

ISSN 1991-8976

Rajshahi University Law Journal

Volume 08 2013



**Faculty of Law
University of Rajshahi**

Do Judges Make Law? A Scrutiny in the Context of the Decisions of the Supreme Court of Bangladesh

The Fourth and Fifth Amendment Rights of the American Constitution: Protection of Rights during Search, Seizure and Interrogation

Trans-Border Movement of Natural Persons under the General Agreement on Trade in Services (GATS) and Right to Work

Gender Equality and Its Impact on Domestic Violence Law: A Comparative Study of Australia and Bangladesh

Debates on Family Law Reform in Bangladesh with Special Reference to Muslim Law

Problems of Pirpul Estates: An Experience of Shah Mukhdum (Rh.) Pirpul Waqf Estate

The Mayor's Courts in British India and Their Influence on the Judiciary of Bangladesh

Law of Polygamy in Bangladesh: An Analysis in the Context of Islamic Law and Human Rights

***Suo Moto* Jurisdiction of the High Court Division and Its Impact on the Promotion of Human Rights in Bangladesh**

ISSN 1991-8976

Rajshahi University Law Journal (RULJ)

Volume 08 2013

Published by

Dean

Faculty of Law

University of Rajshahi

Rajshahi - 6205

Bangladesh



Faculty of Law
University of Rajshahi

Rajshahi University Law Journal (RULJ) Volume 08 2013

Editorial Board

Editor	Biswajit Chanda Dean, Faculty of Law, R.U.
Member	Prof Dr Begum Asma Siddiqua Prof Dr M Anisur Rahman Prof Dr M Ahsan Kabir Dr Md Hashibul Alam Prodhan Dr Md Waliul Hasanat Dr Md Sahal Uddin Dr Shahin Zohora Shahriar Parvez Tapos Kumar Das

Rajshahi University Law Journal (RULJ) 2013

Faculty of Law
University of Rajshahi

Volume 08 2013

Published by
Dean
Faculty of Law
University of Rajshahi
Rajshahi - 6205, Bangladesh

© Reserved by the Publisher

Cover Design & Printed by
Md. Ariful Islam
Text Dot Com (TDC)
Farmgate, Motihar, Rajshahi-6212
Cell: 01711-951377

Subscription Rates

For Individuals: Tk 200.00 US\$ 20 (without postage)
For Organisation: Tk 300.00 US\$ 30 (without postage)

[Published in January 2016]

Rajshahi University Law Journal (RULJ) Volume 08 2013

Authors' Name	Article	Page
Tapos Kumar Das	Do Judges Make Law? A Scrutiny in the Context of the Decisions of the Supreme Court of Bangladesh	7
Dr Abdul Alim	The Fourth and Fifth Amendment Rights of the American Constitution: Protection of Rights during Search, Seizure and Interrogation	34
Dr. Shima Zaman	Trans-Border Movement of Natural Persons under The General Agreement on Trade in Services (GATS) and Right to Work	53
Nasrin Rahman Abu Naser Md Wahid Biswajit Chanda	Gender Equality and Its Impact on Domestic Violence Law: A Comparative Study of Australia and Bangladesh	75
Biswajit Chanda	Debates on Family Law Reform in Bangladesh with Special Reference to Muslim Law	93
Dr Shahin Zohora	Problems of Pirpul Estates: An Experience of Shah Mukhdum (Rh.) Pirpul Waqf Estate	119
Md Rafiqul Islam	The Mayor's Courts in British India and Their Influence on the Judiciary of Bangladesh	135
Dr Halima Khatun Mst Hamida Khatun	Law of Polygamy in Bangladesh: An Analysis in the Context of Islamic Law and Human Rights	149
Md Shahidul Islam Md Golam Moula	<i>Suo Moto</i> Jurisdiction of the High Court Division and Its Impact on the Promotion of Human Rights in Bangladesh	163

The Fourth and Fifth Amendment Rights of American Constitution: Protection of Rights During Search, Seizure and Custodial Interrogation

Dr Md Abdul Alim*

ABSTRACT *The prosecution and structure of courts in the United States is so much complicated. Side by side, the separate court systems are available, one is federal and another is state. In criminal proceedings, many courtrooms do not principally convict either by trial or by guilty plea and many concentrate on dismissing cases. It is necessary to examine the scope of the crime problem that the criminal courts face and the organisational context as well as policies in which they work. The Fourth Amendment rights - search and seizure are important procedure in the ongoing pursuit of crimes in America. The right of the people to remain secured in persons and properties against unreasonable searches and seizures shall not be violated. The police have the power to search and seize, but individuals are protected against unreasonable police intrusion. The Fifth Amendment Miranda rights protect any person from custodial interrogation by the police. It is required that all arrestees be given their Miranda warnings and if they are invoked they must be scrupulously honoured.*

KEYWORDS: *Criminal prosecution, custodial interrogation, exigent circumstances, plain view doctrine, probable cause, reasonable suspicion, search, seizure, Miranda rights*

1. Prelude

In America, the courts act as units of the political system. Here, courts are part of the general government structure and has drawn into nation's political life. Since *Marbury v. Madison* in 1803, United States courts have asserted the right to be authoritative interpreters of the Constitution, and most other political participations have conceded them that power. The Constitution is now what the courts say it is. The President, congressmen, state officials, bureaucrats, and all other Americans are obligated to act in accordance with court interpretations of the federal and state Constitutions. However, in

* Associate Professor, Department of Law at the University of Rajshahi, Bangladesh.

Nebraska Press Association v. Stuart (1976)¹ the United States Supreme Court held that the state courts were bound by the Supreme Court decisions on constitutional matters.² If the courts interpret the Constitution to say that judges may not exclude the press from open hearings, no judge may do so. The Fourth Amendment to the Constitution of the USA states the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures; shall not be violated, and no warrant shall be issued, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. Again, the Fifth Amendment protects defendants from having to testify if they may lay the blame on themselves through the evidence. In the landmark *Miranda v. Arizona* (1966)³ ruling, the United States Supreme Court extended the Fifth Amendment protections to include any circumstances outside of the courtroom that involves the restriction on personal freedom. It is for the reason that law enforcement authority captures a suspect into custody and they must make the suspect aware of all rights. That is popularly known as *Miranda* rights, these rights include the right to remain silent, the right to have an attorney present during questioning, and the right to have a government assigned lawyer if the suspect cannot meet the expense of that situation.

2. Criminal Prosecution

At the first stage the prosecution begins with police apprehension of suspected offenders. Each year police throughout the United States make more than nine million arrests for assorted crimes. In 1975, more than two million of these arrests were for what the FBI terms serious crimes (FBI 1975). Almost all murders and most car thefts are reported to the police; less than half of all assaults are reported to the police by the victims. The victimless crimes such as narcotics offences, prostitution, and gambling are almost never reported to the police. In USA, cheating by retailers, sex offences, racial discrimination by employers, embezzlement by corporate officers, and bribe-taking by public officers are all activities that allegedly occur much more frequently than police records indicate. Even when the police know about a crime they usually

¹ 427 U.S. 539.

² The state courts were de jure subordinate to the Supreme Court in federal matters; they retained a great measure of de facto independence.

³ 384 U.S. 436.

cannot apprehend the criminal. Only when the victim confronts the offender and can identify him then arrest and trial are likely. It is the discretion of individual policeman to determine who will be arrested. Individual policemen observe many illegal acts that they choose to ignore (Rubenstein 1973: 51-54). These acts range from minor traffic violations - occurring when they are busy with more urgent business, family assaults - which they either refer to welfare agencies are matters more of keeping the peace than of enforcing the criminal law. Whether police arrest the offender depends not only on the seriousness of the crime but on how threatening the behavior of the offender is towards the police and police still enjoy considerable discretion in making the arrest. Then, the police may let the offender go free with a warning (Black 1970: 733-747).

When a police arrests a suspect the prosecution must decide what charges to file against him or her. It is the court to decide whether to release the suspect from custody. For many suspects, the release decision is resolved at the police station without any appearance before a judicial officer (Miller 2010: 847). Soon after arrest, suspects learn why they have been detained (Miller 2010: 885). In *Nathanson v. United States* (1933)⁴ it was held that a police officer must provide more than his own confidence in support of probable cause and 'mere affirmance of belief or suspicion is not enough'.

2.1 Probable cause and duty of a police officer

An individual possesses a reasonable expectation of privacy in a place to be searched or a thing to be seized. The Fourth Amendment's protections take hold and the question then becomes what is the nature of those protections. Probable cause is required as the basis of arrest and search warrants and regardless of whether an arrest warrant is required. An officer's subjective belief, no matter how sincere, does not in itself constitute probable cause. However, in determining what a 'person of reasonable caution' would believe, a court will take into account the specific experiences and expertise of the officer whose actions are under scrutiny.

Police officers need no justification to stop someone on a public street and ask questions, and individuals are completely entitled to refuse to answer any such questions and go about their business.⁵ However, a police officer may only

⁴ 290 U.S. 41.

⁵ Available at <<http://legal-dictionary.thefreedictionary.com/Search+and+Seizure>>. Accessed 30 July 2012.

search people and places when the officer has probable cause or reasonable suspicion to suspect criminal activity.

In the case of *Brinegar v. United States* (1949)⁶ it is held that a police officer has probable cause to arrest when 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a person of reasonable caution in the belief that an offence has been or is being committed'. Again in the case of *Texas v. Brown* (1983)⁷ it is considered that probable cause may determine - no precise degree of certainty required, but not 'any showing that such a belief be ... more likely true than false'. 'Probable cause' exists when the facts and circumstances within an officer's personal knowledge, and about which he has reasonably trustworthy information, are sufficient to warrant a 'person of reasonable caution' to believe that:

- (i) in the case of an arrest, an offense has been committed and the person to be arrested committed it;
- (ii) in the case of a search, an item described with particularity will be found in the place to be searched.

Again, all searches and seizures need to be founded on probable cause. A lesser standard 'reasonable suspicion' may apply where the intrusion is minor, such as a pat-down for weapons. Furthermore, where the intrusion on a person's privacy is especially slight and society's interest in conducting the search or seizure is significant, there may be no need for individualised suspicion, such as for society and border checkpoints and certain administrative searches (Gottlieb 2002: 167). Federal courts have clustered border searches into two ways; routine and non-routine. Routine searches impose into an individual's privacy in very limited ways. It generally includes document checks, pat-downs, or the emptying of pockets, and do not need to be justified by any suspicion of wrongdoing. Similarly, a government agent generally does not need suspicion of criminal activity before he may conduct limited inspections of cars and personal property at the border (Kim 2009: 1). On the other hand, government officials may conduct 'non-routine' searches at the border when they have a 'reasonable suspicion' of smuggling contraband or other illegal activities. Reasonable suspicion test is a fact-intensive totality

⁶ 338 U.S. 160.

⁷ 460 U.S. 730.

of the circumstances test determined on a case-by-case basis.⁸

Direct Information

Probable cause may be founded on direct information. Unless a magistrate has reason to believe that an affiant has committed false swearing or recklessly misstated the truth, the magistrate may consider all direct information provided by the affiant. The affiant's information is considered reasonably trustworthy because it is provided under oath.

Hearsay Information

A magistrate may consider hearsay evidence for the purpose of determining probable cause, as long as the information is reasonably trustworthy. The informant's identity must not be disclosed to the magistrate unless the magistrate disbelieves the affiant's trustworthiness regarding the hearsay.

Totality of the Circumstances Test

The *Aguilar-Spinelli* (1964)⁹ test was a judicial guideline set down by the U.S. Supreme Court. It was for determining the validity of a search warrant or a warrantless arrest based on information provided by a confidential informant. Then the Supreme Court replaced *Aguilar-Spinelli* test by the *Illinois v. Gates* (1983)¹⁰ 'totality-of-the circumstances' test. In the *Gates* (1983) Court abandoned *Aguilar* and substituted the totality-of-the-circumstances test for probable cause determinations, which requires the magistrate to balance 'the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip'. The 'totality-of-the circumstances' test are that, when law enforcement seeks a search warrant and a magistrate signs a warrant he must be informed of the reasons to support the conclusion that such an informant is reliable and credible. And again the magistrate must be informed of some of the underlying circumstances relied on by the person providing the information. The factors expressed in *Aguilar* - basis-of-knowledge and veracity remain 'highly relevant' in determining the value of an informant's tip but are no longer treated as separate, independent requirements.

⁸ The reasonable suspicion standard requires less suspicion of wrongdoing than probable cause, the normal standard is required for a Fourth Amendment search or seizure. See *Terry v. Ohio* (1968) 392 U.S. 1, 21.

⁹ 378 U.S. 108; 393 U.S. 410.

¹⁰ 462 U.S. 213.

3. Reasonable Suspicion

In *Terry v. Ohio* (1968)¹¹ the Court, for the first time, permitted officers to seize individuals and conduct a limited search for weapons in the absence of probable cause to believe that the individual was armed and engaged in criminal activity. The facts of *Terry* are as follows. Officer McFadden was on the lookout for shoplifters and pickpockets in the middle of the afternoon in downtown Cleveland. At some point, he noticed Terry and Chilton standing on a street corner. McFadden could not articulate 'precisely what first drew his eye to them'.¹² They just 'didn't look right', he testified, even though they were dressed in topcoats, customary attire at the time. '[T]o be truthful', he admitted, 'I just didn't like them'.¹³ Although McFadden never mentioned it, both Terry and Chilton were Black. McFadden watched the two men for ten minutes as they took turns walking down the street, looking into a store window, and returning. Their behavior led McFadden to suspect that the two were casing a store in preparation for a daytime robbery. Without probable cause, McFadden grabbed Terry, spun him around, frisked him, and found a concealed weapon.

The issue was brought before the Court whether the Fourth Amendment permitted officers to seize and frisk individuals in the absence of probable cause. The Court answered the question in affirmative. It held that reasonable suspicion, and not the traditional probable cause standard, authorised officers to detain individuals for questioning and to conduct a limited search for weapons. In order to justify what is conversationally known as a 'stop and frisk', the reasonable suspicion test requires an officer 'to point to specific and particular facts which ... leads him reasonably to conclude in light of his

¹¹ 392 U.S. 1.

¹² Ibid. Part of McFadden's testimony: Q. Well, at what point did you consider their actions unusual? A. Well, to be truthful with you, I didn't like them. I was just attracted to them, and I surmised that there was something going on when one of them left the other one and did the walking up, walk up past the store and stopped and looked in and come back again. *State of Ohio v. Richard D. Chilton* and *State of Ohio v. John W. Terry*: The Suppression Hearing and Trial Transcripts, 72 ST. JOHN'S L. REV. 1387, 1456 (1998).

¹³ Ibid.

experience that criminal activity may be a foot' or that the individual with whom he is interacting is armed and dangerous.¹⁴

4. Execution of Warrant

The 4th Amendment to the Constitution of the USA, states that the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall be issued, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. There is a 48-hour staleness doctrine, under which the warrant need to be executed. Here, it is not told of how close in time police officer should perform the warrant after it is issued, therefore, they will proceed to the knock and announce rule.

4.1 Knock and announce requirement

The common law principle is that police officers executing a warrant must knock and announce their presence that they are police officer to perform a search warrant. Police officers approaching should have been clearer that they were police at defendant house, knocked, and asked if they could enter to enact a warrant. At the same time, the Supreme Court in the case of *Wilson v. Arkansas* (1995)¹⁵ recognised that the 'flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests'. The Wisconsin Supreme Court concluded that police officers are never required to knock and announce their presence when executing a search warrant in a felony drug investigation. Again, the US Supreme Court overturned the state high court's decision in *Richards v. Wisconsin* (1997)¹⁶. In *Richards* (1997) the Court said that the Fourth Amendment does not permit a blanket exception to the knock-and-announce requirement for the execution of a search warrant in a felony drug investigation. The fact is that felony drug investigations in the present

¹⁴ Chief Justice Warren's opinion was not crystal clear on the appropriate standard for conducting a stop and frisk. See, e.g., Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1309 (1998). However, the *Terry* decision now stands for the proposition that reasonable suspicion is the guiding standard for stops and frisks.

¹⁵ 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976.

¹⁶ 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615.

circumstances regularly warranting a no-knock entry. The Court said, it cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case.¹⁷ Moreover, it is the duty of a court to decide whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement (Scott et al 2008: 207). To justify a no-knock entry, the Court in the case of *Richards* (1997) stressed that police must have a reasonable suspicion that knocking and announcing their presence under the particular circumstances would be dangerous or futile, or that it would inhibit the effective investigation of the crime, for example, allowing the destruction of evidence.

4.2 Exceptions

Plain View

When an officer is in a place they have a legal right to be in, and they view something that is clearly contraband, they may confiscate the material under the plain view doctrine.

Exigent Circumstances

If any police officer is assaulted by any defendant then police could move quickly to any apartment and confiscate gun or such deadly weapon. It would be that they are fearful for their own safety, and quickly move to ascertain the nature of the danger and in such event they may have a valid exception to exceeding the scope of the search under exigent circumstances. In *California v. Acevedo* (1991)¹⁸ the court announced a new rule that the police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained. The US Supreme Court in the case of *Florida v. White* (1999)¹⁹ held that the warrantless seizure of automobile violates the 4th Amendment rights in absence of exigent circumstances.

Exclusionary Rule

Defendant, who has been subject to an illegal search or coerced confession, has the right to have this evidence excluded from prosecution. A defendant

¹⁷ Available at <http://legal-dictionary.thefreedictionary.com/Search+and+Seizure>. Accessed 28 July 2012.

¹⁸ 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619.

¹⁹ 526 U.S. 559, 119 S. Ct. 1555, 143 L. Ed. 2d 748.

must have standing to assert rights under the exclusionary rule, and must show that their rights were violated, that they had a possessor's interest in the premises, and that there was governmental conduct. The Fourth Amendment generally requires a warrant in order to justify the search and seizure of a person or their property (Roach 1999:76).

Derivative Evidence

Any evidence illegally obtained must be excluded, along with any evidence obtained or derived from the exploitation of that illegally obtained evidence. In other words, where the original seizure is improper, anything else that is seized as a result of, or derivative to, the unlawful seizure, will be deemed fruit of the poisonous tree, and will be excluded from evidence.

Fruit of the Poisonous Tree

The exclusionary rule is the fruit of the poisonous tree doctrine, established by the Supreme Court in *Nardone v. United States* (1939)²⁰. Under this doctrine, a court may exclude from trial any evidence derived from the results of an illegal search. If any gun is seen as an improper search and seizure, the gun will be the fruit of the poisonous tree and will likewise be excluded. The prosecutor will argue that a warrant must be judged according to the totality of the circumstances in order to judge whether probable cause existed. The prosecutor will argue that probable cause did exist when all the information in the affidavit is judged.²¹ Furthermore, in *Chimel v. California* (1969)²² it was held that police may search without a warrant only at the immediate area around the suspect from which he could obtain a weapon or destroy evidence. But a person's entire dwelling cannot be searched merely because he is arrested. However, if the warrant is found to be faulty, the prosecutor will argue that the search was still legal since it was based on the officer's good faith that they had a valid warrant. The officer's good faith will be nullified only if the warrant was facially invalid, if the affidavit obviously lacked probable cause, or if the police misled the judge by falsifying the affidavit. While the police excluded information from the affidavit, this would not

²⁰ 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307.

²¹ 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307.

²² 395 U.S. 752 (1969) is a Supreme Court of the United States case. In *Chimel*, the Court held that police officers arresting a person in his or her home could not search the entire home without a search warrant.

constitute misrepresentation. Therefore, the search would be legal under this exception. Finally, the prosecutor would also argue that the evidence should not be excluded, even if the warrant was illegal, because the police suspicions of defendant would have led to the inevitable discovery of the evidence. Therefore, defendant's motion to exclude the items seized under the warrant should be denied.

5. Search Procedure

In the case of *Katz v. United States* (1967)²³ federal officers, acting without a warrant, attached an electronic listening device to the outside of a telephone booth where the defendant engaged in a number of telephone conversations. The controlling legal test at the time for determining whether police conduct violated the Fourth Amendment was known as the 'trespass' doctrine.²⁴ Under the trespass doctrine, the Fourth Amendment did not apply in the absence of a physical intrusion. A trespass has actually done into a 'constitutionally protected area' such as a house. The arrival of modern technology that allowed the government to electronically capture conversations without physical intrusion into any enclosure, the Court abandoned the trespass doctrine and announced that the appropriate inquiry for Fourth Amendment challenge was whether the defendant had a 'reasonable expectation of privacy'. Applying this new standard, the Court found that despite the fact the telephone booth was made of glass and the defendant's physical actions were knowingly exposed to the public, what he sought to protect from the public were his conversations, as evidenced in part by shutting the door to the phone booth. Thus, the government's electronic surveillance of the defendant's conversations without a warrant violated the Fourth Amendment.

In *New Jersey v. T.L.O* (1985)²⁵ case, a public school student's protection against unreasonable search and seizure is less strict in school than in the

²³ 389 U.S. 347.

²⁴ 389 U.S. 347, 357 (1967) (Searches conducted outside the judicial process without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.)

²⁵ 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720. (T.L.O. was a high school student. School officials searched her purse suspecting she had cigarettes. The officials discovered cigarettes, a small amount of marijuana, and a list containing the names of students who owed T.L.O. money. T.L.O. was charged with possession of marijuana. Before trial, T.L.O. moved to suppress evidence discovered in the search. The Court of New Jersey found her guilty and

world at large. Under ordinary circumstances, the Court said, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.

5.1 False friends doctrine

The Fourth Amendment protects private conversations where no party consents to the close watch and recording but does not protect conversations where one party consents to such activity. Under the doctrine of 'false friends' established by *United States v. White* (1971)²⁶ no search occurs if a police informant or undercover agent camouflaged as the defendant's friend, business associate, or colleague in crime, reports to the government the defendant's statements made in the informant's or agent's presence. A person is not deemed to have a reasonable expectation of confidentiality from a person with whom he is conversing. The doctrine also applies where the 'false friend' wears a 'wire' to record the conversation with the defendant.

6. Seizure Proceeding

Fourth Amendment seizure of a person occurs when a police officer, by means of physical force or show of authority, in some way restrains the liberty of a citizen observed in *Florida v. Bostick* (1991)²⁷ or put another way, when *United States v. Mendenhall* (1980)²⁸ says, 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave'. A seizure of person includes:

sentenced her to probation for one year. She made an appeal and the Superior Court of New Jersey, Appellate Division affirmed the denial of the motion to suppress evidence. The New Jersey Supreme Court reversed, holding that the exclusionary rule of the Fourth Amendment applies to searches and seizures conducted by school officials in public schools. Does the exclusionary rule apply to searches conducted by school officials in public schools? The 6 judges vote for New Jersey and 3 against and Justice Stevens said it is not the role of the Supreme Court to offer guidance on questions the parties did put at issue.

²⁶ 401 U.S. 745.

²⁷ 392 U.S. 1.

²⁸ 446 U.S. 544.

- i. arrests;
- ii. physically restraining or ordering a person to stop in order to frisk or question him on the street;
- iii. taking the person into custody and bringing him to a police station for questioning or fingerprinting;
- iv. ordering a person to pull his automobile off the highway for questioning or to receive a traffic citation;
- v. stopping a car by means of a roadblock.

However, brief questioning by itself is unlikely to amount to a seizure e.g., brief questioning during a 'bus sweep' is not a seizure. Brief questioning about citizenship during a 'factory sweep' is not a seizure [*Immigration and Naturalization Service v. Delgado* (1984)²⁹]. In contrast to a search, which affects a person's privacy interest, a seizure of property attacks a person's possessor's interest in that property. Tangible property is seized in Fourth Amendment terms 'when there is some meaningful interference with an individual's possessor's interests in that property'.

6.1 Mere evidence rule in seizure

The 'mere evidence' rule permits only certain categories of evidence to be seized (Emanue 2009: 53):

- (i) a 'fruit' of a crime (e.g., money obtained in a robbery);
- (ii) an instrumentality of a crime (e.g., the gun used to commit a robbery, or the car used in the get-away); or
- (iii) contraband (e.g., illegal narcotics).

The 'mere evidence' items that have only evidentiary value in the apprehension or conviction of a person for an offense could not be seized. The Supreme Court abolished the mere evidence rule in *Warden v. Hayden* (1967)³⁰ which permits police officers to seize any evidence that has a connection to the criminal activity under investigation.

²⁹ 460 U.S. 210.

³⁰ 387 U.S. 294 .

7. Interrogation in Police Custody

The Fifth Amendment of US Constitution provides that:

[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

A person is deemed to be in custody if he is deprived of his freedom of action 'in any significant way'. 'Custody' requires the existence of coercive conditions that would cause a reasonable person to believe, under all the circumstances surrounding the interrogation that he is not free to go (Leo 2009: 124). For example, a police interrogation room may be deemed a coercive environment but the totality of the circumstances may indicate that a person is not in custody, he came to the police station voluntarily. As per *Oregon v. Mathiason* (1971)³¹ case prior to questioning the defendant is informed that he is not under arrest, and he is free to leave the police station at any time. The Court in *Berkemer v. McCarty* (1984)³² case held that brief detention by the police likewise brief questioning during a routine traffic stop or roadblock does not necessarily put one in custody. In the case of *Miranda v. Arizona* (1966)³³ police are forbidden from interrogating a suspect once he has asserted his right to counsel under the Sixth Amendment. In *Rhode Island v. Innis* (1980)³⁴ case the court held that interrogation is not just direct questioning but also its 'functional equivalent'. The Court stated that, 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect'.

In *Innis* (1980) case a murder suspect was being transported to the police station when the police commented that they hoped that the murder weapon,

³¹ 429 U.S. 492; 463 U.S. 1121.

³² 468 U.S. 420.

³³ 384 U.S. 436.

³⁴ 446 U.S. 291.

which had not yet been located, would not be found by any children from a nearby school for the handicapped. In response, the suspect, who had previously requested a lawyer, revealed the location of the gun. The Court held that the comments were not the functional equivalent of interrogation because it found that:

- (i) the comments were brief;
- (ii) the comments were not particularly evocative;
- (iii) the suspect was not disoriented or upset when the comments were made;
- (iv) there was no evidence that the police should have known that the suspect would be susceptible to an appeal to his conscience.

7.1 Miranda warnings

The Court in *Miranda v. Arizona* (1966)³⁵ noted that Congress and the states are free to develop procedural safeguards for protecting a suspect's Fifth Amendment rights during custodial interrogation. However, they are 'fully as effective' as those described in *Miranda*, the police must apprise the suspect issue prior to custodial interrogation, that:

- (i) the suspect has a right to remain silent;
- (ii) anything said can and will be used against the suspect in court;
- (iii) the suspect has the right to consult with a lawyer and to have his lawyer present during interrogation;
- (iv) if the suspect is indigent a lawyer will be appointed to represent him.

7.2 *Miranda v. Arizona*

The landmark case *Miranda v. Arizona* (1966)³⁶ resulted from the consolidation of four cases on appeal. In each case, the suspect was taken into custody, questioned in a police interrogation room in which the suspect was alone with the interrogators, and never informed of his privilege against self-incrimination. *Miranda* held that any statement, whether exculpatory or inculcator, obtained as the result of custodial interrogation could not be used

³⁵ 384 U.S. 436.

³⁶ 384 U.S. 436.

against the suspect in a criminal trial unless the police provided procedural safeguards effective to secure the suspect's privilege against compulsory self-incrimination. Custodial interrogation is defined in *Miranda* case as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way'. The *Miranda* warnings apprise an arrestee of the right to obtain counsel and the right to remain silent. If these warnings are not read to an arrestee as soon as he or she is taken into custody, any statements the arrestee makes after the arrest may be excluded from trial.

7.3 Right to remain silent

In the case of *Pennsylvania v. Muniz* (1990)³⁷ the court states that *Miranda* warnings need not to be issued prior to asking a suspect in custody routine booking questions, such as name, address, date of birth, and other biographical data necessary to complete the booking process. *Miranda* states that, once warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease. In *Michigan v. Mosley* (1975)³⁸ the Court held that police must honor a suspect's right to silence after he asserts the privilege but are not necessarily precluded from attempting to interrogate the suspect under different circumstances.

In a later case *Edwards v. Arizona* (1981)³⁹ the Court opined that when a suspect in custody invokes his right under *Miranda* to consult with an attorney, the police must cease the interrogation until the suspect's attorney is present unless the suspect initiates further 'communication, exchanges, or conversations' with the police. This rule is intended 'to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights' and applies to all interrogation, including questioning about crimes other than the one for which the suspect is in custody. However, the *Edwards* rule originated in the case of *Edwards v. Arizona* (1981)⁴⁰ does not apply unless a

³⁷ 496 U.S. 582.

³⁸ 423 U.S. 96. (final holding that the police did not violate the defendant's Fifth Amendment rights when the interrogation ceased immediately upon request; two hours elapsed; the subsequent questioning was by a different officer, in a different location, for a different crime; and *Miranda* warnings were restated).

³⁹ 451 U.S. 477.

⁴⁰ The Arizona Supreme Court affirmed a conviction of Petitioner Edwards which included the use of incriminating testimony given by him to police officers. During at an interrogation just

suspect unambiguously asserts his right to counsel. Furthermore, in *Minnick v. Mississippi* (1990) ⁴¹ the Court observed that once a suspect in custody invokes his *Miranda* right to counsel, the police may not re-initiate interrogation at any time thereafter unless counsel is present. Where the suspect initiates communications with the police in the absence of counsel, the police may recommence interrogation upon obtaining a valid waiver of his Fifth Amendment rights. A suspect initiates communications, exchanges or conversations by any comment or inquiry that indicates his desire to engage in a discussion relating directly or indirectly to the investigation. The Court in *Oregon v. Bradshaw* (1983) ⁴² held that comments or inquiries 'relating to routine incidents of the custodial relationship', such as a request for water or to use a telephone, do not qualify as 'communications, exchanges, or conversations' and thus do not properly trigger further police interrogation.

7.4 Waiver of *Miranda* rights

Miranda states that a valid waiver of Fifth Amendment rights during interrogation could be found when after the reading of *Miranda* rights, a suspect expressly states a willingness to make a statement, without the presence of an attorney, 'followed closely' by such statement.⁴³ A voluntary waiver is 'the product of a free and deliberate choice rather than intimidation, coercion, or deception'. In *Moran v. Burbine* (1986) ⁴⁴ the Court observed that a knowing and intelligent waiver is made with 'full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it'. A waiver cannot be deemed 'knowing and intelligent' unless the police issued proper *Miranda* warnings.

before he was to be given appointive counsel at his first court appearance. The United States Supreme Court holding that once a defendant invokes his Fifth Amendment right to counsel police must cease custodial interrogation. Re-interrogation is only permissible once defendant's counsel has been made available to him, or he himself initiates further communication, exchanges, or conversations with the police. Statements obtained in violation of this rule are a violation of a defendant's Fifth Amendment rights.

⁴¹ 498 U.S. 146.

⁴² 462 U.S. 1039.

⁴³ Also affirmed in the case of *Edwards v. Arizona* [1981] 451 U.S. 482.

⁴⁴ 475 U.S. 412.

7.5 Express and implied waiver

In *North Carolina v. Butler* (1979)⁴⁵ it was held that a valid waiver may not be presumed simply from the suspect's silence following reading of the *Miranda* warnings or from the fact that he confesses. Nevertheless, an express statement of waiver is not invariably necessary, in some cases waiver may be clearly inferred from the suspect's words and actions that follow *Miranda* warnings, although the Supreme Court has given little guidance on when such circumstances exist.

Exigent Circumstances

A public safety exception to *Miranda* allows the police to interrogate a suspect prior to *Miranda* warnings if an exigency exists that requires immediate police action to ensure public safety, e.g., to locate a loaded weapon in a public place. The Court in *New York v. Quarles* (1984)⁴⁶ case directed that the questions asked prior to issuance of the warnings must be directed at the exigent circumstances only.

8. Conclusions

From the beginning of the US history the relationship between state and federal Courts was complex. The highest federal Court in the United States is consisting of nine justices and having jurisdiction over all other courts in the nation. The Supreme Court is the highest Court in most states within the United States. Section 25 of the Judiciary Act of 1789 gave the Supreme Court authority to review state court decisions that had ruled against a claim based on the federal Constitution or a federal statute. The most important doctrinal sources used by the Supreme Court have been the commerce, due-process, and equal-protection clauses of the Constitution. It also has often ruled on controversies involving civil liberties movement, including freedom of speech and the right of privacy. Supreme Court's duty is to clarifying, refining, and testing the Constitution's philosophic ideals and translating them into working principles. The Fourth Amendment to the Constitution guarantees US citizens freedom from unreasonable searches and seizures. The privacy of the

⁴⁵ 441 U.S. 369.

⁴⁶ 467 U.S. 649. It was observing in this case that the defendant, who had just attacked a woman and then fled into a grocery store, had an empty shoulder holster, an officer validly asked the defendant, without issuing *Miranda* warnings, where the gun was.

individual is protected against arbitrary intrusion by agents of the government. In 1949 in the case of *Wolf v. Colorado* (1949) ⁴⁷Justice Felix Frankfurter wrote:

The security of one's privacy against arbitrary intrusion by the police is basic to a free society. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

A warrant is not required for a search incident to a lawful arrest, the seizure of items in plain view, a border search, a search affected in open fields, a vehicle search, an inventory search of an impounded vehicle, and any search demanded by exigent circumstances. It is also not required for a stop and frisk, a limited search for weapons based on a reasonable suspicion that the subject has committed or is committing a crime. The 4th Amendment protection against unreasonable searches and seizures is reinforced by the clause that requires a warrant, or court authorisation, for such searches and seizures. A warrant should not be issued unless there is a finding of 'probable cause' by a neutral magistrate or judge. The 4th Amendment principle of personal security against unlawful intrusion is clear enough. But the exact meaning of the key phrases and their precise application in specific cases requires interpretation and judgment—the duties of the federal courts. What constitutes 'unreasonable searches and seizures'? What exactly is the meaning of 'probable cause'? Are there any situations that justify a warrant less search by government officials? If so, what are they, and what are the justifications? After the introduction of the *Miranda* rights, there have been many concerns surrounding the issues of the validity of the law. Some may argue that this law is unconstitutional; while other argues that it is just an 'extension' of the Constitution. This law is much needed when dealing with criminal investigations today.

Miranda rights originated to provide safeguard against coerced confession by the arrestee. The question today is: do the *Miranda* rights do more harm to the criminal justice system than they give help? In some opinion, they believe that the *Miranda* Rights are not all that beneficial to the criminal justice system. The only benefit the law gives is giving the suspect a choice to speak now or

⁴⁷ 338 U.S. 25.

to speak when his attorney is present. If someone who commits a crime is not aware of their rights, should that not be his responsibility as a citizen of this country? The *Miranda* rights are not mandatory to be given by the arresting police officer but are used as a 'safeguard' to make sure that the police have acted within the Constitution. *Miranda* has provided another technicality that provides a hindrance to criminal investigations because it is unnecessary and unconstitutional in its context. In many opinions, the law should be overturned and not be a part of today's criminal justice system because it is not stated in the United States Constitution.

References

- Black, Donald J. 1970. 'The Production of crime rates', *American Sociological Review* 35:733-747.
- Emanue, Steven. 2009. *Criminal Procedure*. New York: Aspen Publisher.
- Federal Bureau of Investigation (FBI). 1975. *Uniform Crime Reports*. Washington DC: Government Printing Office.
- Fletcher, G P. 1995. *With Justice for Some: Victims' Rights in Criminal Trials*. Boston: Addison-Wesley Publishing.
- Roach, Kent. 1999. *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice*. Totonto: University of Toronto Press.
- Gottlieb, Henry. 2002. 'N.J. Joins Minority of States that Ban Freewheeling Consent Searches; Justices Invoke 'Reasonable and Articulable Suspicion' Standard'. *New Jersey Law Journal* 167 (March 18).
- Kim, Yule. 2009. *Protecting the U.S. Perimeter: Border Searches Under the Fourth Amendment*. Newyork: Congressional Research Service.
- Leo, Richard A. 2009. *Police Interrogation and American Justice*. Cambridge: Harvard University Press.
- Miller, Marc I. 2010. *Criminal Procedure*. Newyork: Aspen Publisher.
- Nagal, Stuart. 1962. 'Sociometric Relations among American Courts', *South Western Social Science Quarterly*: 136-140.
- Rubenstein, Jonathan. 1973. *City Police*. New York: Farrar, Straus, and Giroux.
- Scott, J. Harr; Hess, Kären M. Orthmann, Christine M. H. *Constitutional Law and the Criminal Justice System*, 5th ed. California: Wadsworth.