AN ALTERNATIVE LEGAL FRAMEWORK FOR MIRANDA RIGHTS

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INTRODUCTION

Anyone who has watched foreign law enforcement television shows is familiar with, or can even recite by heart, the phrases of "You have the right to remain silent, anything you say may and will be used against you in a court of law; you have the right to an attorney," and so on and so forth. However, for members of the bench and bar, likewise for law enforcers, Miranda rights are of great significance, dealing with, as they do, the validity and legality of evidence taken during or as a result of a custodial investigation.[1] Thus do Miranda rights, lying at the core of the law on confessions, bear vital repercussions for a person undergoing custodial investigation, as what spells the difference between a conviction and an acquittal may just lie in the proper appraisal and implementation of the Miranda warnings.

Plainly, the Miranda doctrine is but judge-made law, having come into being through the seminal case of *Miranda v. Arizona*,[2] and its self-claimed precursor, *Escobedo v. Illinois*.[3] While numerous issues have arisen since the doctrine's incipience, succinctly put, these issues revolve around the following questions: "When are these rights available?; What are the rights available?; and Why are these rights available?"[4] To answer the second question, §12(1), Article III of the Constitution provides:

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1 *See* Perfecto V. Fernandez, *Welcome Remarks, in* I INSTITUTE OF HUMAN RIGHTS, U.P. LAW CENTER, RIGHTS OF THE ACCUSED, PROCEEDINGS OF SYMPOSIA ON THE RIGHTS OF THE ACCUSED 256 (1996) [textbook hereinafter cited as I RIGHTS OF THE ACCUSED].

2 384 U.S. 436, 16 L. Ed 2d 694, 86 S. Ct. 1602, 10 A.L.R. ed 974 (1966). It must be noted, however, that *Miranda* was passed by a sharply-divided Court, *i.e.*, five (5) to four (4), with Warren, *C.J.*, writing the majority opinion (concurred in by Messrs. Justices Black, Douglas, Brennan and Fortes), while Clark, *J.*, dissented in part and concurred in part. Messrs. Justices Harlan, Stewart and White dissented.

3 378 U.S. 478, 12 L. Ed 2d 977, 84 S. Ct. 1758 (1964).

4 *See* I JOAQUIN G. BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 343 (1st ed.1987) [hereinafter I BERNAS].

> Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.

As to the consequence of a violation of these rights, paragraph 3 of the same Section declares: "Any confession or admission obtained in violation of this or Section 17 hereof shall be inadmissible in evidence against him."[5]

This article, in dealing with the first and third questions set forth above, reflects upon the very foundation of the Miranda doctrine, then examines the prospect of extending the parameters of the availability of Miranda rights to fora outside custodial investigations, specifically, police line-ups and baranggay conciliation proceedings. This has been prompted by the holding in *Galman v. Pamaran*,[6] that:

> The fact that the framers of our Constitution did not choose to use the term "custodial" by having it inserted between the words "under" and "investigation", as in fact the sentence opens with the phrase "any person" goes to prove that they did not adopt in toto the entire fabric of the Miranda doctrine. Neither are we impressed by petitioners' contention that the use of the word "confession" in the last sentence of said Section 20, Article 4[7] connotes the idea that it applies only to police investigation[s] xxx

Likewise, the author aims to provide an alternative legal foundation for Miranda and analyze the repercussions thereof as to the time or occasions when Miranda rights may be invoked.

[5] The pronoun "him" refers to a person under investigation for the commission of an offense, while Section 17, in providing for the right against self-incrimination, states: "No person shall be compelled to be a witness against himself."

[6] 138 SCRA 294, 319-320 (1985).

[7] The 1973 Constitution counterpart of the present Constitutional provision on Miranda may be found in Article IV, §20, which reads, in part: "No person shall be compelled to be a witness against himself. Any person under investigation for the commission of an offense shall have the right to remain silent and to counsel, and to be informed of such right. xxx"

II. CURRENT DOCTRINE

A. The Right Against Self-Incrimination

1. Historical Development

A brief discussion on the history, nature, scope and rationale of and for this right is in order, given that the clear intent of the majority of the Supreme Court of the United States in promulgating *Miranda* was to ground it upon the right against self-incrimination.[8] Historically, the right was transplanted in the Philippines pursuant to President McKinley's Instructions of April 7, 1900,[9] having been alien to this jurisdiction during the Spanish regime.[10] However, the origin of the right goes back much further and has its roots in the common law.[11]

The earliest proceedings in which the right was applied was to the inquisitorial method of canon law.[12] Subsequently, however:

> [T]he privilege began to assume a more comprehensive, and also modern, interpretation in the famous trial of Lilburne before the Star Chamber in 1627. In sixteenth century England the bishops had the authority to administer oaths to clergy and laymen suspected of having weak faith or ill morals. The purpose of the oaths was to allow these persons the opportunity to clear themselves, and thus authorities deemed a refusal to speak or to take the oath as equivalent to a confession of guilt. During the trial, Lilburne refused to swear an oath and xxx claimed that no one could force him to incriminate himself and withstood floggings and beatings while making his statement against government oppression.
>
> Just a few years after Lilburne's challenge, the government disbanded the Star Chamber and compensated Lilburne for his injuries. Thereafter, the privilege against self-incrimination began to assume an increasing importance in English law [and] was transmitted in turn to the United States.

[8] Miranda, 384 U.S. at 706: "Our holding [in sum] is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards to secure *the privilege against self-incrimination*." (emphasis supplied)

[9] Galman, 138 SCRA at 345 [1985], De la Fuente, *J.*, concurring.

[10] *See* Pacifico A. Agabin, *The Evolution and the Development of the Guaranty Against Self-Incrimination*, *in* I RIGHTS OF THE ACCUSED at 463 [hereinafter Agabin-I RIGHTS OF THE ACCUSED].

[11] ISAGANI A. CRUZ, CONSTITUTIONAL LAW 290 (1991 ed.); *See* DAVID M. NISSMAN ET AL., LAW OF CONFESSIONS (1985), §2.2 - 2.13, at 27 - 57, for an account of the historical development of the right [hereinafter NISSMAN, ET AL.].

[12] McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affectation, Raison d'Etre and Miscellaneous Implications*, 51 J. Crim. L., Criminology and Police Sci. 138, 150-151 (1960).

2. Nature and scope of the right against self-incrimination

The right may only be claimed by natural persons,[13] be they ordinary witnesses or suspects under custodial investigation.[14] Further, the kernel of the right is the prohibition only against "testimonial compulsion"[15] or the performance of "a *positive, testimonial, communicative act.*"[16] On this score, the Constitution seeks to protect a witness, the accused, from compulsory disclosure of incriminatory facts, *i.e.*, implicating one's self in the commission of a crime[17] or even furnishing a link in the chain of evidence needed to prosecute the claimant of the right,[18] not merely disgraceful or humiliating matters, supplied either by way of testimony or production by the accused of incriminating documents and articles.[19] Hence, and of particular relevance to this article, subjection to mere physical examination is not covered by the self-incrimination clause.[20]

The right "is accorded to every person who gives evidence, whether voluntarily or under compulsion of *subpoena*, in any civil, criminal or administrative proceeding."[21] Although the right is available in administrative cases where the proceeding, "while administrative in character xxx possesses a criminal or penal aspect" because of the penalty imposed.[22]

[13] *See* Hale v. Henkel, 201 U.S. 43 (1906); *See also* ALICIA B. GONZALES-DECANO, THE EXCLUSIONARY RULE AND ITS RATIONALE 143-144 (1991) [hereinafter GONZALES-DECANO.

[14] Makasiar, *C.J.*, concurring. Galman, 138 SCRA at 331.

[15] Villaflor v. Summers, 41 Phil. 62, 68 (1920), where the Supreme Court held that a woman accused of adultery could not invoke the right against self-incrimination in refusing to take a pregnancy test.

[16] Beltran v. Samson, 53 Phil. 570, 579 (1929), where the Supreme Court held that in a prosecution for falsification, the accused could not be compelled to produce a sample of his handwriting to be used as evidence against him.

[17] I BERNAS, *supra* note 4, at 422-423.

[18] GERALD GUNTHER and NOEL T. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW 872 (1970) [hereinafter GUNTHER and DOWLING]

[19] *See* GONZALES-DECANO, *supra* note 13, at 126 and 141.

[20] People v. Paynor, G.R. No. 116222, 9 September 1996, where the Court held that the protection of the accused under custodial investigation referred to testimonial compulsion, not when the body of the accused was proposed to be examined (*citing* People v. Gamboa, 194 SCRA 372 [1991]). In fact, an accused could validly be compelled to be photographed or measured, or his garments or shoes removed or replaced, or to move his body to enable the foregoing things to be done, without running afoul of the proscription against testimonial compulsion. (People. v. Otadora, 86 Phil. 244 [1950]). *See also* U.S. v. Ong Siu Hong, 36 Phil. 735 (1917), where morphine forced out of the mouth of the accused was held to be admissible in evidence; likewise, People v. De Guzman, 224 SCRA 93, 101 (1993) and People v. Canceran, 229 SCRA 581 (1994) regarding the conduct of a paraffin test; and People v. Tranca, 235 SCRA 455 (1994), as to an ultraviolet ray examination to determine the presence of ultraviolet powder.

[21] People v. Ayson, 175 SCRA 216, 226 (1989).

[22] Pascual v. Board of Medical Examiners, 28 SCRA 344 (1969); Cabal v. Kapunan, 6 SCRA 1059 (1962).

3. Basis for the right against self-incrimination

It has been uniformly held here that the right "was established on grounds of public policy and humanity -- of policy, because if the party were required to testify, it would place the witness under the strongest temptation to commit the crime of perjury, and of humanity, because it would prevent the extorting of confessions by duress."[23] And in consonance with the general nature of the entire Bill of Rights as invocable only against the State, and not private persons,[24] it has been observed that the right against self-incrimination has been understood partially as a means to forestall governmental oppression and tyranny.[25]

In other jurisdictions, as an offshoot of the above, it has been posited that human rights lie at the very heart of the privilege:

> Two theories arise from this human rights approach to explain the basis for the rights guaranteed by the self-incrimination clause. The first theory provides that compelled testimony is intolerably cruel and violates the common notion of what a human being should have to endure. The second theory holds that compelled testimony violates the individual's right to privacy. Both of these theories rest on the idea that the individual battle between government and individual require that the individual not be bothered for less than good reason and not be conscripted by his opponent to defeat himself.[26]

In addition, it has been noted that the rationale behind the guarantee may be traced to the unreliability of evidence obtained by compulsion; moreover, use of such evidence would be offensive to one's sense of justice.[27]

It has been observed that during the earlier part of this century, the Philippine Supreme Court perceived that the right was aimed at ascertaining the truth or ensuring the trustworthiness of evidence, as opposed to what the Supreme Court of the United States comprehended to be the Constitutional foundation for the privilege, *i.e.*, the preservation of human dignity. Currently, however, the Philippine Su-

[23] United States v. Navarro, 3 Phil. 143, 152 (1904). *See also* David G. Nitafan, *Constitutional Rights Against Self-Incrimination -- Development Under Federal Decisions, in* I RIGHTS OF THE ACCUSED at 479 [hereinafter Nitafan-I RIGHTS OF THE ACCUSED].

[24] *See* People v. Marti, 193 SCRA 57 [1991].

[25] Fausett, *Extending the Self-Incrimination Clause to Persons in Fear of Foreign Prosecution*, Virginia JOURNAL OF TRANSNATIONAL LAW, No. 4, 699, 702 - 703 (1987) [hereinafter Fausett]. *See also* ALDERMAN AND KENNEDY, IN OUR DEFENSE: THE BILL OF RIGHTS IN ACTION 171-17? (1992).

[26] Fausett at 705, *citing* Dolinko, *Is There A Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986).

[27] *See* Nitafan-I RIGHTS OF THE ACCUSED, *supra* note 23, at 483.

preme Court accords equal weight to both values in recognizing that the twin "imperative requirements of truth and humanity condemn the utilization of force and violence to extract confessions."[28]

Finally on this subject, as to the legal bases for the right, it has been written that:

> Some decisions also trace the history of the guarantee from the due process clause, which excludes involuntary confessions not because they may not be truthful, but because of fundamental unfairness in the use of evidence so obtained. Others, from the protection against unreasonable searches and seizures because it was said that if a person is compelled to produce certain personal and private papers and other effects, he is said to be being compelled to furnish evidence against himself.[29]

B. Miranda Rights

1. In general

In essence, the Miranda safeguards aim to guarantee the voluntariness of a confession[30] by preventing the extraction of coerced confessions during custodial investigations, considering that "coercion can be mental as well as physical."[31] Traditionally, Miranda rights are regarded as being available only during "custodial investigations," *i.e.*, "when the investigation is no longer a general inquiry into an unsolved crime but has began to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements;"[32] or "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."[33]

In general, the elements of custody, interrogation and official police involvement must concur in order to trigger the need to "Mirandize" a person,[34] for it is this concurrence which has spurred recognition of "the fact that the psychological if not physical atmosphere of custodial investigations, in the absence of proper safeguards,

[28] *See* Agabin-I RIGHTS OF THE ACCUSED, *supra* note 23, at 468-472, tracing the evolution of the right from Villaflor v. Summers, 41 Phil. 62 (1920), U.S. v. Ong Siu Hong, 36 Phil. 735 (1917), People v. McCoy, 45 How. Pr. 216 (1873), Miranda v . Arizona, 384 U.S. 436 (1966), Spano v. New York, 360 U.S. 315 (1959), Murphy v. Waterfront Commission, 378 U.S. 52 (1964), and People v. Magbanua, 115 SCRA 642 (1982).

[29] Nitafan-I RIGHTS OF THE ACCUSED, *supra* note 23, at 484.

[30] I BERNAS, *supra* note 4, at 352.

[31] I BERNAS, *supra* note 4 , at 347, *citing* Blackburn v. Alabama, 361 U.S. 199, 206 [1960].

[32] Escobedo, 378 U.S. at 986.

[33] Miranda, 384 U.S. at 986 and 706.

[34] NISSMAN, *supra* note 11, at 82.

is inherently coercive."[35] It is then this factual setting of compulsion which has been likened to the legal framework of compulsion contemplated by the right against self-incrimination, which accounts for the adoption of Miranda rights as founded upon the right against self-incrimination. A more in-depth discussion of these three (3) elements will be provided later.

2. Administrative investigations

It has been uniformly held here that Miranda rights are not available in investigations not conducted by law enforcement authorities, as administrative investigations lack the compulsive atmosphere of a police-dominated environment.[36] Recently, several court personnel were implicated in anomalous transactions regarding funds deposited with a municipal trial court. One respondent, a court interpreter, contended that as she was pressured to sign an affidavit containing inculpatory admissions before the Office of the Court Administrator (OCA) without being "Mirandized," the affidavit was inadmissible. However, the Supreme Court rejected this argument, holding that Miranda rights could only be invoked during an investigation conducted by police authorities, which the OCA clearly was not.[37]

In an illegal dismissal suit, likewise, the Supreme Court admitted confessions and admissions furnished by petitioners-employees in the course of the administrative investigation (for theft of electrical wire) conducted by the employer, despite petitioners not having been informed of their Miranda rights. The Court held there that the investigation by the employer, despite its having been held at a police station, did not qualify as a criminal investigation, especially considering that the questions were propounded by the employer's lawyer, not by police officers.[38]

In the United States, however, as regards the applicability of Miranda rights to tax investigations, the rule is yet unclear. In *Mathis v. United States*,[39] the Federal Supreme Court ruled that nothing in *Miranda* called for a curtailment of the warnings to be given persons under interrogation by officers. The Court pointed out that tax investigations frequently lead to criminal prosecutions, as in the instant case, where a full-fledged criminal investigation had begun only eight (8) days after the last interview of the taxpayer. While in *United States v. Wainwright*,[40] it was held

[35] JOAQUIN G. BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A REVIEWER-PRIMER 110 (2nd ed. 1992).

[36] *See* Pacifico A. Agabin, *When Should Miranda Warnings Be Administered?*, *in* I RIGHTS OF THE ACCUSED at 276-278 [hereinafter Agabin-Miranda-I RIGHTS OF THE ACCUSED], *discussing* Arizona v. Beckwith, 425 U.S. 341 and People v. Ayson, 175 SCRA 219 (1990).

[37] Office of the Court Administrator v. MTC Judge Augusto Sumilang (271 SCRA 316).

[38] Manuel v. N.C. Construction (282 SCRA 326).

[39] 391 US 1, 20 L. Ed 2d 381, 88. S Ct. 1503 (1968), *discussed in* J.F. Ghent, *What Constitutes "Custodial Interrogation" Within Rule of Miranda v. Arizona Requiring that Suspect be Informed of his Federal Constitutional Rights Before Custodial Interrogation?*, 31 A.L.R.3d 565, 649 [hereinafter Ghent].

[40] 284 F. Supp. 129 (1968, DC Colo), in Ghent, 31 A.L.R. 3d at 648.

that any attempt to distinguish a criminal tax investigation from any other criminal investigation where a crime was known to have been committed was a distinction without a difference. Further, there were no apparent difficulties in requiring internal revenue agents to adequately inform a taxpayer of his constitutional rights at the initial contact with them after the investigation had been referred from the civil to the criminal division.

On the opposite side of the spectrum lay *United States v. Gleason*,[41] where the court commented that to extend the Miranda rule to tax investigations would be a huge step, with enormous consequences for the whole field of administrative investigation. Whatever unpleasantness attended tax investigations, the situation differed markedly from the jailhouse inquiries in *Miranda*. While in *Spinney v. United States*,[42] it was held that the requirements enumerated in *Miranda* did not apply where one was legally free, albeit at the risk of unpleasant consequences, to reject the government's invitation to appear for and participate in an Internal Revenue Service interview.

C. Suspect Identification

In *People v. Teehankee, Jr.*,[43] the Court had occasion to enumerate the various police methods in conducting out-of-court identification of suspects:

> It is done thru show-ups where the suspect alone is brought face to face with the witness for identification. It is done thru mug shots where photographs are shown to the witness to identify the suspect. It is also done thru line-ups where a witness identifies the suspect from a group of persons lined up for the purpose. Since corruption of out-of-court identification contaminates the integrity of in-court identification during the trial of the case, the courts have fashioned out rules to assure its fairness and its compliance with the requirements of constitutional due process. In resolving the admissibility of and relying on out-of-court identification of suspects, courts have adopted the totality of circumstances test where they consider the following factors, viz: (1) the witness' opportunity to view the criminal at the time of the crime; (2) the witness' degree of attention at that time; (3) the accuracy of any prior description given by the witness; (4) the level of certainty demonstrated by the witness at the identification; (5) the length of time between the crime and the identification; and (6) the suggestiveness of the identification procedure.

In brief, the Court there upheld the witness' identification of appellant in an unoccupied house in Forbes Park in light of security reasons; lack of proof of impermissible suggestiveness; at the time the crime was committed, the *locus criminis* was well-lit and the witness had a full five (5) minutes to view appellant's face; the witness had

[41] 265 F. Supp. 880 (1967,DC NY), in Ghent, 31 A.L.R.3d at 650.

[42] 385 F.2d 908 (1967, CA1 Mass), in Ghent, 31 A.L.R.3d at 653.

[43] 249 SCRA 54, 95 (1995), *reiterated in* People v. Timon (281 SCRA 577).

no ill-motive to falsely testify against appellant; and the witness' testimony at the trial was straightforward.

While in *People v. Timon*, where appellants pointed out that no other suspects were presented to the witnesses-crew members for identification (of culprits who robbed a fishing boat at sea and killed one [1] crew member), the Court, utilizing the "totality of circumstances test," likewise upheld the out-of-court identification, given that the crew members described appellants' physical characteristics to the police prior to the identification; the crime was committed in broad daylight and the witnesses' attention was intense; and each of the eyewitnesses could identify only some, not all, of appellants, which served as a badge of truthfulness and indicated that the identification process was not manipulated by the police.

In *Gamboa v. Cruz*, the Supreme Court *en banc* laid down the rule that the conduct of a police line-up, *per se*, did not require assistance of counsel for the suspect. The Court reasoned that the line-up was not part of the custodial inquest, as the process had not yet shifted from the investigatory to the accusatory stage.[44] In so holding, the Court declared that it "[found] no real need to afford a suspect the services of counsel during a police line-up,"[45] despite *United States v. Wade*[46] which expressed misgivings about the possibility of the influence of improper suggestion at police line-ups. The Court then disregarded the applicability of *Wade* based on a due process argument, by ruling that presence of counsel was indispensable only at a post-indictment line-up. However, the Court did caution that:

> [T]he moment there is a move or even an urge of said investigators to elicit admissions or confessions or even plain information which may appear innocent xxx from the suspect, he should then and there be assisted by counsel, unless he waives the right xxx in writing and in the presence of counsel.[47]

In order to arrive at the underlying premise of *Gamboa*, however, one need turn to *People v. Casirillo*,[48] which quoted from *People v. Olvis*.[49] From a reading of these opinions, it can be gathered that the rule in this jurisdiction regarding line-ups is founded upon the right against self-incrimination.

[44] 162 SCRA 642, 648-649 (1988), *reiterated in* People v. Loveria, 187 SCRA 47, 61-62 (1990), People v. Dimaano, 209 SCRA 819, 832 (1992), People v. Hatton, 210 SCRA 1, 15-16 (1992), People v. De Guzman, 224 SCRA 93, 101 (1993), People v. Lamsing, 248 SCRA 471, 480 (1995) and People v. Salvatierra (276 SCRA 55).

[45] Gamboa, 162 SCRA at 651, *reiterated in* People v. Santos, 221 SCRA 715, 723 (1993) and People v. Frago, 232 SCRA 653, 657-660 (1994).

[46] 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926 (1967), *invoked in* People v. Hatton at 13-14.

[47] Gamboa, 162 SCRA at 651.

[48] 213 SCRA 777, 790-791 (1992).

[49] 154 SCRA 513, 525-526 (1987).

Gamboa, however, must be distinguished from *People v. Hassan*,[50] where the Supreme Court voided a confrontation between the accused and his identifier. According to the Court, the "solo" line-up was "pointedly suggestive, generated confidence where there was none, activated visual imagination, and, all told, subverted [the identifier's] reliability as a witness."[51] *Hassan* was based on *People v. Cruz*,[52] where the Court likewise deplored this single-suspect method of identification, thus:

> [T]his unusual, coarse and highly singular method of identification, which revolts against the accepted principles of scientific crime detection, alienates the esteem of every just man, and commands neither our respect nor acceptance.

Line-ups must be differentiated from a forced re-enactment, where an accused is not merely required to exhibit some physical characteristics, but is made to admit criminal responsibility against his will, akin to and just as condemnable as an uncounselled confession.[53] As such, pictures of a forced re-enactment are inadmissible, being the fruits of a poisonous tree.[54]

As regards the state of the law governing line-ups and other methods of suspect-identification in the United States, it has been noted:

> As a result of *United States v. Wade* and related decisions, lineup and single suspect identifications are now subject to constitutional analysis, both insofar as they satisfy any Sixth Amendment requirements of the presence of counsel and are characterized by impermissible suggestiveness in violation of the due process clause of the Fourteenth Amendment. Less demanding standards would appear to be applied where the identification is made through the use of photographs.[55]

As to the policy considerations of *Wade*, the Court, speaking through Justice Brennan, "was apprehensive of the risks involved in pretrial confrontations, including mistaken identification, because of `the degree of suggestion inherent in the manner in which the prosecution presents the suspects to witnesses.' Thus the presence of counsel could avert prejudice `which may not be capable of reconstruction at trial.'"[56] While as to the legal basis of *Wade*, the Court relied upon the Sixth Amendment right to counsel to protect the Sixth Amendment right to confront one's accusers, thus:

[50] 157 SCRA 261 (1988).

[51] Hassan, 157 SCRA, at 271.

[52] 32 SCRA 181, 186 (1970).

[53] People v. Olvis, 154 SCRA 513, 526 (1987).

[54] *See* People v. Jara, 144 SCRA 516, 535 (1986) and People v. Jungco, 186 SCRA 714, 721 (1990).

[55] JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED: *TRIAL RIGHTS* 179 (1974) (hereinafter COOK).

[56] GUNTHER and DOWLING *supra* note 18, at 851.

> Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him.[57]

As a consequence then of *Wade*, some courts have expressed approval of photographing the lineup to facilitate subsequent evaluation, likewise, video tapes have been used.[58]

Moving on to photographic identification, being easier to reconstruct at trial, this method of suspect identification is far less "critical" than a line-up.[59] In sum, photographic identification is constitutionally reasonable unless the manner by which it was conducted was impermissibly suggestive.[60] Concretely, the series of photographs shown must have been indistinguishable[61] and unaccompanied by pre-display statements from the police that the photos viewed are of persons who are under suspicion, as statements of the sort suggest that the persons in the photos have prior criminal records, thus increasing the possibility of misidentification.[62]

Turning to single-suspect identification, as this method presents a greater opportunity for suggestiveness than line-ups,[63] courts have frowned upon the former where a lineup could as easily has been arranged.[64] Nevertheless, uncounselled single-suspect identifications have been sustained by lower courts before the initiation of criminal proceedings, frequently shortly after the perpetration of the offense.[65] Finally on this point, in *Stovall v. Denno*,[66] the Supreme Court upheld the uncounselled single-suspect identification of petitioner conducted at a hospital, where petitioner was brought in wearing handcuffs, as petitioner was believed to have perpetrated a violent assault on the witness and the witness' husband; the witness had undergone surgery and it was uncertain how long the witness would live; and the witness again identified petitioner at trial.

[57] *Citing* Pointer v. State of Texas, 380 U.S. 400 (1965), in COOK at 180-181, note 14.

[58] COOK *supra* note 55, at 187-189.

[59] *See* United States v. Ash, 413 U.S. 300 (1973).

[60] *See* COOK *supra* note 55,at 207.

[61] *Id.*

[62] *See* COOK, November 1977 Cumulative Supplement at 63-64.

[63] *See* COOK *supra* note 55, at 198.

[64] *Id*, at 207.

[65] *Id* , at 200 .

[66] 388 U.S. 293 (1967).

D. Baranggay Conciliation Proceedings

All criminal cases which involve parties actually residing in the same city or municipality, except those involving offenses punishable by imprisonment exceeding one (1) year or a fine exceeding five thousand pesos (P5,000.00),[67] are subject to baranggay conciliation proceedings. In recognition of the indiscriminate filing of cases in courts, the need to relieve the congestion of the court dockets and to promote the speedy administration of justice,[68] the spirit of the Baranggay Justice Law[69] is to amicably settle disputes at the baranggay level without judicial recourse. Thus, should a party choose to appear, he must do so without assistance of counsel[70] in order to avoid confusion of issues.[71] However, the provincial, city legal officer or prosecutor or the municipal legal officer is tasked to render legal advice on matters involving questions of law to the appropriate baranggay adjudicative officer or body presiding over the dispute.[72]

III. PRE-*ESCOBEDO* AND *MIRANDA*

Prior to the 1973 Constitution, the Miranda doctrine did not exist in this jurisdiction. In fact, on at least one (1) occasion, *Miranda*'s applicability was even rejected by the Supreme Court.[73] During this period of Philippine legal history, the rules governing admissibility of extrajudicial statements were all founded on principles concerning voluntariness, *vis-a-vis*, truthfulness;[74] while procedural due process safeguards, *e.g.*, the right to counsel, were based on the due process clause.

In the United States, prior to *Miranda*, admissibility of a confession was tested in the 18th and 19th centuries solely as to its trustworthiness as evidence, even independent of whether or not it was voluntary.[75] On the other hand, however:

> [T]he courts' continued reference to the term "voluntariness" in enunciating the requisites for the admissibility of a confession under the due process clause was defended by Dean McCormick, who suggested that it might be prompted "not only by a liking for its convenient brevity, but also by a recognition that there is an interest here to be protected closely akin to the interest of a witness or of an accused person which is protected by the privilege against compulsory self-incrimination."[76]

[67] Local Government Code, R.A. 7160, §408 (1991).

[68] *See* JOSE N. NOLLEDO, THE LOCAL GOVERNMENT CODE OF 1991 454 (1992) [hereinafter NOLLEDO].

[69] Presidential Decree No. 1508, now *superseded* by §§399 - 422, R.A. 7160, effective 1 January 1992.

[70] §415, R.A. 7160.

[71] NOLLEDO, *supra* note 67 at 476.

[72] §407, R.A. 7160.

[73] *See* People v. Jose, 37 SCRA 450 (1971).

[74] *See* Tabios, *The Admissibility of Extra-Judicial Confession in a Criminal Prosecution* (SCRA Annotation), 142 SCRA 110, 122 (1986).

[75] YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE, CASES, COMMENTS AND QUESTIONS 452 (8th ed., 1994) [hereinafter KAMISAR, ET AL.], explaining that Wigmore even condemned the use of the "voluntary" terminology for the reason that "there is nothing in the mere circumstance of compulsion to speak in general xxx which create any risk of truth," at 3 Wigmore, *Evidence* §822 (3d ed. 1940).

Eventually, the Due Process Clause gained a foothold in ascertaining the admissibility of a confession, beginning with *Brown v. Mississippi*,[77] where three (3) African-American men confessed to a killing, but only after having been whipped with buckled leather straps until their backs were cut to pieces. Thus as to *Brown* and subsequent confessions cases, it was noted that:

> The Fourteenth Amendment Due Process Clause by its own terms applied to the states, and the United States Supreme Court had utilized the Due Process Clause to intervene in a number of state criminal cases prior to Brown. The Court decided to use the clause to reverse the Mississippi convictions.
>
> x x x
>
> State criminal convictions obtained by the use of tortured confessions would henceforth be subject to federal review. The use of tortured confessions was a type of compulsion that violated a federal due process right. This decision to review state confessions cases on a due process standard revolutionized confessions law. Over the next thirty years forty decisions were handed down fine tuning a legal doctrine that would remain the classic test for voluntariness.[78]

It has been observed, however, that over time, various legal bases for the due process standard evolved or were utilized: first, the "untrustworthiness" rationale, *i.e.*, the view that the confession rule was designed merely to protect the integrity of the fact-finding process; second, that due process was actually less concerned with the reliability of the confession as evidence, than disapproval of police methods used to extract the confession, *i.e.*, the historic function of the Due Process Clause was to assure employment of appropriate police procedure before liberty was curtailed or life was taken; and third, that a coerced confession was inadmissible due to its inherent unreliability, likewise offending the community's sense of fair play and decency.[79] These then led to the conclusion that by the early 1960s:

> [T]he "due process" or "involuntariness" test appeared to have *three* underlying values or goals. It barred the use of confessions (a) which were of doubtful reliability because of the police methods used to obtain them;

[76] *Id.* at 452, *citing* McCormick, *The Scope of Privilege in the Law of Evidence*, 16 Texas L.Rev. 447, 453 (1938).

[77] 297 U.S. 278, 80 L.Ed 682, 56 S. Ct. 461 (1936).

[78] NISSMAN, ET AL., *supra* note 11 at 7-8. *See* tables enumerating badges of voluntariness, at 17-21.

[79] *See* KAMISAR, ET AL., *supra* note 75, at 453-454, *discussing*: (1) Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L.REV. 213, 235 (1959) which commented on Brown and Ashcraft v. Tennessee, 322 U.S. 143 (1944); and (2) Mr. Justice Frankfurter's majority opinions in Watts v. Indiana (and companion cases), 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801 (1949) and Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

(b) which were produced by offensive methods even though the reliability of the confession was not in question; and (c) which were involuntary *in fact* (e.g., obtained from a drugged person) even though the confession was entirely trustworthy and not the product of any conscious police wrongdoing.[80]

In sum, however, whether the primary goal of the due process test was to ensure the trustworthiness of the confession as evidence, or a condemnation of police practices employed to secure the confession, what mattered was that the due process clause was the sole legal criterion by which to judge the admissibility of a confession.[81] This, in turn, entailed an assessment of "the totality of the surrounding circumstances [which] included `both the characteristics of the accused xxx and the details of the interrogation.'"[82]

As to the eventual demise of due process as the lone test in adjudging the admissibility of confessions, this was explained, thus:

Viewed in a historic context, this nation started with a federal Bill of Rights in an eighteenth century world where modern police organizations and sophisticated police interrogation techniques did not exist. Over the years the criminal justice system came to rely more and more upon confessions extracted incommunicado at the station house. Abuses of that process, the "third degree", became a matter of concern. Cases involving physical torture of blacks in the South caused the Supreme Court to begin reviewing confessions cases in the nineteen-thirties. After experimenting for decades with a Fourteenth Amendment totality of circumstances test, and a federal speedy arraignment remedy, the Court was unsatisfied with the results. Given the choice of giving up, or taking an activist position, the Court chose the latter course. The Warren Court was going to apply the Bill of Rights to the interrogation room, and write the rules.[83]

Given this historical background, it has then been propounded that it "seemed inevitable that the Court would seek `some automatic device by which the potential evils of incommunicado interrogation [could] be controlled.'"[84]

[80] *Id* at 453.

[81] *See however* Bram v. United States, 168 U.S. 539 (1897), where the U.S. Supreme Court excluded a confession based on the self-incrimination clause. However, NISSMAN, ET AL. at 6-7 and 62-63, have noted that Bram was widely-criticized, having been disowned in subsequent decisions and characterized by Wigmore as "the height of absurdity in misapplication of the law," or by McCormick as "an historical blunder."

[82] KAMISAR, ET AL., supra note 75 at 455, *citing* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[83] NISSMAN, ET AL., supra note 11 at 65.

[84] Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP.CT.REV. 102-03 (quoting from Schaefer, *The Suspect and Society* 10 (1967), in KAMISAR, ET AL., *supra* note 75, at 458.

IV. *ESCOBEDO* AND *MIRANDA*

The definition of and need for counsel during "custodial investigation" first arose in *Escobedo v. Illinois*. Petitioner, the accused in a murder case, was initially arrested without a warrant and interrogated. After being released pursuant to a state court's writ of *habeas corpus*, he was again taken into custody based on statements given by a detention prisoner being held for the same murder (the detention prisoner had told the police that petitioner fired the fatal shots). Petitioner was convicted of murder after a trial, during which the trial court admitted in evidence incriminating statements petitioner made during police interrogations conducted before he was formally indicted. At the interrogation, the police did not inform petitioner of his right to remain silent and denied his request to consult with his attorney, all the while proclaiming that they had convincing evidence of petitioner's guilt. The Supreme Court of Illinois affirmed the conviction.

On *certiorari*, the Supreme Court of the United States reversed, holding that the police investigation, having been one focused on petitioner rather than a general investigation, the refusal to honor his request to consult with his attorney constituted a denial of his right to assistance of counsel under the Sixth[85] and Fourteenth[86] Amendments.[87] Thus, the statements should not have been admitted in evidence.

It bears emphasis that this new pre-trial right to counsel rested on the Due Process Clause. In fact, this was even borne out by the dissenting opinions of Messrs. Justices Stewart and White (the latter joined by Mr. Justice Clark):

[T]he Court seems driven by the notion that it is uncivilized law enforcement to use an accused's own admissions against him at his trial. It attempts to find a home for this new and nebulous rule of due process by attaching it to the right to counsel guaranteed in the federal system by the Sixth Amendment and binding upon the States by virtue of the due process guarantee of the Fourteenth Amendment.[88] (underscoring supplied)

[85] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

[86] Section 1. "All persons born or naturalized the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[87] Escobedo, 378 U.S. at 986.

[88] Escobedo, 378 U.S. at 989.

In 1966, the landmark decision in *Miranda v. Arizona* was handed down, disposing of four (4) cases[89] involving the admissibility of statements obtained from an individual who was subjected to custodial interrogation. Inexplicably, however, in discussing the necessity for procedures to safeguard the process of custodial interrogation, the Supreme Court of the United Stated based this need on an individual's right against self-incrimination.

As to the cryptic link *Miranda* created between the right against self-incrimination and the need for procedural safeguards at custodial investigations, plainly, *Miranda* simply and unjustifiably departed from the theoretical foundations laid down in *Escobedo*:

> We start here, as we did in Escobedo, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the Escobedo decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in out Constitution -- that `No person ... shall be compelled in any criminal case to be a witness against himself,' and that `the accused shall ... have the Assistance of Counsel' -- rights which were put in jeopardy in that case through official overbearing. xxx[90] (underscoring supplied)
>
> And it is in this spirit, consistent with our role as judges, that we adhere to the principles of Escobedo today.[91]
>
> Our holding xxx briefly stated xxx is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.[92] (underscoring supplied)

This link between the Fifth Amendment and *Miranda* was severely criticized in the dissenting opinions of Messrs. Justices Clark, Harlan, Stewart and White.[93] From Mr. Justice Clark, who advocated continued observance of the "due process-totality of circumstances test:"

[89] Case No. 759: Ernesto A. Miranda v. State of Arizona (for kidnapping and rape); Case No. 760: Michael Vignera v. State of New York (for robbery); Case No. 761: Carl Calvin Westover v. United States (for robbery); and Case No. 584: State of California v. Roy Allen Stewart (for kidnapping to commit robbery, rape and murder).

[90] Miranda, 384 U.S. at 705.

[91] Miranda, 384 U.S. at 706.

[92] Miranda, 384 U.S. at 706.

[93] The author has attempted to disregard policy arguments regarding stultifying effects of the majority opinion on the efforts of law enforcement authorities, instead focusing on legal arguments.

> Rather than employing the arbitrary Fifth Amendment rule xxx I would follow the more pliable dictates of Due Process Clauses of the Fifth[94] and Fourteenth Amendments xxx In this way we would not be acting in the dark nor in one full sweep changing the traditional rules of custodial interrogation which this Court has for so long recognized as a justifiable and proper tool in balancing individual rights against the rights of society.[95]

While from Mr. Justice Harlan, who, aside from characterizing the majority opinion as "poor constitutional law,"[96] wrote:

> I believe that reasoned examination will show that xxx even if the Fifth Amendment privilege against self-incrimination be invoked, its precedents taken as a whole do not sustain the present rules.[97]
>
> I turn now to the Court's asserted reliance on the Fifth Amendment, an approach which I frankly regard as a *trompe l'oeil*. The Court's opinion in my view reveals no adequate basis for extending the Fifth Amendment's privilege against self-incrimination to the police station. Far more important, [the majority] fails to show that the Court's new rules are well supported, let alone compelled, by Fifth Amendment precedents. Instead, the new rules actually derive from quotation and analogy drawn from precedents under the Sixth Amendment, which should properly have no bearing on police interrogation.[98]
>
> Historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions, for which distinct standards evolved; indeed, "the *history* of the two principles is wide apart, differing by one hundred years in origin and derived through separate lines of precedents [citing 8 Wigmore, Evidence §2266, at 401) xxx[99]
>
> While the Court finds no pertinent difference between judicial proceedings and police interrogation, I believe the differences are so vast as to disqualify wholly the Sixth Amendment precedents as suitable analogies in the present cases.[100]

[94] No person shall be held to answer for a capital crime, 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 offence to be twice put in jeopardy of limb 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.

[95] Miranda, 384 U.S. at 740.

[96] *Id.*

[97] Miranda, 384 U.S. at 741.

[98] Miranda, 384 U.S. at 744.

[99] *Id.*

[100] Miranda, 384 U.S. at 746.

In all probability, the single most telling portion of Mr. Justice Harlan's dissent was this statement: "I do not believe these premises are sustained by precedents under the Fifth Amendment,"[101] not so much for the statement itself, but the accompanying footnote (number 9), which lay aside all semblance of euphemism in denouncing the majority, thus: "I lay aside Escobedo itself; it contains no reasoning or even general conclusions addressed to the Fifth Amendment and indeed its citation in this regard seems surprising in view of Escobedo's primary reliance on the Sixth Amendment."[102]

Finally, from Mr. Justice White: "[A] confession is not rejected because of any connection with the *privilege against self-incrimination* xxx;"[103] and as to the majority's creation of a right to counsel to protect the right against self-incrimination, Mr. Justice White replied: "Obviously there is no warrant in the Fifth Amendment for thus installing counsel as the arbiter of the privilege."[104]

V. POST-*MIRANDA* DEVELOPMENTS IN THE UNITED STATES

Post-*Miranda* decisions in the United States have elaborated on the three (3) elements of a custodial investigation, to repeat, custody, interrogation and involvement by law-enforcement officials.[105] Pertinent to this paper are: First, as regards the element of custody, it has been observed that a subjective or "reasonable belief" test on the part of the suspect, independent of the interrogator's intent, has been employed in adjudging whether custodial investigation has begun, *i.e.*, did the suspect *reasonably believe* that he was deprived of his freedom in a significant way?[106]

As such, in *People v. Merchant*,[107] the court there concluded that certain circumstances, if presented to a person questioned by one in authority, might have reasonably suggested to a suspect that he was under restraint, *e.g.*, confrontation with unfavorable evidence, questioning in a hostile environment or questioning under pressure. So it was held in *People v. Arnold*[108] that the defendant, in a prosecution for the manslaughter of her daughter, might reasonably have believed that she had no alternative other than to comply with a deputy district attorney's authoritative summoning for interrogation at his office, and that defendant might reasonably have believed that if she had attempted to leave during the course of the interrogation, which lasted an hour and forty-five minutes, the deputy district attorney would have arrested her or told police officers to physically detain her.[109]

Second, as to the element of interrogation, it has been noted that certain factors must be considered in ascertaining whether or not the questioning initiated by policemen constituted custodial interrogation:

1. The length of the questioning;
2. The manner of questioning; and
3. An apparent purpose either to force or to trick the suspect into an admission of guilt.[110]

Thus, in *State v. Barnes*,[111] a woman had just been arrested for escaping from a reformatory. During a cursory search of her automobile, the police saw checks on the floor and asked "Whose stuff is this?" The court there held that such did not constitute a custodial interrogation which required Miranda warnings, as the question was open-ended in its form, did not focus on any particular aspect nor suspect, and was unrelated to the cause of her arrest as an escapee. Likewise, when questions asked were merely routine questions ordinarily asked, with no incriminating purpose, to every individual who was subjected to the booking procedure, *e.g.*, name, address and place of employment, then Miranda warnings were unnecessary.[112]

[101] Miranda, 384 U.S. at 745.

[102] *Id.*

[103] Miranda at 754, *quoting* from 3 Wigmore, Evidence §823 (3d ed 1940).

[104] Miranda, 384 U.S. at 759-760.

[105] Although it has been noted that there are several significant factors to consider in determining what constitutes custodial investigation, or when it begins, *e.g.*, the nature of the interrogator; the nature of the suspect or the suspect's susceptibility of intimidation; the time and place of the interrogation; the nature of the interrogation; and the progress of the investigation at the time of interrogation (in Ghent at 577), this article merely discusses those pertinent to its propositions.

[106] Ghent, 31 A.L.R. 3d at 581.

[107] 260 Cal. App. 2d 875, 67 Cal. Rptr. 459 (1968), in Ghent, 31 A.L.R. 3d at 582.

[108] 66 Cal. 2d 438, 58 Cal. Rptr. 115, 426 P.2d 515 (1966), in Ghent 31. A.L.R. at 582.

[109] *See also* fact patterns in People v. Hazel (252 Cal. App. 2d 412, 60 Cal. Rptr. 437 [1967]), in Ghent at 581; People v. Ward (266 Cal. App. 2d 241, 72 Cal. Rptr. 46 [1968]), in Ghent at 611; Rosario v. Guam (391 F.2d 869 [1968]), in Ghent at 583, where the court held that for a person to be deemed in custody "it is not required that he be in handcuffs or even that he be advised in express terms that he is under arrest," otherwise, as declared in United States v. Pierce (397 F.2d 128 [1968]), in Ghent at 630, Miranda rights "would be fragile things indeed." *See* People v. Wilson (268 Cal. App. 2d 581, 74 Cal. Rptr. 131), in Ghent at 584, where questioning done during a search of defendant's home, pursuant to a search warrant which authorized the police to detain defendant, necessitated the application of Miranda. *See also* State v. Intogna (101 Ariz. 275, 419 P.2d 59), in Ghent at 583 - 584, where police questioning of defendant at the latter's residence while the officer was standing with his gun drawn within three (3) feet of defendant was likewise deemed to have constituted custodial investigation. *See further* Orozco v. Texas (394 U.S. 324, 22 L.Ed 2d 311, 89 S.Ct. 1095) and People v. Glover (52 Misc. 2d 520, 276 N.Y.S.2d 461), the latter holding, in effect, that as long as suspicion has already focused on the accused, the time and place of custody/detention are immaterial in determining whether police questioning undertaken constitutes custodial investigation. *See* People v. Ceccone (260 Cal.App 2d 866, 67 Cal.Rptr. 499 [1968]), in Ghent at 597, and State v. Tellez (6 Ariz.App. 251, 431 P.2d 691), in Ghent at 599, as regards questioning after police have probable cause to believe that the suspect has committed an offense constitutes custodial investigation, *but see* People v. Stewart (267 Cal. App 2d 366, 73 Cal. Rptr. 484), in Ghent at 601 and State v. Bradford (267 Cal. App. 2d 366, 73 Cal. Rptr. 484), in Ghent at 601, that questioning during situations equivalent or akin to a "stop-and-frisk," merely qualifying as "preliminary questioning," as not constitutive of custodial investigation.

[110] United States v. Gibson, 392 F.2d 373 (1968), in Ghent 31 AL.R. at 615.

[111] 54 N.J. 1, 252 A.2d 398 (1969), in Ghent 31 A.L.R. 3d at 604.

[112] Clarke v. State, 3 MD App 447, 240 A.2d 291, in Ghent at 641.

Third, still as to the element of interrogation, it has likewise been noted that statements not covered by *Miranda* may be broadly categorized into two (2): voluntary statements and general-on-the scene questioning.[113]

As regards voluntary statements,[114] in *People v. Matthews*,[115] the court there reasoned that if, without questioning, a prisoner volunteered a statement and the police simply listened and recorded (or asked a neutral question such as "What do you want to say?"), the statement was entirely voluntary both in origin and making, because the police role was purely passive and there was no exercise by the police of the compulsion and pressure which *Miranda* found to be inherent in custodial interrogations.

An example which combines both concepts of "voluntary statements" and "general-on-the-scene questioning" may be found in *People v. Paton*[116] where the police officer on duty answered the phone and defendant said, "Get a deputy out here quick, and send an ambulance. It is Betty Paton. I just stabbed my husband." When the deputy arrived at the Paton residence, he asked, "What happened?," to which defendant replied, "The same thing as last time. I stabbed him again." The court, in admitting defendant's statements, emphasized that they had been made before any custodial investigation had begun.

Finally, as to the element of police involvement, the general rule is that *Miranda* has no application when confessions or admission are given to persons who are not officers of the law,[117] unless a private person acts as an agent of law officers.[118] Hence, the ruling in *People v. Wright*:[119] "It does not matter that a particular employee's duties may be confined to the protection of persons and property on his employer's premises or that his employer may be the state, a political subdivision thereof or a local entity. What does matter is whether he is employed by an agency of government, federal, state or local, whose primary mission is to enforce the law."

[113] *See* Miranda, 384 U.S. at 1013-1014.

[114] Over time, these voluntary statements have been termed as "blurts," *see* Carrington v. State, 1 MD App 353, in Ghent at 678. On this score, it has also been held that *Miranda* cannot be interpreted to exclude statements which are part of the *res gestae*.

[115] 264 Cal. App. 2d 557, 70 Cal. Rptr. 756 (1968), in Ghent at 632 - 633.

[116] 255 Cal. App. 2d 347, 62 Cal. Rptr. 865, in Ghent at 678.

[117] *See* Carnes v. States, 115 Ga. App. 387, 154 S.E.2d 781, in Ghent at 675, regarding incriminating statements obtained by owner of stolen merchandise; People v. Omell (15 Mich. App. 154, 166 N.W.2d 279), in Ghent at 596, anent incriminating statements made to a private investigator; and State v. Kemp (251 La.592, 205 So. 411 [1967]), in Ghent at 675, as to incriminating statements made to private individuals during a citizen's arrest.

[118] *See* Commonwealth v. Bordner, 432 Pa. 405, 247 A.2d 612 (1968), in Ghent 31 A.L.R. 3d at 670 - 671, where the court, in excluding a boy's confession to his mother, reasoned that since the circumstances revealed a plan on the part of the police to use the mother as a police instrumentality in the interrogation of the accused son, then the statements made to the mother were as though made to the police themselves, hence, such constituted a custodial interrogation which required Miranda warnings.

[119] 249 Cal. App. 2d 692, 57 Cal. Rptr. 781 [1967], in COOK *supra* note 55, at 360-361.

VI. CRITIQUE OF *MIRANDA*

Significantly, despite the passage of time, the criticisms put forward by the *Miranda* dissents still resound. In all probability, it is precisely the years that have elapsed which have allowed the *Miranda* critics to refine their arguments. Thus, as to the portion of *Miranda* which claimed kinship with *Escobedo*,[120] despite seemingly having done away with the need for a shift to the accusatory stage, the following has been posed:

> The reference to the Fifth Amendment here is disarming. Escobedo was purely a Sixth Amendment decision. That the Court had come to bury Escobedo, not to praise it, become more clear a few pages later, when Justice Warren pinned the new Miranda protections to a custody requirement. In a footnote, the Court says, "[t]his is what we meant when we spoke [in Escobedo] of an investigation which had focused on the accused.[121]

Moreover, "[t]hough the separate doctrines of confessions law and the privilege against compulsory self-incrimination had developed individually over a three hundred year period, the Warren Court xxx with Miranda, inseparably fused the rules,"[122] "[thus, the *Miranda* Court] erred, at least from a historical perspective, in perceiving an `intimate connection' between the privilege [against self-incrimination], which prohibited compulsory oaths and mandatory judicial questioning of the accused, and the issues pertaining to the admissibility of extrajudicial confessions."[123]

On his part, Professor Joseph Grano charges that *Miranda* was an "illegitimate" decision:

> [T]he Fifth Amendment" does not proscribe self-incrimination that it not compelled, nor does it proscribe custody, interrogation, or custodial interrogation as such. By supposedly adopting a conclusive presumption of compulsion (Y) from the mere fact of unwarned custodial interrogation (X), *Miranda* eliminated compulsion (Y) from the legal standard. xxx[124]

[120] "We have undertaken a thorough re-examination of the Escobedo decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in out Constitution -- that `No person ... shall be compelled in any criminal case to be a witness against himself,' and that `the accused shall ... have the Assistance of Counsel' -- rights which were put in jeopardy in that case through official overbearing xxx," Miranda at 705.

[121] NISSMAN, ET AL. *supra* note 11, at 212.

[122] *Id.*, at 60.

[123] KAMISAR, ET AL. *supra* note 75, at 449.

[124] JOSEPH GRANO, CONFESSIONS, TRUTH, AND THE LAW 173-198 (1993), *in* KAMISAR, ET AL. at 506 [hereinafter GRANO-KAMISAR].

To expound, of the legal arguments against *Miranda* having been based on the Fifth, perchance, nothing more effectively exposes the flaw in *Miranda*'s legal logic, thus:

> Why had the self-incrimination provision been excluded from the police station until Miranda. Why for so many years had the Constitution required so much in the courtroom but meant so little in the interrogation room? The legal reasoning was that "compulsion" to testify against oneself meant legal compulsion. Thus, a legislature could not make it a crime for a person to refuse to incriminate himself. Nor could a judge hold a defendant in contempt for refusing to testify at his own trial. But the subject of police interrogation cannot legally be compelled to say anything (although often the suspect did not know that, and the police did not, and were not required, to tell him). Since he is threatened neither with perjury for testifying falsely nor with contempt for refusing to testify at all, it could not be said, ran the argument, that the interrogated suspect was being "compelled" to be a witness against himself within the meaning of the self-incrimination clause -- even though he was likely to assume or be led by the police to believe that there were legal (or extralegal) sanctions for refusing to 'cooperate.' Since the police had no lawful authority to make a suspect answer questions, there was, ran the argument, no legal obligation to answer to which a privilege in the technical sense could apply.[125]

While as to a policy critique of the *Miranda* majority:

> Had the Court decided Miranda solely on the basis of the due process clause many constitutional problems that arose later could have been avoided. But the Court was attempting to create a bright line, an absolute. xxx But absolute rules have their failings as well. As they are applied in this less than perfect world, situations arise that beg for compromise approaches. In tying the Miranda rule to the self-incrimination clause of the Fifth Amendment, the Court was pulling the privilege out of the controlled environment of the courtroom and placing it in the real world. xxx[126]

On the other hand, however, *Miranda* advocates assert that the "conclusive presumption of compulsion is in fact a responsible reaction to the problems of the voluntariness test xxx and to the adjudicatory costs of case-by-case decisions in this area."[127] Finally, others seem to have taken *Miranda* merely at face value, *i.e.*, that

[125] WILLIAM B. LOCKHART ET AL., THE AMERICAN CONSTITUTION, CASES AND MATERIALS 451-452 (2nd ed. 1967). *See also* Yale Kamisar, *The Right to be Informed of Legal Right: The Miranda Warnings*, in Constitutional Law SCRA Annotations 433, 441 (1st ed. 1987).

[126] NISSMAN, ET AL. at 70 - 71.

[127] Stephen Schulhofer, *Reconsidering Miranda*, 54 U.CHI.L.REV. 435 (1987), in KAMISAR, ET AL. at 506.

Miranda established a right to counsel in order to protect the right against self-incrimination.[128]

VII. POST-*MIRANDA* PHILIPPINE DEVELOPMENTS

Under the 1973 and 1987 Constitutions, the following points concerning Miranda relevant to this article were adopted, developed and refined: First, that despite the restrictive scope accorded by the 1971 Constitutional Convention to the concept of a custodial investigation, *i.e.*, limited only to those conducted by governmental police agencies,[129] the Supreme Court ruled that Miranda rights were available during a preliminary investigation conducted by a fiscal or prosecutor,[130] which was actually but in consonance with the inquisitorial nature of the proceedings.[131] Second, the Supreme Court, by way of the *Galit-Morales* doctrine[132] and in advance of the 1987 Constitution, prospectively required that waivers of Miranda rights be with the assistance of counsel. Third, in *People v. Ayson*,[133] the rights accruing to a person suspected of having committed a crime were clarified, thus:

> BEFORE THE CASE IS FILED IN COURT (or with the public prosecutor, for preliminary investigation), but after having been taken into custody or otherwise deprived of his liberty in some significant way, and on being interrogated by the police: the continuing right to remain silent and to counsel, and to be informed thereof, not to be subjected to force, violence, threat, intimidation or any other means which vitiates the free will; and to have the evidence obtained in violation of these rights rejected; and
>
> AFTER THE CASE IS FILED IN COURT (or during preliminary investigation before a Judge or a public prosecutor) --
>
> a) to refuse to be a witness;
> b) not to have any prejudice whatsoever result to him by such refusal;
> c) to testify in his own behalf, subject to cross-examination by the prosecution;

[128] NISSMAN, ET AL., *supra* note 11, at 203.

[129] As including only investigations conducted by the municipal police, the Philippine Constabulary and the NBI and such other police agencies in government, in I BERNAS 344.

[130] *See* People v. Abaño, 145 SCRA 555 (1986).

[131] Tandoc v. Resultan, 175 SCRA 37, 42-43 (1989).

[132] *See* Morales v. Enrile, 121 SCRA 538 (1983) and People v. Galit, 135 SCRA 465 (1985). Thus, under the 1987 Constitution, the advisability that any written waiver executed in the presence of counsel be identified and offered in evidence (People v. de la Cruz, 224 SCRA 506, 527 [1993]); likewise, when the testimonial evidence conflicts as to the presence of counsel, the assisting attorney should be presented in court to confirm his or her presence at and actions during the investigation (People v. Saludar, 188 SCRA 189, 197 [1990]). However, in People v. Yap, 185 SCRA 222, 227 (1990) when the affidavit-confession allegedly taken in denial of the accused's Miranda rights was not objected to during the formal offer, the affidavit was admitted.

d) WHILE TESTIFYING, to refuse to answer a specific question which tends to incriminate him for some crime other than that for which he is then prosecuted.

Under the 1973 Constitution, in fealty to the *Miranda* majority,[134] the provisions regarding the right against self-incrimination and in-custody safeguards were combined in Article IV, §20 of the 1973 Constitution.[135] However, under the 1987 Constitution, the deliberations of the Constitutional Commission clearly show that the intent of the framers was to widen the scope of applicability of Miranda:

> FR. BERNAS: The reason we separated Section 20 [Section 17 at present] from Section 21 [Section 12 at present] is that we want Section 21 to be more general than just for the purpose of preventing involuntary confessions. The Commissioner will notice that Section [17] is the general statement against self-incrimination. We have separated it as an article by itself so as to prevent the impression that those matters mentioned in Section [12] are only for the purpose of preventing self-incrimination. ...[136] (underscoring supplied)

Moreover, when Commissioners Aquino and Tadeo inquired as to the applicability of Miranda to military "tactical interrogations," Commissioner Colayco responded:

> Section [12] is, we might say, an expansion of the provision in the 1973 Constitution which concerns the so-called custodial examination xxx [U]nder the old rule, the mantle of protection where the suspect or accused under investigation could only claim the right against self-incrimination and the right to be informed of his right to have counsel and to remain silent was apparently limited to that portion of the investigation when he was already under the technical custody of the investigator. That is why it was referred to as custodial investigation.
>
> We went further by extending the mantle of protection to the time immediately after the commission of the offense, whether the policeman or the person making the investigation has any suspect under custody. xxx[137]

In view of the foregoing, Rev. Joaquin Bernas, S.J., concluded that "if one puts the Galman case together with the 1986 deliberations, the conclusion that comes

[133] 175 SCRA 216, 234 (1989).

[134] *See* Magtoto v. Manguera, 63 SCRA 4, 18 (1975).

[135] *Supra* note 7.

[136] I RECORD OF THE CONSTITUTIONAL COMMISSION 682 [hereinafter I RECORD].

[137] I RECORD 713 - 714.

out is that the [Miranda] rights are available if a person is in custody, even if he is not yet the suspect, or if the person is the suspect, even if he is not yet in custody."[138]

It would not be remiss to quote the pertinent portions of Republic Act No. 7438,[139] the implementing statute as regards §12(4),[140] Article III of the 1987 Constitution:

> Section 2. Rights of Person Arrested, Detained, or under Custodial Investigation; Duties of Public Officers. --
>
> a) Any person arrested, detained or under custodial investigation shall at all times be assisted by counsel.
>
> b) Any public officer or employee, or anyone acting under his order or in his place, who arrests, detains or investigates any person for the commission of an offense shall inform the latter, in a language known to and understood by him, of his rights to remain silent and to have competent and independent counsel, preferably of his own choice, who shall at all times be allowed to confer [in] private with the person arrested, detained or under custodial investigation.
>
> c) As used in this Act, "custodial investigation" shall include the practice of issuing an "invitation to a person who is investigation in connection with an offense he is suspected to have committed.

VIII. DISCUSSION

A. Baranggay Conciliation Proceedings

It goes without saying that should a respondent choose not to appear at baranggay conciliation proceedings involving a criminal offense, then any discussion as to rights invocable therein is forestalled. However, a problem arises as to the legal prohibition against assistance of counsel should a respondent choose to appear.

Tested against the elements of a custodial investigation, the baranggay confrontation contemplated here could be deemed to fulfill the element of custody, in light of the "reasonable belief test." Moreover, undoubtedly, the questions respondent would face would constitute "interrogation," albeit absent legal compulsion which, however, did not prevent tying *Miranda* to the right against self-incrimination; while as to a factual setting of compulsion, once more, the "reasonable belief test" may be employed. Further, while those who would propound the questions,

[138] I BERNAS *supra* note 4, at 345 (underscoring supplied).

[139] 88 O.G. 3880 (No. 25).

[140] The provision reads: "The law shall provide for penal and civil sanctions for violations of this section as well as compensation to and rehabilitation of victims of torture or similar practices, and their families."

i.e., the proper barangay adjudicative officer or body, would not ordinarily qualify as police authorities, under an expanded view, however, they may be deemed agents for the State, especially in light of §338 of the Local Government Code (LGC), which expressly provides that for purposes of the Revised Penal Code, the punong barangay, sangguniang barangay members and members of the lupong tagapamayapa in each barangay shall be deemed "persons in authority" within their jurisdictions.[141] Finally, pursuant to *People v. Matos-Viduya*,[142] §407 of the LGC (anent the provincial, city legal officer or prosecutor or the municipal legal officer rendering legal advice on matters involving questions of law during a baranggay conciliation dispute) is then rendered inutile as to a respondent in this instance.

The deprivation of counsel then is indeed questionable, as the process would certainly have shifted to the accusatory phase as regards respondent. Thus does the prohibition against assistance of counsel require remedial action on the part of the legislature; and as to the courts, they should be vigilant as to the exclusionary rule embodied in §12(3) regarding Miranda and the right against self-incrimination, lest what should have been deemed excluded be introduced into the record of a judicial proceeding. Likewise, perhaps, a judge-made rule could be fashioned, in like manner as *Miranda*, pertaining to the right of counsel at baranggay conciliation proceedings for criminal offenses in order to safeguard the right against self-incrimination. Indeed, if the applicability of the right against self-incrimination has been extended to administrative investigations which are criminal in nature; likewise as regards Miranda rights in tax investigations, at least in certain jurisdictions in the United States, the author fails to see why the reasoning there may not be employed in this specific instance; more so in light of the general nature of the Bill of Rights as creating a zone forbidden to government.[143]

B. The Right To Counsel At Line-Ups

As may be gleaned from the earlier discussion, so the logic of the *Miranda* doctrine goes, it is the concurrence of the three (3) elements of custody, interrogation and police involvement, which creates the factual setting of compulsion which *Miranda*, based upon the right against self-incrimination, seeks to address; and now that the right against self-incrimination has found its way into the stationhouse, subjection to purely physical examination, such as inclusion in a police line-up, falls outside of *Miranda*'s ambit.

[141] People v. Sion 277 SCRA 127.

[142] 189 SCRA 403, 409-410 (1990), holding that a fiscal or prosecutor cannot serve as Miranda counsel to a suspect.

[143] *See* Marti, 193 S.C.R.A, at 67, *citing* Sponsorship Speech of Commissioner Bernas, I RECORD 674.

It may be argued that even with the right against self-incrimination serving as the foundation for Miranda rights, a right to counsel may nevertheless be found to exist at a police line-up. In light of the quoted portions of the deliberations of the Constitutional Commission[144] and the conclusion of Fr. Bernas,[145] *i.e.*, that even if one is not a suspect -- as long as he is in custody -- Miranda rights attach, one may assert that even if the investigation has not yet shifted to the accusatory stage, the right to counsel at a pre-indictment line-up may yet exist. However, should one maintain that these authorities contemplated the need for questioning so as to exclude mere physical examination at a police line-up, the author then turns to the wording of R.A. No. 7438 to support this article's proposition.

Specifically, §2(a) and (b) of the statute speak of an "arrest," a "detention" and a person "under custodial investigation," and under each of these distinct scenarios, a person is entitled to be assisted by counsel. That these three (3) situations stand apart from each other cannot be denied, as both an "arrest" and a "custodial investigation" have technical meanings,[146] which properly pertain to a shift in the process to an accusatory stage. Thus, it may be argued that the statute's design as regards "detention" is that which should be understood in its plain, ordinary meaning, *i.e.*, "to hold or keep, as in custody,"[147] which speaks nothing of the need for a shift to the accusatory stage. This then has lead to the following observation:

> The use of the words, "arrested, detained or under custodial investigation" shows the intent of RA 7438 to cover not only situations of arrest but also of simple detention, like detaining a person to ask questions about the offense. This covers a broader ground than that carved out by the US Supreme Court in *Miranda* xxx Unfortunately, however, our Supreme Court has been indiscriminately importing American precedents on custodial interrogation rights, thus negating the innovation under the Constitution and RA 7438.[148]

The author further wishes to stress that the phrase "like detaining a person to ask questions about the offense" in the above quoted portion seems to have been provided merely as an example, and is thus not definitive as to the scope of the "expanded *Miranda* coverage" in this jurisdiction.

What the author likewise wishes to underscore, is that under §2(f)(2) of R.A. No. 7438, a "custodial investigation" includes "the practice of issuing an 'invitation'

[144] *Supra* notes 136 and 173 and accompanying text.

[145] *Supra* note 138.

[146] Rule 113, §1 defines an arrest as "the taking of a person into custody in order that he may be bound to answer for the commission of an offense;" while a custodial investigation has a specific meaning within the Escobedo and Miranda field.

[147] FEDERICO B. MORENO, PHILIPPINE LAW DICTIONARY 267 (3d ed. 1988), *citing* Nava v. Gatmaitan, 90 Phil. 172, 211 (1951), that the writ of *habeas corpus* applies to all persons detained, whether or not formal charges have been filed.

[148] Agabin-Miranda-I RIGHTS OF THE ACCUSED at 262.

to a person who is investigated in connection with an offense he is suspected to have committed xxx." Plainly, this statutory example of what constitutes "custodial investigation" dispenses with the element of "custody," pursuant to the use of the word "invitation"; moreover, the example is silent as to the need for "questioning." The statutory example is thus far-removed from the intent of *Miranda*, and may serve as basis for advancing the view that even under the *status quo*, a right to counsel already attaches to a person invited to participate in a line-up.

Certainly, in light of R.A. No. 7438, when one is called in to take part in a police line-up, it cannot be said that he is not being "detained" or "investigated" for the commission of an offense. Moreover, the police would not have made the person participate in the line-up unless they had at least some suspicion of his complicity in a crime, thus the person falls within the statutory example of a custodial investigation. Hence, the following excerpt from the deliberations of the Constitutional Commission bears repeating, as indicative of the intent of the framers to extend the scope of Miranda rights under the 1987 Constitution:

> FR. BERNAS: The reason we separated Section 20 [Section 17 at present] from Section 21 [Section 12 at present] is that we want Section 21 to be more general than just for the purpose of preventing involuntary confessions. The Commissioner will notice that Section [17] is the general statement against self-incrimination. We have separated it as an article by itself so as to prevent the impression that those matters mentioned in Section [12] are only for the purpose of preventing self-incrimination.[149]

One may argue, however, that an *ejusdem generis* construction must be accorded the term "detain" as used in §2(a) and (b) of R.A. No. 7438, in conjunction with the technical meaning of an "arrest" and a pre-R.A. No. 7438 definition of "custodial investigation." As such, a shift to the accusatory stage would still be a condition *sine qua non* to trigger Miranda rights. With all due respect, the author begs to differ.

As an alternative argument, the author scrutinizes the very foundation of *Miranda*, *i.e.*, the right against self-incrimination. In light of the *Miranda* dissents and critique, the Philippine Supreme Court may wish to rethink the present foundation of Miranda rights, given its tenuous legal reasoning, *viz.*, the right against self-incrimination is in essence a legal test, directed against tribunals (judicial or legislative) with *subpoena* and contempt powers, as opposed to due process, which is properly directed towards a factual test of voluntariness and trustworthiness of confessions, as manifested by the various badges of voluntariness and/or coercion. Plainly, in attempting to eliminate coercion or trickery from the stationhouse, what *Miranda* ultimately aims to guarantee is voluntariness, which "is a question of fact."[150]

[149] *Supra* note 136.

[150] NISSMAN, ET AL. at 283.

To illustrate the inapplicability of the right against self-incrimination to the stationhouse, one need only compare the bases for this right and the right to due process. As discussed earlier, first, both these rights aim to preserve the reliability of evidence; second, while due process was meant to ensure the employment of proper police procedure, the right against self-incrimination was meant to prevent coercion or duress in extracting confessions, thus both share this goal; and third, both aim to ensure fair play and decency or combat methods of procuring confessions which are offensive to one's sense of justice. The only factor which the right against self-incrimination addresses which due process does not, *i.e.*, to combat the temptation to commit perjury, then only strengthens the position that it is due process, and not the right against self-incrimination, which must govern stationhouse proceedings in absence of legal compulsion therein.

Should the Court, however, adopt another right as the basis of Miranda rights, the Court would then be faced with two (2) options: either to, first, totally rid this jurisdiction of self-incrimination as the basis for Miranda rights and adopt due process as the foundation therefor; or second, recognize that during custodial investigation, the right to remain silent and the right to counsel have two (2) distinct legal bases, the former founded upon the right against self-incrimination, while the latter, on the right to due process. However, this second sub-option would nevertheless suffer from the same infirmity as the *status quo*, *i.e.*, that in terms of precedent and rationale, the right against self-incrimination simply has no place in the stationhouse.

As to totally scorning self-incrimination as the basis for Miranda rights, the author submits that it is not wholly unworkable, either from a legal or policy perspective, bearing in mind that confessions law in the United States and here were, prior to *Miranda*, tested against a due process standard. Clearly, a due process framework would validly allow for the right to counsel even at pre-indictment line-ups, while the right to remain silent technically does not come into play at a line-up, unless law enforcement officials question the suspect. As long then as counsel's presence at a custodial investigation or a line-up is guaranteed, then counsel would presumably ensure that no coercion or trickery is employed, thus the net effect would be to safeguard the suspect's right to remain silent. To buttress the advocacy for eliminating the right against self-incrimination in the stationhouse, as a policy consideration, it has been posited that:

> Because successful [police] investigation often depends on the questioning of reluctant witnesses and suspects, and on other intrusive strategies as well, the investigative stage, as a practical matter, cannot be subject to the same restraints that govern the adjudicative stage. The operative rules will be different because the institutions that dominate the successive stages of the process have dissimilar functions and responsibilities. Simply put, [a police investigation] is not, and cannot be, a trial.[151]

[151] GRANO-KAMISAR *supra* note 124, at 450-51.

Should the Court, however, fear the overzealousness of Philippine law enforcement authorities, then adherence to the *status quo* would be more advisable, as current Miranda doctrine provides an absolute rule, a "bright line," so to speak. Moreover, it has been said that a preference for a case-to-case analysis, which total adherence to a due process standard would inevitably entail, is only proper for or "suitable to first level trial courts,"[152] given that factual matters fall, in general, outside the confines of appellate review.

Perhaps, in the end, discounting legal precision, it is immaterial as to which right, whether due process or self-incrimination, the Court bases Miranda rights upon; for as long as the presence of counsel during a custodial investigation is mandated by the Constitution, then any abuses should be effectively curtailed, if not, totally discouraged.

Anent single-suspect identifications, the Philippine Supreme Court voided those conducted in *Cruz* and *Hassan*, but upheld those in *Teehankee, Jr.*, and *Timon*, the latter after testing the "totality of circumstances" surrounding the single-suspect identifications. Without a doubt, the increased judicial sophistication displayed by the Court in the recent decisions is most welcome, and it is only hoped that the same fervency is expended in the future, in recognition of the inherently greater opportunity for suggestiveness attendant a single-suspect identification as compared to a line-up.[153] In so doing, it would likewise be most welcome if the courts heeded the factors surrounding the validity of photographic and single-suspect identifications in the United States, *viz.*, whether the photographs presented to the accuser were indistinguishable; the feasibility of conducting a line-up instead; the lapse of time between the commission of the crime and identification; and *force majeure*.[154]

As to police line-ups, the author submits that the Court disregard its preference for applying the self-incrimination standard to line-ups, realizing that only a due process test, which redounds to the presence of counsel, may effectively address law enforcement methods creating impermissible suggestiveness.

As to counsel's role at a line-up, he may either be a passive observer, merely to assure against abuse, which, however, could be accomplished by the photographing or the use of video recording. The line-up, on the other hand, especially when the suspect is brought in after the lapse of a considerable period of time after commission of the crime, could be a full-blown adversarial proceeding, where counsel for the suspect could raise objections. This active role of counsel, however, has been criticized as: first, suspect's counsel could then manipulate the proceedings; and second, as regards procedural matters, would objections not raised at the line-up be deemed waived, especially considering that in reality, a junior member of the public

[152] Charles H. Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure*, 24 WASHBURN L.J. 471-74 (1985), in KAMISAR, ET AL. at 117.

[153] *See* COOK *supra* note 59, at 198.

[154] *Supra* notes 63-66 and accompanying text.

defender's staff would inevitably attend to line-up matters. Thus it has been proposed that counsel should not be obliged to make his objections or deemed to have waived them, likewise it should not be incumbent upon police to abide by the suggestions or objections of the suspect's counsel. All that would be required is that any objections be made part of the record of the identification procedure, thus could the issue be raised at trial or the police may wish to remedy the situation if they so chose.[155]

If the Court is so inclined to recognize that self-incrimination is simply improper in adjudging a line-up, then the Court could rest easy with the knowledge that the creation of a right to counsel at line-ups, or photographing or using video recorders at line-ups for purposes of reconstruction at trial and safeguard against any impermissible suggestiveness, would be founded upon sound legal basis, *i.e.*, due process. Moreover, it has been suggested that "blank" lineups could be utilized, if only to ensure reliability of a pre-trial identification.[156] In fact, that an emerging trend in this direction exists is evident through *People v. Alcantara*[157] and *People v. Abdul Hadi Alshaika*,[158] hopefully in recognition of the fact that "the best way to reduce the number of convictions based on misidentifications is to improve the quality of pretrial determination of identity and to tighten the standards for prosecution in cases in which identity is in dispute.'"[159]

The author sees no impediment to the Court's removing the matter of line-ups from the rubric of *Miranda* and self-incrimination. From a legal standpoint, it is submitted that this paper has provided ample legal basis for a shift to a due process standard by which to verify impermissible suggestiveness; while from a policy perspective, in cases where the perpetrator's identity is in doubt, it can not be deemed unreasonable that law enforcers utilize, at least, photographs or videos of a line-up or blank line-ups. As regards the right to counsel at line-ups, the author likewise wishes to draw attention to the Court's policy regarding the role of counsel as part and parcel of the due process guarantee, which has shifted away from a restrictive perspective to a more permissive stance.

The former was reflected in *Nera v. Auditor-General*,[160] where, in an administrative case involving retirement claims, it was held that "[t]he right to assistance of counsel is not indispensable to due process unless required by the Constitution or a

[155] *See* KAMISAR, ET AL. 659-60.

[156] KAMISAR, *ET AL.* at 663, a blank line-up entails the eyewitness viewing two (2) separate line-ups, with the express instruction to the eyewitness that the suspect may or may not appear in a specific line-up.

[157] 240 SCRA 122, 135 (1995), where the Court held that "in US v. Wade, 'the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor.'"

[158] 261 SCRA 637, 645 (1996), where the Court declared that it would "not hesitate to invalidate inherently suggestive lineups on grounds of due process, especially when conducted in the absence of counsel xxx."

[159] KAMISAR, ET AL. *supra* note 75, at 664, 665.

[160] 164 SCRA 1, 5-6 (1988).

law [or custodial investigation]. xxx The assistance of lawyers, while desirable, is not indispensable. The legal profession was not engrafted in the due process clause xxx." While a few years later, the Court declared that "[t]he right to counsel in civil cases exists just as forcefully as in criminal cases"[161] [and is] "a very basic requirement of substantive due process xxx. Indeed, the rights to counsel and to due process of law are two of the fundamental rights guaranteed by the Constitution to any person under investigation, be the proceeding administrative, civil or criminal."[162]

If there stand the legal principles of resolving doubt in favor of the accused or the laborer, or that the presumption is always against the waiver of constitutional rights, or that preliminary investigation is meant to save a respondent from harassment, and the State, its resources, the author can only hope that the arguments raised here may, someday, given that the issues affect the liberty, if not the very life of an accused, serve as a catalyst for the Court to rethink its present position. The *Miranda* doctrine, as a rule of exclusion, initially resulted in the acquittal of a possible kidnapper-rapist and other alleged unsavory characters. As despicable as that may seem, *Miranda* was founded upon the axiom that "[t]he quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."[163] While the author is certainly unopposed to this, what this article merely wishes to underscore is that fealty to sound legal bases and precedent be not disdained.

[161] Telan v. Court of Appeals, 202 SCRA 534, 540-541 (1991).

[162] Salaw v. NLRC, 202 SCRA 7, 13 (1991).

[163] Miranda, 384 U.S. at 727.

CONSTITUTIONALISM AND THE NARVASA COURT

JOAQUIN G. BERNAS, S.J.*

INTRODUCTION

Let me first say that I consider it an honor to be invited to give this lecture on "Constitutionalism and the Narvasa Court." It is, however, an honor which I approach with no small degree of trepidation. I take it that the invitation involves not merely a matter of summarizing what the Narvasa Court has said, which would not be a perilous task, but also offering personal reflections on the work of the Court. When you consider that the membership of the Court consists of some of the best legal minds of the country, accepting the invitation on that understanding and for delivery in the lions' den itself borders on recklessness. For that reason and for purposes of self-protection, I have decided to be eclectic. I will discuss mainly cases where the Justices of the Court themselves were not in unanimity. In that way I am assured that in whatever position I might take I will find support from at least one or other of the lions.

CONSTITIONALISM

By way of situationer, let me say a few general words about my understanding of constitutionalism.

Modern liberal constitutionalism as we have it now consists of five irreducible elements. First, there is a differentiation and distribution of functions. On the horizontal level, the distribution is among the legislative, executive, and judicial departments. On the vertical level, there is sharing of power between the national government and local governments — very pronounced in a federal system but not so pronounced in our unitary system. Second, there is a planned mechanism for cooperation among the three main power organs. The mechanism acts as the familiar system of "checks and balances." Third, there is a system for breaking deadlocks among the three power holders. Fourth, there is an amendatory process, which is essentially a mechanism for adjusting the constitution to changing socio-political conditions. The amendatory process is also one of the vehicles through which popular sovereignty is expressed. Fifth and finally, there is a delineation of areas of private life which are fenced off from encroachment by power holders.

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