. Justice Cruz wrote: "What is worse is that the searches and seizures are peremptorily pronounced to be reasonable even without a proof of probable cause and much less the required warrant." In the same vein, Justice Sarmiento argued that "the absence alone of a search warrant . . . makes checkpoint searches unreasonable" and that "the burden is the State's to demonstrate the reasonableness of the search."

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[34]Papa v. Mago, 22 SCRA 857 (1968). *See also* Roldan v. Arca, 65 SCRA 336 (1975).

[35]101 SCRA 86 (1980).

[36]G.R. No. 83988, Sept. 29, 1989.

There have been criticisms -- some of them vitriolic and intemperate – against the decision in this case.[37] Given the "abnormal times" in which we live, checkpoints may really be the "price we [must] pay for an orderly society and a peaceful community." However, one may take issue with the holding that the allegation "that [petitioner] had been stopped and searched without a search warrant . . ., without stating the details of the incidents which amount to violation of his right against unlawful search and seizure, is not sufficient." A search without a warrant is unlawful and allegation to this effect is sufficient. Certainly, Justice Sarmiento is right in his dissent that "the petitioners did not have to give details of the incident," because the burden was on the government to demonstrate the validity of the search.

The difficulty in *Valmonte v. De Villa*, however, lay in the fact that there was no evidence nor even allegation of just exactly what was being done at the checkpoints. Both the majority and the minority Justices simply assumed that what were being done were "searches" within the meaning of the Constitution. But merely stopping vehicles and detecting by means of one's natural senses what is inside a vehicle is not searching, for the same reason that there is no search where one simply overhears conversations in adjoining motel room, if they are audible by the naked ear.[38] Nor is there a search when common means of enhancing the senses, such as flashlights[39] or binoculars,[40] are used. In the *Valmonte* case, there was agreement on the Court that merely using a flashlight to see what is inside a vehicle was not unreasonable search.

If the petitioners in *Valmonte* were required to specify what was done at the checkpoints, and the Court ruled on what constitutes a search within the meaning of the Constitution instead of assuming that there were searches made, greater clarity could have been attained and unnecessary disagreement among the members could have been avoided. It is this lack of specification as to what exactly was being done at the checkpoints which really made the case hardly the appropriate vehicle for litigating an important constitutional issue. For in truth, to say that there was a search made so as to impose the requirement for search warrants was to state a conclusion and not a fact.

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[37]*See, e.g.*, In Re Ramon Tulfo, AM No. 90-4-1545-0, April 17, 1990, finding a columnist guilty of contempt of the Supreme Court for calling the ruling in Valmonte v. De Villa "an idiotic decision."

[38]United States v. Fisch, 474 F.2d 1071 (9th Cir. 1973).

[39]Marshall v. United States, 422 F.2d 185 (5th Cir. 1970).

[40]People v. Ciocon, 23 Ill. App.3d 363, 319 N.E.2d 332 (1974).

On the other hand, in *Guanzon v. De Villa*[41] the Supreme Court stopped short of dismissing a petition for prohibition to prevent the military from conducting so-called "areal target zonings" in Metro Manila and instead remanded the case to the Regional Trial Court to determine allegations of human rights violations committed in the course of such zonings. The petitioners were residents of Metro Manila. They complained that on various dates mentioned in their petition, the military launched "saturation drives" by cordoning off large areas and rudely rousing the residents from their sleep in the dead of the night or in the early hours of the morning, requiring males to strip down to the waist to check them for tattoo marks, ransacking houses, even destroying parts thereof like the ceilings, resulting in some cases in the loss of money and other valuables, and arresting those pointed to by hooded informers. These allegations were denied by the respondents who claimed that the "areal target zonings" were conducted in coordination with the barangay officials who in turn enlisted the support of the residents to flush out lawless elements who had killed even policemen and government soldiers. The charges of excesses were denied.

Justices Cruz and Sarmiento again dissented in separate opinions. Justice Cruz argued that " even without proof of the hooded figure and the personal indignities and the loss and destruction of properties and the other excesses allegedly committed, the mere waging of saturation drives is enough" to warrant a finding of unconstitutional search. As in the checkpoint case (*Valmonte v. De Villa*), Justice Sarmiento found there had been arrests and searches made and, since they were made without court orders, they violated Art. III, Sec. 2. To him, although the "zonings" might have been made "with due courtesy and politeness," they were nevertheless invalid because of lack of warrants from the courts.

Apart from the fact that the suit was not brought by those who might have been actually injured, but by concerned citizens, this and the checkpoint case raise questions as to the appropriateness of prohibition as a remedy against checkpoints and "target zonings." Suppose, on remand, the trial court found the alleged abuses by the military to be true, would that be a basis for enjoining the military from committing similar abuses in the future? For unless shown that the alleged atrocities were committed in furtherance of a government policy, the writ of prohibition cannot be issued without unwarrantedly assuming that the military would engage in similar conduct in the future. It would be as if the government were enjoined to sin no more simply because in the past its agents had been found guilty of human rights violations. Surely, military abuses should not be tolerated. But the

[41]G.R. No. 80508, Jan. 30, 1990.

remedy in such case would be the prosecution of erring military personnel or the exclusion of any evidence they may have obtained in the course of the "areal target zonings."

*Wire Tapping*

Republic Act No. 4200 makes it a crime for any person, "not being authorized by *all* the parties to any private conversation or spoken word, [1] to tap any wire or cable or, [2] 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 dictaphone or dictagraph or detectaphone or walkie-talkie or tape recorder, or however otherwise described." However, in cases involving national security offenses, a court may authorize the government to tap telephones upon proof of the commission of such offenses. The law was enacted in 1965 to implement the constitutional guarantee of privacy of communication and correspondence.

In one case, it was held that a person who listens to a telephone conversation through the use of an extension line, at the instance of one of the parties to a telephone conversation, does not violate Republic Act No. 4200, otherwise, it was pointed out, a caller, by merely using a telephone, can force the listener to secrecy no matter how obscene, criminal or annoying the call may be. It was pointed out that it is the use of the devices mentioned in the law for the purpose of intercepting messages that is prohibited.[42] Justice Gutierrez' opinion of the Court pointed out that the Anti-Wire Tapping Act covers only instruments which are not of common use, whose installation cannot be presumed by the parties, like those mentioned in the law.

I would sustain the admissibility of the evidence of this case but on the ground that what the Anti-Wire Tapping Law prohibits is the secret overhearing by third parties of the conversations without the consent of *all* the parties, so that if one of the parties asks another to listen in on a conversation, as in *Gaanan*, no violation of the law results. For a party to a telephone conversation can take down notes of what the other party says, or record such conversation. And so if he can do this, why can he not also ask a third party to listen in through the extension line?

But, if a party listens through an extension phone without the knowledge and consent of all the parties to the telephone conversation, is there any question that there is an unconstitutional invasion of the privacy of communication? Suppose it was a government agent who

[42]Gaanan v. IAC, 145 SCRA 112 (1986).

eavesdropped in the *Gaanan* case and this was done without the consent of both parties to the conversation, can the State justify the act of its agent on the ground that it was an extension line that was used and not any device similar to a detectaphone or a tape recorder? And suppose a telephone conversation was tape recorded at the instance of one of the parties, would such party be liable for violation of the law?

*The Exclusionary Rule*

A violation of the right to the security of persons, papers and effects against unreasonable searches and seizures as well as the privacy of communication and correspondence renders the evidence obtained inadmissible. This is the exclusionary rule which embodies the ruling in *Stonehill v. Diokno*.[43] Before 1967 the rule was that the admissibility of evidence was not affected by the illegality of the means used to obtain it. The victim of unreasonable searches and seizures was relegated to the remedy of criminal, civil and administrative actions against the erring officers.[44] As Judge Cardozo put it, the criminal must not be allowed to go scot-free simply because the constable has blundered.[45] But, in *Stonehill v. Diokno*,[46] the Supreme Court, under the impetus of the newer doctrines in America, particularly that of *Mapp v. Ohio*,[47] adopted the exclusionary rule as the only practical way to enforce the constitutional injunction against unreasonable searches and seizures. The exclusionary rule was later embodied in the 1973 Constitution[48] and then reiterated in the present charter.[49]

*"Fruit-of-the-poisonous tree" Doctrine*

The exclusionary rule applies not only to the use of evidence illegaly obtained but also to leads furnished by such evidence. In *Silverthorne Lumber Co. v. United States*,[50] books and documents illegally seized by federal agents were ordered returned by the court, but the petitioners were later required to produce them before a grand jury. As the petitioners refused to comply with the order, they were punished for contempt. The U.S. Supreme Court, by Justice Holmes, reversed the conviction, rejecting the government's claim that it may "use knowledge that it has gained" from the illegal seizure "to call upon the owners in a

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[43]20 SCRA 383 (1967).
[44]Moncado v. People's Court, 80 Phil. 1 (1948).
[45]People v. Defore, 140 N.E. 585 (1926).
[46]20 SCRA 383 (1967).
[47]367 U.S. 643 (1961).
[48]Art. IV, sec. 4(2).
[49]Art. III, sec. 3(2).
[50]251 U.S. 385 (1920).

more regular form to produce them." It was explained that "the essence of the rule forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but it shall not be used at all."

*Warrants of Arrest*

As already noted, under current practice and procedure, particularly under Rule 112, Sec. 4 and Sec. 6(b) of the 1985 Rules of Criminal Peocedure, the examination of the complainant and witnesses is the duty of prosecutors and municipal trial court judges conducting preliminary investigations. These prosecutors do not have the power to issue warrants of arrest.[51] Only judges of the Regional Trial Courts, which have jurisdiction to try the criminal cases investigated, have such power.

Indeed, the issuance of a warrant of arrest by the judge of the Regional Trial Court after the filing of the case, there being probable cause, is mandatory, otherwise he would not acquire jurisdiction over the person of the accused. He may decide not to rely on the prosecutor's certification. If he doubts the existence of probable cause, he may have to examine the record of the preliminary investigation. But if he finds probable cause, it is he who has to issue a warrant of arrest, or he will not acquire jurisdiction over the person of the accused.

*Warrantless Arrests*

Rule 113, Sec. 5 authorizes the making of arrests without judicial warrants in any of the following cases:

> (a) When in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense;
>
> (b) When an offense has in fact just been committed, and he has personal knowledge of facts indicating that the person to be arrested has committed it; and
>
> (c) When the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgement or temporarily confined while his case is pending, or has escaped while being trasferred from one confinement to another.

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[51]Sayo v. Chief of Police of Manila, 80 Phil. 860 (1948) (City Fiscal of Manila cannot issue warrants of arrest); Samulde v. Salvani, 165 SCRA 734 (1988) (Municipal Trial Court judge cannot order arrest of respondent unless necessary "in order not to frustrate the ends of justice.")

It may be that the instances enumerated above are not the only ones in which an arrest without warrant may be made. There may be circumstances reasonably tending to show that the person has committed, or is about to commit any crime which may warrant an arrest. Thus, a policeman, who arrested two individuals whom he had seen at midnight enter an uninhabited warehouse for investigation in the municipal hall, was held to be not liable for arbitrary detention even though the person arrested was later found to be innocent.[52]

The individual arrested without a warrant must, however, be charged in court within twelve, eighteen and thirty-six hours as the case may be, otherwise he must be released from custody.[53]

*Immunity from Arrest*

It should finally be noted that members of Congress are privileged from arrest for offenses punishable by imprisonment of not more than six years, while Congress is in session. This changes the rule in the 1935 Constitution, under which it was held that members of Congress did not really enjoy parliamentary immunity from arrests.[54]

In addition, under Republic Act No. 75, ambassadors and public ministers of foreign states authorized and received by the President, as well as their domestic servants, are immune from arrest.

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[52]United States v. Santos, 36 Phil. 853 (1917); *Accord*, United States v. Sanchez, 27 Phil. 442 (1914).

[53]REV. PEN. CODE, art. 125.

[54] Art. VI, sec. 11; Martinez v. Morfe, 44 SCRA 22 (1972).