MIRANDA TO MANGUERA: NOTES ON THE NEW RIGHT TO COUNSEL

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> It is not unusual that the vote of a justice reflects his deeply-held convictions. Much more so in constitutional law where it can truly be said that it may not be a matter of right or wrong but of means and ends.
>
> Justice Fernando

I. INTRODUCTION

Before the adoption of the present Constitution, the right to counsel of an accused in a criminal case was not extended to custodial interrogation. In fact, the doctrine enunciated in the cases of *Escobedo v. Illinois*[1] and *Miranda v. Arizona*[2] was categorically rejected by the Supreme Court.[3]

After the effectivity of the 1973 Constitution, the Supreme Court had occasion to rule on one aspect of the new right to counsel clause[4] in the principal case of *Magtoto v. Manguera*[5] and two companion cases of *Simeon v. Villaluz*[6] and *People v. Isnani*[7]. According to the Court this constitutional provision should be given prospective and not retroactive application.[8]

It is submitted that a serious study of the ramifications of the doctrine must be made if its operation must be appraised properly. The problem gains added significance when it is recognized that the coerced confession rule has been a traditional constitutional limitation on police interrogation. A substantial step in this direction was taken by Justice Fernando in his dissenting opinion in the above-mentioned cases.

This paper seeks to analyze the right to counsel during custodial interrogation — to treat of its historical development and conceptual an-

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1 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964).

2 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, 10 ALR, 974 (1966).

3 People v. Jose, G.R. No. L-28232, February 6, 1971, 37 SCRA 450 (1971); People v. Paras, G.R. No. L-23111, March 29, 1974, 56 SCRA 248 (1974).

4 CONST., Art. IV, sec. 20.

5 G.R. No. L-37201-02, March 3, 1975, 63 SCRA 4 (1975).

6 G.R. No. L-37424, *Ibid.*

7 G.R. No. L-38929, *Ibid.*

8 *Ibid.*, at p. 12.

tecedents and to deal with problems associated with its implementation. The principal thrust of this essay is to indicate Magtoto's "potential for expansion" — to explore the ramifications of the right in the light of the policy it seeks to serve and current decisional developments in the United States from which the doctrine was adopted.

II. Nature of the Right

A. *The Right to Counsel*

An extended essay on the value of assistance of counsel is not required here. Its basic importance must, however, be recalled briefly. It is not simply that an attorney may get the accused "off". Rather, counsel is necessary because society has chosen the adversary process to seek the truth. It is in this sense that Justice Moran has spoken on the value of counsel:

> ". . . The right to be heard would be of little avail if it does not include the right to be heard by counsel. Even the most intelligent or educated man may have no skill in the science of the law, particularly in the rules of procedure, and, without counsel, he may be convicted not because he is guilty but because he does not know how to establish his innocence . . ."[9]

In some sense, therefore, this right is a precondition to all others, since it ensures, at least ideally, that other rights can be claimed.[10]

B. *Stages of the Rights*

Under the 1935 Constitution, the right to counsel was recognized only during the stage of criminal prosecution itself.[11] In implementing the aforesaid constitutional provision, however, the Supreme Court extended the right even before the actual prosecution of the accused.

The Supreme Court had occasion to construe a similar provision in the Philippine Bill of 1902 in the case of *U.S. v. Beecham*[12]. Construing the term "criminal prosecution", the Court stated that it meant proceedings before the trial court from arraignment to the rendition of judgment.

Conformable with this principle, Section 1, Rule 115 of the Rules of Court provides that "In all criminal prosecutions, the defendant shall be entitled . . . (b) to be present and defend in person *and by attorney*

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[9] People v. Holgado, 85 Phil. 572, 756 (1950).

[10] Black, Jr., Perspectives in Constitutional Law 109 (1963).

[11] Art. III, sec. 17, provided: In all criminal prosecutions the accused shall be presumed to be innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses in his behalf.

[12] 23 Phil. 258 (1912).

at every stage of proceedings, that is *from arraignment to the promulgation of judgment."* In addition the Rules also provide for instances where an accused is entitled to counsel even before arraignment, if he so requests. These are during the second stage of *preliminary investigation,*[13] and after arrest.[14] As to the stage of appeal, the Rules of Court provide for an appointment of an attorney-*de-oficio* for a defendant on appeal where he is confined in prison without means to employ an attorney.[15]

C. *Right to Counsel During Custodial Interrogation*

The right to counsel at this stage is now embodied in the present Constitution which provides that:

> "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. No force, violence, threat intimidation, or any other means which vitiates the free will shall be used against him. Any confession obtained in violation of this section shall be inadmissible in evidence."[16]

Justice Fernando describes its importance: "It is one of the worthwhile innovations of the present Constitution, that even at the stage of custodial interrogation when the police agencies are investigating a man's possible connection with a crime, he is already entitled to counsel."[17]

III. HISTORICAL CONSIDERATIONS

A. *England*

Prior to 1698, a person charged with treason or felony had no right to demand the assistance of counsel to aid him in preparing his defense. Strangely, during this period, persons charged with misdemeanors and parties in civil cases were entitled to seek and obtain legal assistance. This rule allowing the right to retain counsel only for minor cases but denying it in more serious offenses was clearly illustrated in one of the most famous treason trials of history — the trial of Mary Queen of Scots. Since her education was French, she was forced to defend herself

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[13] Rule 112, sec. 11 reads: At any time during the proceedings referred to in the preceding section the defendant, if he so requests, shall be allowed have the services of an attorney. For this purpose, the judge or corresponding officer may require any peace officer to deliver any message from the defendant to any attorney requesting the latter's services.

[14] Rule 113, sec. 18 provides: Any attorney entitled to practice in the courts of the Philippines shall, at the request of the person arrested or of another acting in his behalf, have the right to visit and confer privately with such person in the jail or any other place of custody at any hour of the day or, in urgent cases, of the night.

[15] RULES OF COURT, Rule 122, sec. 13.

[16] CONST., Art IV, sec. 20.

[17] E. FERNANDO, THE CONSTITUTION OF THE PHILIPPINES 693 (1974).

in a foreign tongue when her request for counsel was denied. The rule thereby elicited vigorous dissent from 17th century English statesmen and lawyers. Its apologists however defended the practice on the ground that the Court functioned in place of counsel in providing ample safeguards for the accused.[18] After the English Revolution of 1698, the rule denying counsel in treason cases was abolished, but existing restrictions on the right to counsel in other felony cases were not abolished until 1836, when Parliament granted a corresponding right with respect to felony offenses in general.[19] At present, the only provision for an accused in custody to have counsel is contained in guidelines known as Judges' Rules. The Rules were promulgated by the judges of the Queen's Bench division as a guide to police officers conducting interrogations. They do not have the force of law but serve as guidelines as to what judges will consider to be proper police conduct when ruling on the admissibility in evidence of statements given by the defendant to the police. For example, *Judges' Rule C* provides that the accused should be allowed to contact his lawyer so that the latter may advise him on how to react to police questioning.[20]

B. *United States*

The English experience on the right to counsel does not parallel that of the United States since in the latter the necessity of legal assistance in criminal cases was recognized at an earlier date.[21] The provisions in the Bill of Rights and in the state constitutions confirmed the practice of allowing defendants to be represented by counsel.[22] Following the declaration of independence in 1776, several of the 13 original states provided in their constitutions the guarantee of the right to counsel. This was a marked improvement from the British practice since the matter of appointment of counsel was removed from judicial discretion. As originally drafted, the Federal Constitution of the United States did not contain the guarantee of the right to counsel. It was only when the Bill of Rights was adopted by the First Congress of the United States that the right to counsel was provided for under the Sixth Amendment.[23]

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[18] L. RADZINOWICZ, A History of the English Criminal Law 399-601 (1948).

[19] See, Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527 (1932).

[20] See P. Mattingly, The Right to Counsel: A Comparative Analysis of the United States and Great Britain, 50 NOTRE DAME LAW, 117 (1974).

[21] For a survey of the historical background see BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS, Chapter 2 (1955).

[22] The provisions are summarized in BEANEY, Chap. 4; see also Fellman, The Right to Counsel Under State Law, 2 WIS. L. REV. 281 (1955).

[23] 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 been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confrontel with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the *assistance of counsel* for his defense.

In the United States, the relationship of the Six Amendment to the due process clause of the Fourteenth Amendment has been much litigated.[24] It was not until 1932 that the Federal Supreme Court in the case of *Powell v. Alabama*[25] ruled that the states had a constitutional duty to see that an effective representation by counsel was extended in capital offenses to ensure fair trial. In case of *Johnson v. Zerbst,*[26] a case dealing with the right to counsel under the Sixth Amendment, it was recognized that an individual accused of crime in the federal courts possesses an absolute right to have counsel assigned to assist in his defense. Unless such right has been intelligently and competently waived, a federal trial or guilty plea not accompanied by assistance of counsel would be set aside as unlawful. In *Betts v. Brady,*[27] a divided U.S. Supreme Court held that the Fourteenth Amendment did not require a state to assign counsel to an indigent defendant in a non-capital felony case unless the surrounding circumstances showed that absence of counsel resulted in substantial unfairness. As regards state capital cases, appointment of counsel was made mandatory.[28] In 1962, in the case of *Gideon v. Wainwright,*[29] it was held that indigents are entitled to counsel as a matter of constitutional right. In the ensuing decade, the right to counsel was extended to custodial interrogations,[30] to line-ups,[31] to preliminary hearings[32] and finally in the case of *Argersinger v. Hamlin*[33] to misdemeanor prosecutions involving a likelihood of imprisonment. Within a period of less than 20 years, therefore, the right to counsel has been extended to all felony cases.

The developments in the right to counsel constitute a fascinating chapter in the changing law of society. Let us therefore examine briefly the conceptual antecedents of the right. As early as 1958, the problem of when the right to counsel begins was presented to the United States Supreme Court in the cases of *Crooker v. California*[34] and *Cicenia v. Lagay.*[35] In *Crooker,* a 31-year-old college graduate, with one year of law school training, after being interrogated in three periods confessed to the commission of murder. His requests for an attorney were denied and he was told that he would only be allowed to do so at the conclusion of the investigation.

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[24] See cases of Powell v. Alabama, *supra,* note 19; McNeal v. Culver, 365 U.S. 109, 81 S.Ct. 413, 5 L.Ed. 2d 445 (1961).

[25] *Supra,* note 19.

[26] 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357 (1938).

[27] 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942).

[28] De Meerleer v. Michigan, 329 U.S. 663, 67 S.Ct. 596, 91 L.Ed. 584 (1947); Tomkins v. Missouri, 323 U.S. 485, 65 S.Ct. 370, 89 L.Ed. 407 (1945); Williams v. Kaiser, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398 (1945).

[29] 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799, 93 A.L.R. 733 (162).

[30] Miranda v. Arizona, *supra,* note 2.

[31] U.S. v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967).

[32] Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed. 2d 387 (1970).

[33] 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972).

[34] 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed. 2d 1448 (1958).

[35] 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed. 2d 1523 (1958).

The Federal Supreme Court applied the "fair trial" rule and in the brief opinion penned by Mr. Justice Clark it was held that the denial of the request for counsel had not prejudiced the defendant so as to "infect" his subsequent trial with an absence of "the fundamental fairness essential to the very concept of justice."[36] In *Cicenia,* the Supreme Court of the United States reiterated the rule that lack of counsel is only one pertinent element in determining whether or not a trial is unfair. Mr. Justice Douglas in his dissent in the *Crooker* case pointed out the various functions of counsel at the pre-trial stage, and ended with the observation that "the demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at anytime after the moment of arrest."[37]

This state of affairs in the jurisprudence on the "new right to counsel" seemed to have merited approval by many text-writers prior to 1960 who expressed doubt that the right to counsel could ever progress beyond the preliminary hearing. One writer, for example, had this comment:

> "The right to assignment of counsel in Federal Courts does not appear to extend to proceedings at the stage of police interrogation or proceedings preliminary to the indictment."[38]

Yet there were signs of a gradual, if erratic, trend toward a more generous treatment of defendants before trial. In *Massiah v. United States,*[39] which was decided late in the 1963-1964 term, the same term in which *Escobedo* was to be decided, the United States Supreme Court stated that "Any secret interrogation of the defendant from and after the filing of the indictment without the jurisdiction afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and fundamental rights of person charged with crime." Justice Stewart, who wrote the opinion of the Court, recalled that he and three other Justices had earlier taken the position in *Spano v. New York*[40] that the "Constitution required reversal of the conviction upon the sole and specific ground that the confession has been deliberately elicited by the police after the defendant has been indicted and therefore at a time when he was clearly entitled to lawyer's help," and that a "Constitution which guarantees a defendant the aid of counsel at trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding."

In his dissent in the *Massiah* case, Mr. Justice White forecast that the reasoning here would seem equally pertinent to statements obtained

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[36] *Ibid.*
[37] *Ibid.*
[38] EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 163 (1952).
[39] 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed. 2d 246 (1964).
[40] 360 U.S. 315, 324, 326, S.Ct. 1202, 3 L.Ed. 2d 1265 (1959).

at any time after the right to counsel attached whether there had been an indictment or not. This prediction became a reality in a few weeks time in the celebrated case of *Escobedo v. Illinois*.[41] Here the investigation took place prior to indictment. In this case, the defendant was arrested for the first time and released the same day on a writ of *habeas corpus*. He told the police nothing at this time. He was rearrested about eleven days later and before making statements, requested an opportunity to consult with his attorney. His attorney likewise made repeated efforts to gain access to his client. Both men were told that they could not see each other until the police had finished with their interrogation. In the course of the questioning, the defendant stated that another person had committed the shooting, thereby admitting knowledge of the crime and implicating himself in it. At the trial, he moved to suppress the incriminating statements, but his motion was denied. The Supreme Court of Illinois upheld the trial court's ruling on the competency of the statements and the defendant appealed to the United States Supreme Court. The Supreme Court voted 5-4 to reverse the decision below. Mr. Justice Goldberg, who wrote the majority opinion adopted the "critical stage" reasoning approach. Stating that the post-arrest interrogation was the stage "when legal aid and advice were most critical" to a criminal accused, Justice Goldberg observed:

> "In *Gideon v. Wainwright*, we held that every person accused of crime, whether state or federal, is entitled to a lawyer at trial. The rule sought by State here, however, would make the trial no more than an appeal from interrogation and the right to use counsel at the formal trial would be a very hallow thing if for all practical purposes, the conviction is already assured by pre-trial examination."[42]

The precise point in the criminal process when the right to counsel attaches and the suspect must be permitted to consult with his attorney was stated as follows:

> "Where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry on a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and has been denied an opportunity to consult with his lawyer and the police have not effectively warned him of his absolute right to remain silent, the accused has been denied "the Assistance of Counsel" in violation as "made obligatory upon the States by Fourteenth Amendment" and that no statement elicited by the police during interrogation may be used against him at a criminal trial."[43]

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[41] *Supra*, note 1.
[42] *Ibid.*, at 487.
[43] *Ibid.*, at 491.

Clarifying this lengthy paragraph, Justice Goldberg concluded with the admonition that:

> "When the process shifts from investigatory to accusatory — when its focus is on the accused and its purpose is to elicit a confession — our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."[44]

With *Escobedo,* the right to counsel has been extended to the earliest possible point in the criminal process. Many questions, nevertheless, were left unanswered; Escobedo had requested counsel during the interrogation and his request was denied. What if he had been ignorant of his rights and had not made the demand on the police? Moreover, Escobedo had already retained his own attorney and was not asking for assistance of assigned counsel. Would it have made any difference if he had requested the police to furnish him with legal assistance at state expense?

Following the *Escobedo* decision, the state courts in a series of cases attempted to apply the rule developed but with different interpretations. In California the highest court of the state refused to admit any confession where counsel was not granted and there was no warning given to the suspect that he had a right to remain silent or have counsel present, despite the fact that the defendant never indicated during the interrogation that he desired legal assistance.[45] In Illinois, on the other hand, the highest court on precisely the same facts reached the opposite conclusion, declining to hold a confession inadmissible in the absence of evidence that the accused had requested and had been denied an attorney even though the police had not effectively warned him concerning his constitutional rights.[46] The need for an authoritative clarification was obvious.

On June 13, 1966 the Supreme Court of the United States spoke. Almost everyone versed in the law would have predicted what it would say. Only the reasoning of the Court was surprising. In *Miranda v. Arizona,*[47] and its three companion cases, four convictions were reversed because in each instance incriminating statements had been obtained from the defendants under circumstances which did not comport with the constitutional standards enunciated by the Court. The reversal was not made to hinge upon the Sixth Amendment right to counsel, but on the Fifth Amendment provision concerning self-incrimination. The presence of counsel was held necessary as a means of enforcing immunity against self-incrimination.

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[44] *Ibid.,* at 492.
[45] People v. Dorado 40 Cal. 264, 394 P. 2d 952 (1964).
[46] People v. Hartgraves, 31 Ill. 2d 375, 202 N.E. 2d 33 (1964).
[47] *Supra,* note 2.

Under the *Miranda* ruling, it is no longer necessary for the suspect to request counsel during custodial interrogation. The burden is placed on the police to inform the suspect of his constitutional rights and to refrain from asking any further questions unless the accused knowingly waives his right to counsel and to remain silent. Chief Justice Warren, who wrote the majority opinion summarized the Court's sweeping new mandate as follows:

> "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 . . . (Unless) other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wished to consult with an attorney before speaking there can be no any questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or voluntered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned."[48]

In determining when these warning must be given and the suspect afforded an opportunity to consult with counsel, the *Escobedo* and *Miranda* cases must be read together. In *Escobedo,* the Court stated that when the process shifts from investigatory to the accusatory and when its focus is on the accused and its purpose is to elicit a confession, the accused must be permitted to consult with counsel. In the *Miranda* case, the court explained what was meant by custodial interrogation:

> "By custodial interrogation, we mean 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."[49]

Taken together, these cases stand for the rule that whenever a person is taken into custody or questioned with a view to obtaining incriminating

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[48] *Ibid.*, at 444-445.
[49] *Ibid.*

statements from him, the police must advise him of his right to counsel, either retained or appointed, and of his right to remain silent.

Three decisions handed down by the United States Supreme Court in June 1967 extended the right to counsel provisions to police lineups and other exhibitions of the accused for identification purposes.[50] In a decision in which the members of the Supreme Court had little consensus of opinion,[51] the Court reasoned that the lineup was a "critical stage of the proceeding and counsel should have been present at the lineup. In justifying this the Court stated:

> "Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt for Wade the post-indictment lineup was a critical stage of the prosecution at which he was "as much entitled to such aid of counsel . . . as at the trial itself." *Powell v. State of Alabama.*[52] Thus both Wade and his counsel should have been notified of the impending lineup and the counsel's presence should have been a requisite to the conduct of the lineup absent an intelligent waiver."[53]

C. *Philippines*

1. The Law Before

In a line of cases, it was established that statements obtained from a defendant under police custodial interrogation if given freely and voluntarily are admissible.[54] Then in *People v. Carillo,*[55] the Supreme Court held that:

> ". . . the conviction of an accused on a voluntary extrajudicial statement in no way violates the constitutional guarantee against self-incrimination. What the above inhibition seeks to protect is compulsory disclosure of incriminating facts. While there could be some possible objections to the admissibility of a confession on grounds of its untrustworthiness, such confession is never excluded as evidence on account of any supposed violation of the constitutional immunity of the party from self-incrimination . . . The use of voluntary confession is a universal, time-honored practice grounded on common law and expressly sanctioned by statutes."

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[50] United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967); Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967); Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967).

[51] Seven of the nine judges dissented as to the last part of the opinion.

[52] *Supra,* note 19.

[53] U.S. v. Wade, *supra* note 31 at 236-237.

[54] U.S. v. Castillo, 2 Phil. 17 (1903); U.S. v. Lio Team, 23 Phil. 64 (1912); U.S. v. Ching Po, 23 Phil. 578 (1912); U.S. v. Corrales, 28 Phil. 362 (1914); People v. Hernane, 75 Phil. 554 (1945)

[55] 77 Phil. 572, 576-577 (1946).

2. The Cases of *People v. Jose*[56] and *People v. Paras*[57]

In these cases, attempt was made by counsel for the accused to invoke the Miranda-Escobedo rule. The Supreme Court rejected the rule that an extrajudicial confession given without the assistance of counsel is inadmissible in evidence. The Court held:

> ". . . The rule in the United States need not be unquestioningly adhered to in this jurisdiction, not only because it has no binding effect here, but also because in interpreting a provision of the Constitution, the meaning attached thereto at the time of the adoption thereof should be considered."[58]

The remarkable thing therefore is that the present concept of the right to counsel is not a judge-made law as it had been developed in the United States. The right, rather, is the result of a policy decision of the Constitutional Convention to adopt the Miranda-Escobedo rule. Justice Fernando would thus say:

> "The delegates to the Constitutional Convention, many of them lawyers were familiar with this ruling announced in 1966. Concerned as they were with vitalizing the right against self-incrimination, they advisedly used words that render unmistakable the adoption of the Miranda doctrine . . . Precisely it must have been partly the dissatisfaction by the Constitutional Convention with the doctrine announced that led to its inclusion with its express prohibition against the admission of confession so tainted, without any qualification as to when it was obtained."[59]

3. *The Constitutional Convention proceedings*

A study of the resolutions by the delegates to the Constitutional Convention shows their awareness of the Miranda-Escobedo rule. How they proposed to adopt it in the Constitution provides an equally interesting study.[60] These resolutions embodied the new right to counsel either in

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[56] *Supra*, note 3.
[57] *Supra*, note 3.
[58] *Ibid.*, at 263.
[59] Dissenting opinion of Justice Fernando, p. 35-36.
[60] These resolutions are: Res. No. 318 by Del. Jose Suarez, Zosimo Canila and Custodio Villalva; Res. No. 433 by Delegates Hilario Davide, Jr. and Francisco Zosa; Res. No. 1311 by Del. Loreto Valera; Res. No. 1375 by Del. Aquilino Pimentel, Jr.; Res. No. 1581 by Del. Renaldo Villar; Res. No. 1700 by Del. Benjamin Rodriguez; Res. No. 1803 by Delegates Juan Liwag, Ceferino Padua, Emerito Salva; Res No. 1843 by Dels. Oscar Lazo, Antonio de Guzman; Res. No. 2283 by Del. Efren Sarte; Res. No. 2546 by Del. Emmanuel Noli Santos; Res. No. 2563 by Del. Mauro Baradi; Res. No. 2807 by Del. Pedro Laggui; Res. No. 3604 by Del. Alberto Jamir and Jose Santillan; Res. No. 4048 by Del. Abraram Sarmiento; Res. No. 4534 by Del. Rodolfo Ortiz; Res. No. 4575 by Del. Antonio Velasco; Res. No. 4603 by Del. Cesar Sevilla; Res. No. 4995 by Del. Fernando Bautista; Res. No. 5153 by Del. Raul Roco; Res. No. 5173 by Del. Amanio Sorongon; Res. No. 5417 by Del. Manuel Concordia.

Section 17 of the Constitution in its first sentence or reserving the last sentence for the declaration of the new right. So that, the section would read: "In all criminal prosecutions, *which shall include police investigations* conducted by law enforcement agencies . . ."[61] or the last sentence would provide: "A person shall enjoy the right to counsel in administrative and extrajudicial proceedings and investigations."[62] Some delegates would settle for nothing less than a separate constitutional provision merging the right to counsel and the privilege against self-incrimination. Typical of this was the resolution of Delegates Juan R. Liwag, Ceferino Padua and Emerito Salva. "No person shall be compelled to be a witness against himself. The right to counsel shall be enjoyed during police investigation. Any confession obtained without assistance of counsel shall be null and void and the police authority concerned shall be criminally liable therefore."[63] The resolution of Delegate Noli Santos would likewise subsume the right in one section but with the rather emphatic declaration "regardless of whether the privilege of the writ of *habeas corpus* has been suspended or martial law has declared." On the subject of waiver, Resolution No. 2807 of Delegate Pedro Laggui provided that *"Unless waived in writing,* the right of a person not to be subjected to any form of investigation except in presence and with aid of counsel, shall not be abridged; any evidence secured in violation hereof, shall be inadmissible for any purpose in any proceeding."

The dissatisfaction of the delegates with the Supreme Court's rejection of the adoption of the Miranda doctrine which Justice Fernando had spoken of in his dissent could be seen in one of the explanatory notes to these resolutions:

> "It is sad to note, however, that our Courts have failed to arrive at the same happy conclusion despite similarity of our constitutional provisions on this matter with those of the United States Constitution . . . In our country, it is not uncommon to hear of persons being "invited" for questioning by police agencies, and made to sign confessions, or otherwise forced to participate in "reenactments" of crimes of which they have no knowledge. Needless to state, these proceedings are invariable, conducted without the presence of counsel. In removing the cloud of suspicion shrouding these proceedings, this resolution will help in restoring the faith of the populace in the police agencies."[64]

The same sentiment was expressed by delegates who bewailed the use of force and intimidation in extracting extrajudicial confessions. It is there-

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[61] Res. No. 1166 by Del. Hilario Davide.
[62] Res. No. 4048 by Del. Abraham Sarmiento.
[63] Res. No. 1803.
[64] Res. No. 4048.

fore plausible to assert that the present Section 20 of Article IV is a compromise provision to subsume in one section the right to counsel during custodial interrogation, to assure against the use of force, violence and others to extract confessions and to provide for their consequent inadmissibility in evidence in any court or proceedings.

On February 1, 1972, these resolutions were considered by the Committee on Civil and Political Rights.[65] In the Committee Report on March 15, 1972, the wordings of the section render unmistakable the basic similarity between the proposal and the adopted provision. On March 17, 1972, the Steering Council asked the Convention in plenary session to consider the said proposal. Finally, the Draft Article of the Bill of Rights contained exactly the same provision as now contained under the present Constitution.

IV. OBSERVATIONS

Changes in the contents of legal doctrines are normally the outcome of able interest articulation of an important and usually vocal group within society. Less striking, but in many ways more revealing of the value system of a society, are changes in law not through political action. A fitting example is the adoption in Philippine jurisdiction of the Escobedo-Miranda rule which was not due to powerful group or class interest but which was the outcome of an increasing concern to expand the right to counsel to the stage of custodial interrogation. The change was effected through a constitutional amendment because of a previous rejection of the rule by the Supreme Court.

It must be pointed out that the *Miranda* case was primarily based on the Fifth Amendment which guarantees the privilege against self-incrimination rather than the Sixth Amendment which secures the right to counsel. While the two concepts of self-incrimination and right to counsel are different from each other, they are interrelated and overlap in actual operation. According to Herman:

> ". . . it is clear that they (right to counsel and self-incrimination) overlap. If yielding to impermissible pressure, the defendant confesses, both terms may be applied. Perhaps, he did not know that he had a privilege; perhaps he was tricked into making a statement; or perhaps he did not realize the incriminating import of his statement."[66]

He would thus summarize the themes that run through the Escobedo opinion:

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[65] Minutes of the Meeting, Committee on Political and Civil Rights, Constitutional Convention, Feb. 1, 1972.

[66] L. Herman, The Supreme Court and Restrictions on Police Interrogation, 25 OHIO STATE L. J. 440 (1964).

> "The first is that the right to counsel at the police station makes effective the privilege against self-incrimination. The second is that the right to counsel at the police station, makes effective the right to counsel at trial."[67]

Unless these concepts are understood, one is most likely to be misled considering that they had become so interwoven with interrogation and confessions in general that it is difficult to separate one from the other. This is precisely what happened in the *Paras* and *Jose* cases where the Supreme Court merely considered the right to counsel aspect without considering the probable violation against the accuseds' right against self-incrimination. The traditional approach to confessions stressed the aspects of voluntariness and trustworthiness. When confessions were thrown out, it was generally done on due process grounds. Coercion and duress made the statements null and void and for this reason due process of law required exclusion. In *Miranda v. Arizona,*[68] it was indicated that other factors besides physical coercion could undermine the accused's free will. In the words of the Court:

> "In these cases, we might not find the defendants' statements to have been "involuntary" in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment right is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in Miranda, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in Stewart, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.
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> It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles — that the individual may not be compelled to incriminate himself. Unless " adequate protective devices" are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."

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[67] *Ibid.*, at 486.

[68] *Supra*, note 2.

A. *Balancing of Interests*

An assessment of protective law governing the process of determining the guilt of the accused is necessary to make a meaningful comparison between the interests of the individual to have counsel at interrogation and the interest of the state in preserving the administration of criminal justice. Are investigators really operating under a heavy apparatus of restraint? The major argument against the new rule is that it would emasculate the process of interrogation and thus cripple or destroy the enforcement of law.

In order to appreciate more fully the custodial phase of interrogation and the need for counsel at this point, let us look briefly at the police process here. After a man is arrested and before he appears before the court, there is a separate proceedings held in the police station. In this proceedings, the police will book, photograph and fingerprint the suspect, perhaps display him in a line-up and almost invariably interrogate him over a period which may last from a few minutes to several days. Not only are the various investigative procedures carried out at this time, but there is a decision to be made, whether the police will press charge against the accused or whether they will release him. The accused will likewise decide whether he will confess or whether he will attempt to defend against the charges.[69]

When the application of the rule was presented for resolution by the Supreme Court in the *Magtoto* case it was observed by the respondents that the balance of criminal justice in this country is not at all tipped in favor of the police.[70]

"Indeed, this Court can take judicial notice of the fact that for the most part our police methods and techniques of crime detection are not the sophisticated methods and techniques which the United States Supreme Court found had been employed by the police in *Escobedo v. Illinois*[71] and *Miranda v. Arizond*[72]. There are none of the psychologically-oriented police tactics calculated to overbear the will of the suspect — indeed none of mass of empirical evidence of police methods underlying the decisions in *Miranda.*"[73]

This argument is met by the assertion propounded by Jennings who said that: "the development of police interrogation suggests that societal

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[69] See Kenney and William, Police Operation; Policies and Procedures (1960), quoted in Jenning's An Historical Argument for the Right to Counsel During *Police Interrogation*, 73 YALE L. J. 1000-1057 (1964).

[70] Memorandum for Respondents, p. 31.

[71] *Supra*, note 1.

[72] *Supra*, note 2.

[73] *Ibid.*, at 32.

complexity is an inadequate explanation for the growth of this technique."[74] Another writer, however, writing on the psychology of confession and police interrogation would say:

> "The accusation combines then with the evidence, and both impinge further on the subject's psychological freedom. Evidence need not be presented; the accused need only be made aware of its availability; he need only be convinced that corroboration of his guilt exists and is overwhelming. His positions becomes more insecure; his fears increase; the threshold of suggestibility rises and the circle of psychological freedom narrows . . . The accuser who was the enemy becomes the surrogate-friend . . . Confession is the way out to the surcase of tension and anxiety and the removal of the "Terrible burden" of guilt."[75]

It is very hard to verify or refute the assertion on this point by the counsel for the government, absent a showing in evidence of the police manuals which are more psychologically oriented in this country. It may be said however, that our police agencies at least in the metropolitan areas are capable of such tactics. In other words, we can not assume that our police agencies have not progressed beyond the employment of third-degree tactics.

It seems that any argument on the more pervading and ever-present question of state v. individual would not be necessary for as Justice Fernando observed: ". . . it does appear that the Convention, in manifesting its will, had negated any assumption that criminal prosecution would thereby be needlessly hampered."[76] The majority would however consider this point important at least insofar as it bears materially on the question of retrospectivity. Justice Antonio thus stated: "In most areas, police investigators are without modern and sophisticated instruments for criminal investigation. Many grave felonies have been unsolved because of the absence or unavailability of witnesses. In such cases, it is obvious that the custodial interrogation of suspects would furnish the only means of solving the crime . . . The unusual force of the countervailing considerations strengthens my conclusion in favor of prospective application."[77]

It is this observation which elicited a vigorous disagreement from Justice Castro who said that: "I am not aware of any decision of this Court which affirmed the conviction of the accused solely and exclusively on the basis of his written confession during custodial interrogation. To the contrary, my abiding impression is that extra-judicial confessions have

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[74] *Supra*, note 69.

[75] D. Sterling, Police Interrogation and the Psychology of Confession, 31 LAWYERS J. 2, 3 (1966).

[76] *Supra*, note 5 at 36.

[77] *Ibid.*, at 41.

been adduced in criminal trials as mere corroboration of other evidence independently establishing the guilt of the accused."[78]

In the United States, Justice Goldberg, as well as Chief Justice Warren believe that a more morally superior system of justice does not depend on "the confession" but instead requires dependence upon skillful investigation.[79] Goldberg and Warren appear to utilize concepts articulated and developed most clearly by Justice Frankfurter. The latter had put forth the view that through a process of ethical maturing, a system of justice becomes "civilized, evolving from inquisitioral to accusatorial in nature." In both Escobedo and Miranda, references were made to the demands of an "adversary" system of justice. Justice Frankfurter called it an "accusatorial" system of justice.[80]

The new rule is thus progressive. In a dissenting opinion in *Stein v. New York*[81] it was said that from lessons gleaned through historical experience, a society realizes the existence of certain standards of decency, "not out of tenderness for the accused but because we had reached a certain stage of civilization." Progress toward the accusatorial system, becomes particularly noticeable when that stage of civilization is reached when the accused is neither made the deluded instrument of his own conviction nor convicted on evidence secured without the assistance of counsel. The essential components of this rationale was quoted in *Miranda*:

> "The quality of a nation's civilization can be measured by the methods it uses in the enforcement of its criminal laws."[82]

B. *The Question of Retroactivity*

The majority of the Supreme Court refused to apply the right retroactively because no right to counsel during custodial interrogation existed at the time the extrajudicial confessions in these cases were obtained. Concededly, this is a new right, and the counsel for the Government anchored its position upon a number of premises. First are the familiar maxims of law, *Lex prospicit, non respicit* and *Lex de futuro judex de praeterito*. As a general rule, therefore, legislations are prospective in application while decisional law is retroactive.[83] The second is the inference that the Miranda rule may not have been adopted by the Court because it preferred to leave the business of

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[78] *Ibid.*, at 26.

[79] With respect to the moral foundation of Justice Goldberg's remarks, see Developments in the Law of Confessions, 79 HARV. L. REV. 935 (1966).

[80] See Bickel, The Role of the Supreme Court of the United States, 44 Texas L. REV. 954, 961-962 (1966).

[81] Dissenting Opinion, *Stein v. New York*, 346 U.S. 156, 165, 73 S.Ct. 1077, 97 L.Ed. 1522 (1953).

[82] Miranda v. Arizona, *supra*, note 2.

[83] Memorandum for respondents, p. 25.

changing the law to legislation precisely to avoid the adverse consequences which judicial decision, of necessity retroactive in effect, would have on the administration of criminal justice in this country. Quoting Professor Freund, ". . . Creativity that is too upsetting to the legitimate expectations may be eschewed by the judges, whose decisions have retrospective effect, and left to the prospective operation of legislation."[84] The third point relates to the exceptions to the general rule that all judicial decisions are retrospective. Adopting the criteria developed by the United States Supreme Court in the case of *Stovall v. Denno,*[85] it was said that there could be no retroactive application of the new rule in these cases because of (1) the reliance which may have been placed upon prior decisions on the subject; (2) the effect on the administration of justice — in that it would require retrial, if not release, of numerous prisoners found guilty on trustworthy evidence in accordance with prior rules and (3) the purpose of the rule — the Miranda doctrine only seeks to prevent more possibility of official overbearing, hence, it should not retroactively apply because it does not affect materially the integrity of the truth-seeking process. The majority in effect agree with this observation when it is stated that: "Furthermore, to give a retroactive effect to this constitutional guarantee to counsel would have a great unsettling effect on the administration of justice in this country. It may lead to the acquittal of guilty individuals and thus cause injustice to the people and the offended parties in many criminal cases where confessions were obtained before the effectivity of the new Constitution and in accordance with the rules then in force although without the assistance of counsel."[86]

A critical survey of American decisions on the issue of retroactivity would show that in cases in which the new constitutional decision effects an evidentiary or procedural rule, the purpose of which is to prohibit police from unconstitutional activity, the Court declined to apply the rule retroactively in the light of the reliance on the old rule and the obvious detriment to the various judicial systems.[87] In *Linkletter v. Walker*[88] the Court declined to give retroactive effect to *Mapp v. Ohio*[89] requiring exclusion from state criminal trials of evidence seized in violation of the search and seizure provisions of the Fourth Amendment.

On the other hand, where the major purpose of the new constitutional doctrine is to overcome an aspect of the criminal trial which substantially

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[84] Quoted from P.A. Freund, Rationality in Judicial Decisions in Rational Decisions, (Nomos VII) 109, 118 (C. Friedrich ed. 1, 1964).

[85] Stovall v. Denno, *supra,* note 50.

[86] *Supra,* note 5 at 19.

[87] See A. Miller and V. Lefcoe, Gideon's Encore: The Argersinger Decision *in Virginia,* 30 WASH. & LEE L. REV. 431 (1973).

[88] 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965).

[89] 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081, 84 A.L.R. 2d 933 (1961).

impairs the truth-finding function, and serious questions are thus raised concerning the accuracy of verdicts of guilt in the past trials, the Court has balanced the *Stovall test* in favor of complete retroactivity. Thus, the announcement of the applicability of the Sixth Amendment right to counsel in felony cases in *Gideon v. Wainwright*[90] was given retroactive effect in *Pickelsimer v. Wainwright.*[91] *McConnell v. Rhay*[92] gave retroactive effect to the right to counsel at probation revocation hearings as previously announced in *Mempa v. Rhay.*[93] In *Berger v. California,*[94] the Court retroactively applied the *Barber v. Page*[95] ruling that the presence of witness must be secured if that witness is available even though he be out of state. *Roberts v. Russell*[96] similarly gave retroactive application to the rule announced in *Burton v. U.S.*[97]

It is therefore submitted that the trend towards prospectivity in the United States which began with *Johnson v. New Jersey,*[98] a 1966 decision noted with approval in the majority opinion, is a generalization. In a recent decision of the United States Supreme Court involving retroactivity, *Robinson v. Neil,*[99] the Court in holding retroactive the *Waller v. Florida*[100] decision, which held double jeopardy clause to bar separate prosecutions by state and municipal governments for the same offense, noted that the *Linkletter*[101] line of cases dealt with procedural rights and the methods of conducting trials, and that the other rights found in the first eight amendments such as freedom from double jeopardy or cruel and unusual punishment could not be so easily classified and would to be examined individually in terms of their purposes and effects.

Likewise, in the case of *Neil v. Biggers,*[102] closer analysis raises the plausible view that the United States Supreme Court had set forth a new retroactivity doctrine. In this case, a young man was accused of raping Mrs. Beamer on January 22, 1965. During the more than seven months following the rape, Mrs. Beamer viewed several lineups, showups and photographic displays without identifying anyone. On August 17, the police summoned her to the station to "look" at a suspect. When she arrived, two detectives in the presence of three other officers paraded the

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[90] Gideon v. Wainwright, *supra*, note 29.
[91] 375 U.S. 2,84 S.Ct. 80, 11 L.Ed. 2d 41 (1963).
[92] 393 U.S. 2, 89 S.Ct. 32, 21 L.Ed. 2d 2 (1968).
[93] 389 U.S. 128, 88S.Ct. 254, 19 L.Ed. 2d 336 (1967).
[94] 393 U.S. 314, 89 S.Ct.540, 21 L.Ed. 2d 508 (1968).
[95] 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed. 2d 255 (1967).
[96] 392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed. 2d 1100 (1100 (1967).
[97] 393 U.S. 1089, 89 S.Ct. 877, 21 L.Ed. 2d 783 (1968).
[98] 384 U.S. 719, 86 S.Ct. 719, 86 S.Ct. 1772, 16 L.Ed. 2d 121 (1967).
[99] 406 U.S. 916, 92 S.Ct. 1800, 32 L.Ed. 2d 115 (1973).
[100] 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed. 2d 435 (1969).
[101] *Supra*, note 88.
[102] 405 U.S. 954, 92 S.Ct. 1167, 31 L.Ed. 2d 230 (1972).

defendant by her and directed him to say, "Shut up or I'll kill you." Mrs. Beamer identified the defendant as the rapist.

The defendant's subsequent conviction based almost exclusively on Mrs. Beamer's identification was affirmed by the Tennessee Supreme Court. After granting *certiorari,* the Supreme Court of the United States affirmed by an equally divided vote, with Justice Douglas arguing in the only expressed opinion that the show-up violated due process. Thereafter, the defendant petitioned for federal *habeas corpus* relief. After holding an evidentiary hearing, the district court found the showup unnecessarily suggestive and ordered the defendant's retrial or release. The Sixth Circuit affirmed, concluding that the district court's findings were not clearly erroneous. The federal Supreme Court again granted *certiorari* and after argument, reversed the two lower federal courts.

The paragraph which elicits concern reads:

> "The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, not because in every instance the admission of evidence of such a confrontation offends due process . . . Such a rule would have no place in the present case, since both the confrontation and the trial preceded Stovall v. Denno . . . when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury."

In analysis by Grano, "This language carries the distinct flavor of the Court's retroactivity decisions and suggests that the district court may have erred only in applying its analysis to a pre-*Stovall* fact situation. If this interpretation is accurate, the paragraph raises some intriguing questions. In the typical retroactivity case, the Court decides whether a specific constitutional decision can be used to invalidate prior convictions. In *Biggers,* however, the Court was not concerned with *Stovall's* retroactivity; *Stovall* itself had settled the issue by holding that the due process clause is the exclusive constitutional safeguard for defendants whose lineups or showups preceded the nonretroactive *Wade* and *Gilbert* decision. *Biggers* instead implied that the *Stovall* principle, although retroactive, should be interpreted one way with respect to pre-*Stovall* confrontation and quite another way thereafter. This must be viewed as a new chapter in retroactivity law."[103]

It can be gathered from these cases that the U.S. Supreme Court's approach to the retroactivity issue was never static.

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[103] Grano, J., Kirby, Biggers and Ash: Do Any Constitutional Safeguards Reman Against the Danger of Convicting the Innocent? 72 MICH. L. REV. 719, 776-777 (1974).

In the *Magtoto,* and related cases, however, the Philippine Supreme Court only considered the date when the extra-judicial confession was given or obtained. There is thus a denial of both the retroactive application of the right to counsel and the remedy to exclude evidence inadmissible for want of counsel during custodial investigation. Necessarily, the basic premises on which the rationale is based have to be met. In the first place, it is submitted, that the purpose of the new rule is not only to prevent the possibility of police overbearing. A functional analysis of the new rule would lead us to conclude that if there is no right to counsel at this stage, the defendant's right to counsel at the trial itself would be rendered meaningless. Secondly, the new right given to the suspect as a constitutional mandate greatly outweighs the necessity for our personnel and officers to adjust to the new rule. The effect that the new rule would have on the administration of justice would not really be unsettling considering the reforms in the disposition of cases being undertaken by the Supreme Court. In the ultimate analysis, I believe that the dissenting opinion of Justice Fernando conduces more to the spirit of the constitutional provision. It could very well be said that at the time the extrajudicial confession of *Magtoto* was taken, the necessity for the right had already been recognized. There was, in the very least, a clamor for its adoption. It was only a matter of time before it was formally adopted. There seems to be, therefore, no need to distinguish. What is important is the date when it was sought to be offered in evidence. If the danger feared is its unsettling effect on the administration of justice, does it mean that there is no such danger if an assertion is made that the right existed beginning January 17, 1973? In other words, what is the difference between extrajudicial confession obtained without the benefit of counsel before the effectivity of the present Constitution and the one obtained after its effectivity that to consider admissible the former and inadmissible the latter would not be unsettling to the administration of criminal justice but to consider both of them inadmissible would be unsettling?

V. CURRENT TRENDS IN THE UNITED STATES

In the case of *United States v. Ash,*[104] the respondent and another individual were charged with robbing a bank. Shortly before the trial, and after the defendants had been indicted, a Federal Bureau of Investigation agent and the prosecutor showed 5 color photographs to four witnesses of the robbery. Three of the witnesses selected the respondent Ash's photograph, and none selected that of Bailey, the co-defendant. At

[104] 408 U.S. 942, 92 S.Ct. 2849, 33 L.Ed. 2d 766 (1972).

the trial, the photographs and the fact that the identifications had been made were admitted into evidence at the prosecutor's request.

Writing for the majority, Justice Blackmun argued that the purpose of the right to counsel was to protect the defendant from the intricacies of the procedural system and the skill of the trained public prosecutor. The Court indicated that the *Wade* and *Gilbert* decisions were based on the finding that identification confrontations were "trial like" in that they involved "opportunities for prosecuting authorities to take advantage of the accused." A photographic identification, on the other hand, is not the physical confrontation spoken of and the majority concluded that it is therefore not sufficiently "trial-like" for the right to counsel to apply.

The Court further said that a photographic identification is essentially a species of interview between the prosecutors and its witnesses. While abuses are always possible at such interviews, the majority maintained that this possibility had never led to the introduction of opposing counsel into the prosecutor's trial preparation process. The accused is safeguarded from abuses principally by the "ethical responsibility of the prosecutor."

In *Kirby v. Illinois*,[105] petitioner and a companion were stopped by police officers and asked for identification. Each produced items bearing the name "Shard". The police brought Shard, the robbery victim, and took him to a room in the police station where the petitioner and his companion were seated at a table with two police officers. They were not represented by counsel. Shard identified the two suspects as the robbers. At trial, after the judge had overruled a pretrial defense motion to suppress his testimony, Shard testified as to his previous identification at the police station and again identified the defendants as the robbers. The appellate court affirmed the conviction, holding that *per se* the exclusionary rule of *U.S. v. Wade* and *Gilbert v. California* did not apply to pre-indictment confrontations. The Federal Supreme Court on *certiorari* affirmed the appellate court. It was held that a lineup after arrest but before the accused becomes the subject of a criminal prosecution is not a critical stage of the criminal proceeding at which the accused, under the Sixth and the Fourteenth Amendments, is entitled to counsel.

If the trend in the United States is to be indicated by these two cases, it is apparent that there is a perceptible departure from the progressive stance taken in Miranda. In these cases, the protection of the Wade-Gilbert doctrine is held not to be available for photographic identifications. Although counsel is available for corporeal identification, the accused will not be able to avail himself of this protection until formal accusation occurs. In this regard, a writer commented:

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[105] 406 U.S. 682, 92 S.Ct. 1877, 33 L.Ed. 2d 411 (1972).

> "Since the confirmation of Chief-Justice Burger, and Justice Blackmun, Powell and Rehnquiest, the winds of change have begun to sweep over the broad spectrum of law and order issues. Over the past decade, the Warren majority extended significantly the controversial exclusionary rule pertaining to the admissibility of evidence in a criminal proceeding. Today, the premises upon which this rule was based are the subject of an assault by the Burger court."[106]

On this basis, he predicted that the *Miranda v. Arizona* as well as the exclusionary rule are slated for revision.

VI. IMPLEMENTATION AND PRACTICE

Today, there has already been a response to the Magtoto decision. But even before the promulgation of the decision, on July 11, 1974, the Joint Circular[107] of the Department of Justice and National Defense was directed

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[106] Gangi, L., A Critical View of the Modern Confession Rule, 28 ARKANSAS L. REV. 1 (1974).

[107] To implement the foregoing constitutional provision Article IV, sec. 20, the following rules and regulations are hereby promulgated:

1. Whenever any person, civilian or military is under custodial interrogation, that is, when the investigation ceases to be a general investigation of unsolved crimes and begins to focus on the guilt of the suspect and the suspect is taken into custody or otherwise deprived of his freedom of action in any substantial manner, it is mandatory, before such person is interrogated, that he be warned that he has a right to remain silent; that any statement he makes may be used as evidence against him, and that he has a right to the presence of counsel, either retained or appointed.

One conducting the investigation should have for his use a card, the contents of which he must read to the person apprehended and certified to by him as to compliance in any statement that said person may voluntarily give, the contents of which shall be as follows:

"You are under investigation for the commission of _____ (Here state the facts constituting the offense). Before we ask you any questions, you must understand your legal rights.

"You have a right to remain silent.

"Anything you say may be used as evidence against you.

"You are entitled to assistance of counsel of your own choice.

* * *

2. The appearance of counsel shall be entered into the record of the investigation. Thereafter, all further notices shall be served upon counsel.

3. Not more than one counsel may be allowed each person undergoing investigation within the purview of paragraph 1 above, and only one duly-admitted by the Supreme Court to practice law may appear as counsel.

4. Notwithstanding the above procedural safeguards, the one conducting investigation or custodial interrogation is authorized to exclude a counsel who impedes or shows an obvious inclination to impede the administration of justice without prejudice to the respondent's retaining other counsel who will not so impede the administration of justice.

5. The person under investigation may voluntarily waive his right to remain silent and to counsel. In such event, the one conducting the investigation should obtain the written waiver of the person being interrogated. Such waiver may be in the following form:

to all officers, civilian and military, conducting criminal investigations.

A. *Elements consistent with Miranda*

Section 1 in effect embodies certain aspects of Miranda leaving its protections intact. The language of the Circular parallels the Miranda warnings. The rule that if the person consents to answer questions without the assistance of counsel, but later asks for a lawyer at any point in he investigation, the interrogation must cease until an attorney is present, although not specifically provided for, appears to be likewise operative since under Section 1 of the assistance of counsel is an acknowledged right of the accused.

B. *Elements inconsistent with Miranda*

Section 3 gives room to imply that a counsel need not at all times be present during the custodial interrogation. Notices need only be sent to the counsel thereafter. This is complemented by the provisions of Section 4, which grant the authority to exclude counsel who impedes or shows inclination to impede the administration of justice. Why only one counsel is allowed the unarticulated premise that if more than one is allowed, the investigation would be hampered.

It is however the provisions of Section 5 which did not escape the notice of Justice J.B.L. Reyes who saw the danger of waiver without the presence of counsel.[108]

"I have been advised of my right to remain silent, that anything I say may be used as evidence against me, and that I have the right to a lawyer to be present with me while I am being questioned.

"I understand these rights and I am willing to make a statement and answer questions. I do not want the assistance of counsel and I understand and know what I am doing. No promises or threats have been made to me and no force or pressure of any kind have been used against me."

6. The above requirements do not affect the power of the police to conduct general investigations of an unsolved crime. When an individual is in custody on probable cause, police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrouding a crime or other general questioning of citizens in the fact-finding process is not covered by these rules.

Strict compliance herewith is enjoined.

[108]"It is the IBP's position that any such waiver should be executed in the presence of a lawyer or a responsible member of the family of the detainee and couched in a language or dialect known to the detainee and fully explained to him in order to remove any doubts as to the comprehension and voluntariness of the waiver, and we have so manifested to the authorities concerned. An overzealous investigator could easily take advantage of the section aforesaid to nullify the right to silence and to counsel that the Joint Circular endeavours to protect by influencing a detainee to execute the written waiver an inducement that under ordinary circumstances, the detained suspect may find difficult to resists." 2 J. INTEG. BAR PHIL. 122 (1974).

C. *Practices*

It is however, in the area of actual practice where most problems abound. A study conducted in Yale of non-custodial interrogation of draft protestors who were highly-educated and intelligent middle-class students and professors at Yale shows this result:

> "Even though the suspects understand that they could refuse to answer whenever they choose, they had only the vaguest intention about how to decide whether to answer a given question. Their decision whether to waive their right to remain silent was made on hunch alone, without any of the knowledge or understanding required to make it "knowing and intelligent." Their waiver of the right to a lawyer's advice was even less informed, since their ignorance of the significance of the right to silence was compounded by their ignorance of the functions a lawyer might have performed for them."[109]

One reason suggested in the Yale study was that the law enforcement officers cannot be expected to give warnings in a sympathetic way or to assure full comprehension and appreciation in a suspect.[110]

Another equally interesting study shows the omissions on the part of all the actors or participants in custodial interrogation.[111] On the part of the police, it was found out that they in fact failed to observe the spirit and letter of the Miranda rule. The defendants were reported not to have given the stationhouse counsel warning, and over 2/3 as not being given all the Miranda warnings. The defendants themselves were loathe to use attorneys and frequently gave statements to the police because of their inability to apply Miranda to their own circumstances. Over 9/10 of those arrested for felonies and serious misdemeanors did not request counsel. As to the attorneys, they were often unavailable at the critical point in time necessary to protect defendant's rights, because of the delays between the time of arrest and the time the attorney arrived at the station and because of the reported failure of the police to curb interrogation until the defendant consulted the attorney. Moreover, because so few attorneys even thought of telephoning the defendant before setting out for the station house and because so many spent so short a time with the defendant once there, little effort was made in mitigating the consequences of the time delays and police practices. If these be taken as universal indication of the dangers attending the implementation of the rule, we might as well learn from them early. Ultimately, a vigorous educational

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[109] Griffiths and Ayres, A Poscript to the Miranda Project: Interrogation of Draft protestors, 77 YALE L. J. 300 (1967).

[110] *Ibid.*, at 309.

[111] See Medalie, Zeitz & Alexander, Custodial Police Interrogation: The Attempt to Implement Miranda in Our Nation's Capital, 66 MICHIGAN L. REV. 1395 (1968).

campaign is necessary to inform participants in the custodial interrogation process of the mechanics of the new rule.

VI. Conclusion

Alexander Solzhenitsyn, the exiled Russian author, has remarked:

> It seems as virtual fairy tale that somewhere, at the ends of the earth, an accused person can avail himself of a lawyer's help. This means having beside you in the most difficult moment of your life a clear-minded ally who knows the law.[112]

Yet as we stand with Solzhenitsyn, we must also understand a deeper truth. The Gulag Archipelago is not a piece of geography. It is the human condition everywhere a person is denied the right to defend himself adequately and effectively in criminal proceedings against him.

Our Constitution has established an ideal of criminal justice. Yet, a provision tells us nothing of the actual practices under it. It is to be hoped that in the future further discussions of the new constitutional privilege will be undertaken with a view to expanding its application so that the policy underlying it may be fully implemented.

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[112] Alexander Solzhenitsyn, The Gulag Archipelago (T. Whitney Transl., 1974).