

Closing the Gap: The Need for Military Prosecution Appeal Right to Ensure Exclusive Accessibility to Justice

Menutup Jurang: Keperluan Hak Rayuan Pendakwaan Tentera untuk Memastikan Kebolehcapaian Eksklusif kepada Keadilan

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ABSTRACT

With its unique characteristics and sui juris nature, the military justice system is designed specifically for the armed forces and operates independently from the civilian criminal justice system. The same applies in Malaysia, where the system also differs from the ordinary criminal justice system in several aspects, including the availability of appeals. While the Public Prosecutor and the accused in the civilian criminal justice system have the right to appeal against a court's decision, the right to appeal for the prosecution in a court-martial is absent. This study aims to examine the implication of the absence of the military prosecution appeal right in Malaysia, exploring its impact on fairness and effectiveness in relation to Sustainable Development Goal 16 (SDG Goal 16). The absence of the prosecution's right to appeal hinders their ability to seek justice in the military justice system and goes against SDG Goal 16, which promotes peaceful and inclusive societies for sustainable development, provides access to justice for all, and builds effective, accountable, and inclusive institutions at all levels. This study argues for the need to introduce a robust military prosecution appeal right in Malaysia's military justice system that would help promote peace, justice, and strong institutions. By addressing this gap, Malaysia can enhance the fairness and effectiveness of its military justice system, contributing to the broader objectives of sustainable development and justice for all.

Keywords: court-martial; military; justice; appeal; prosecution

ABSTRAK

Dengan ciri-ciri unik dan sifat sui juris yang tersendiri, sistem keadilan tentera direka khusus untuk angkatan tentera dan beroperasi secara bebas daripada sistem keadilan jenayah awam. Begitu juga di Malaysia, di mana sistem ini juga berbeza daripada sistem keadilan jenayah biasa dalam beberapa aspek, termasuk hak untuk merayu. Walaupun Pendakwa Raya dan tertuduh dalam sistem keadilan jenayah awam mempunyai hak untuk merayu terhadap keputusan mahkamah, namun tiada hak rayuan bagi pihak pendakwaan dalam mahkamah tentera. Kajian ini bertujuan untuk mengkaji implikasi ketiadaan hak rayuan pendakwaan tentera di Malaysia, meneroka kesannya terhadap keadilan dan keberkesanan berhubung dengan Matlamat Pembangunan Mapan (SDG) 16. Ketidadaan hak rayuan pendakwaan menghalang keupayaan mereka untuk menacari keadilan dalam sistem keadilan tentera dan bertentangan dengan Matlamat SDG 16, yang mempromosikan masyarakat yang aman dan inklusif untuk pembangunan mapan, memberikan akses kepada keadilan bagi semua, dan membina institusi yang efektif, bertanggungjawab, dan inklusif di semua peringkat. Kajian ini memberikan hujah untuk keperluan memperkenalkan hak rayuan pendakwaan tentera yang kukuh dalam sistem keadilan tentera Malaysia yang akan membantu mempromosikan keamanan, keadilan dan institusi yang kukuh. Dengan menangani jurang ini, Malaysia boleh meningkatkan keadilan dan keberkesanan sistem keadilan tenteranya, menyumbang kepada objektif pembangunan mapan yang lebih luas dan keadilan untuk semua.

Kata Kunci: Mahkamah Tentera; tentera; keadilan; rayuan; pendakwaan

INTRODUCTION

The military justice system in Malaysia deviates from the conventional criminal justice system in several significant ways, notably in terms of the availability of appeals. While the ordinary criminal justice system allows the Public Prosecutor to appeal a court's decision, such a right is noticeably absent within the realm of court-martial proceedings. Based on observation, the military legal system is a separate and unique legal system created to enforce certain standards of behaviour and maintain discipline in the armed forces. (Eng & Jaafar 2009) This study aims to critically analyse the absence of the prosecution's right to appeal under Malaysia's military justice system. It also aims to consider the broader context of Sustainable Development Goal 16 (SDG Goal 16), which emphasizes the establishment of peaceful and inclusive societies, ensuring access to justice for all, and building effective, accountable, and inclusive institutions at every level. By examining the limitations of the military justice system concerning this goal, a better understanding can be attained regarding the implications of the absence of a prosecution appeal right.

In light of these considerations, the introduction of a robust prosecution appeal right within Malaysia's military justice system becomes essential. Such a reform would align with the principles of SDG Goal 16 and contribute to the promotion of peace, justice, and strong institutions. Addressing the absence of this right is crucial to maintaining the integrity of the military justice system, as it helps prevent potential impunity for military personnel involved in wrongful acts.

LITERATURE REVIEWS

Without literature reviews, one would fail to grasp the subject matter, the existing research, the methodologies employed, and the crucial matters on the topic (Hart 2018). According to (Gushchyn, O. et al. 2023), military law is highly significant as it governs the relations pertaining to the activities of the military organization within society to ensure the protection of the state, state sovereignty, and territorial integrity. (Gushchyn, O. et al. 2023) also finds that the purpose of military law is to contribute to the maintenance of order and discipline in the military forces, to increase the effectiveness of military law, and thus strengthen national security. In Malaysia, the available references on military law are limited compared to international literature. The conducted analysis revealed a significant scarcity in the writings and studies about military law itself, especially those focusing on the needs of the appellate system within the military justice system in Malaysia. Based on the suggestion put forward by Omar (1996) it is essential to create a Court-Martial Appeal Court that handles appeals from both the accused and the prosecutors. He further added that a potential approach for its structure and operations could draw inspiration from another country as a working model. Furthermore, as indicated by Aziz (2019), there is a strong endorsement for the serious discussion of various issues, particularly the matters concerning human rights and the appeals system in military courts, which have been debated extensively in numerous countries. According to Omar (1996), in contrast to the United Kingdom, Singapore, Australia, and the United States which each have its own Court-Martial Appeals Court, the Malaysian military legal system has none, despite efforts in the late 1980s to establish one. In the United States, as Fidell (2023) explains when Congress enacted The Uniform Code of Military Justice (UCMJ), it had a variety of related goals. Among those goals was to establish a uniform disciplinary system for all of the armed forces, overseen by a civilian court, the jurisdiction of which would be confined to the appellate review of courts-martial. Fidell agreed that the UCMJ

was undoubtedly a major reform, and the creation of a civilian appellate court was arguably its crown jewel. Further, according to Hargis (2024), The United States Congress purposely created the Court of Appeals for Armed Forces as a specialized court overseeing an exclusively military system of law.

To summarise, the limited availability of literature on military law in Malaysia, particularly regarding the appellate system within the military justice system highlights the need for the establishment of a Court-Martial Appeal Court as earlier suggested by Omar (1996). This would address crucial issues such as human rights including the right of appeal and the appeals process in court-martial, aligning with the international discourse such as principles of SDG Goal 16 on these matters.

METHODOLOGY

Using a doctrinal research methodology, this study delves into the legal framework governing the prosecution's appeal rights within the Malaysian military justice system. By highlighting the existing gaps in the legal provisions, this research draws comparisons with the prosecutorial appeal rights granted in the civil court system. As (Marhaban & Shukri 2022) mentioned, one of the main objectives of the legal study conducted is to identify legal principles enacted by the legislative body and applied within the court system to understand the status of a particular issue or problem from a legal perspective. Additionally, it aims to analyse the weaknesses or gaps in the existing legal system to generate new knowledge or to provide suggestions for improvements to the studied legal system. The primary sources referred to in this study include relevant statutes, legal regulations, and reported cases. These encompass the Armed Forces Act of 1972 [Act 77], the Armed Forces (Court-Martial) Rules of Procedure 1976, the Armed Forces (Summary Jurisdiction) Regulation of 1976, and the Criminal Procedure Code [Act 593]. Secondary sources such as books, journals, articles, thesis, conference papers, and project papers were also utilised as references.

RESULTS AND DISCUSSION

Ensuring exclusive accessibility to justice to all is important, it is no less insignificant within the military justice system. In this discussion, we examine the military justice system in Malaysia, the definition of appeal and its rationale, elaborate on the appeal by public prosecutors in the common criminal court, have a brief insight from an international perspective, and finally discuss the context from SDG 16.

THE MILITARY JUSTICE SYSTEM IN MALAYSIA

In the context of the military justice system in Malaysia, it is important to note that the right to appeal is not available to either the prosecution or the accused. Nevertheless, under Section 123 of the Armed Forces Act 1972 [Act 77], the word petition is used to give the right to the accused to present a petition against the finding or sentence or both. At first glance, the word petition may signify that the accused is appealing his case to a reviewing or higher authority and that an appeal is in place. Moreover, the procedure prescribed by the Armed Forces (Court-Martial) Rules and Procedures 1976, Rule 101(2) also uses the word petition which provides that an accused sentenced

by a court-martial can submit a petition within six months of promulgation against the sentence to a reviewing authority or an officer authorised to reconsider court-martial sentences.

The usage of the word “petition” triggers some confusion regarding the availability of the appeal’s right in a court-martial. The Court of Appeal’s case decided in 1997 was best to demonstrate the confusion concerning the word “petition” used in Malaysia’s military justice system’s post-trial mechanism. According to the judgment made by the learned Court of Appeal judges in the case of *Lt Kol Yusof bin Abdul Rahman v Kol Anuar bin Md Amin & Anor* [1997] 1 MLJ 562, “Rule 101 of the Rules provides the accused with a right of appeal.” The judges further elaborate, in which the exact wording is reproduced as follows:

“As we indicated earlier, the appeal period under r 101(2) has long since expired. If a court did err in applying the wrong yardstick on the burden of proof, or wrongly admitted inadmissible evidence, or committed some other procedural error, it is always open to the appellate court to rectify the matter. Appeals are by way of rehearing and the appellate court can therefore determine what the result ought to have been if the proper tests had been applied. It will not interfere unless there has been a miscarriage of justice”.

However, with all due respect, it is crucial to clarify that the word “petition” used above is not attributed to the appeal but to the process of review only. These have been voiced out by Omar (1996) as he argued that the term “petition” used in military legislation is a result of the British legacy where it represented a formal request for relief and remedy against alleged wrong of the court-martial. There is no re-hearing or relitigation on matters of facts but only to the extent of the legal conclusions arrived at by the court-martial. By virtue of Section 128 Armed Forces Act 1972 [Act 77], the principles applicable in considering a petition are similar to those applicable in review. Therefore the significance of the term “petition” lies in the fact that unlike an “appeal”, the petitioner is deprived of a right for a re-hearing against his convictions on questions of facts. In arriving at these inferences, Omar (1996) referred to the word petition in the old English law since there is no statutory definition of the word petition. Thus, the judgment cited in the above case saying that Rule 101 of the Rules provides the accused with a right of appeal may be misled by the word “petition” used and it was inaccurate. It is hoped that this clarifies the confusion or any misunderstandings anyone may have had and all are clear about the absence of the right of appeal under the military justice system in Malaysia.

ACCUSED RIGHT TO SEEK REDRESS

Nonetheless, based on the above discussion, it is crucial to highlight that the accused does possess alternative avenues to seek redress. Specifically, they have the opportunity to submit applications for review to reviewing authorities or pursue a judicial review to the High Court. These mechanisms serve as essential means by which the accused may seek an assessment of their cases, ensuring fairness and justice within the military justice system. According to Suppiah (1984), the court-martial is largely subject to the control and supervision of the civil court. However, the High Court is bound not to interfere with the findings of the court-martial. The established legal principle is clear that the High Court does not serve as an appellate court. In the case of *Kolonel Dr. Faiz Azraai Bin Abdul Aziz v Mahkamah Tentara* [2019] MLJU 1175, the applicant sought a certiorari order to set aside the decision made by the court-martial. The respondents on the other hand argued that the High Court does not have the power to interfere with matters related to military actions and military laws governing the control and discipline of military officers. The High Court can only intervene when the actions of the military affect the civil rights of the military personnel concerned. The learned Judge Nordin bin Hassan ruled that the law is clear that judicial review

can be sought when a decision is tainted by illegality, irrationality, or procedural impropriety. In the absence of these elements, the High Court dismissed the judicial review application. It is evident that the High Court, as a civil court, will not arbitrarily interfere with the findings or decisions of the court-martial in carrying out its role during judicial reviews.

In another case of *Lt Kol Yusof bin Abdul Rahman v Kol Anuar bin Md Amin & Anor* [1997] 1 MLJ 562, the Court of Appeal ruled that the civil court should exercise caution to ensure that applications masked as certiorari applications do not turn into appeals. The civil court should only intervene in exceptional circumstances. Recently, as reported on September 7, 2022, by FMT Reporters (2022) the Malacca High Court granted a judicial review application by military personnel Fazli Fadzil, as the High Court Judge found procedural irregularities that rendered the challenged order invalid. Furthermore, as FMT Reporters (2023) reported on January 12, 2023, the Kuala Lumpur High Court rejected a judicial review application filed by former sergeant Wan Ramli Wan Seman who was discharged from service for refusing to comply with the COVID-19 vaccination directive. The Kuala Lumpur High Court Judge Ahmad Kamal Shahid stated that there was no legal wrongdoing or irrational action on the part of the military in terminating his service.

THE ABSENCE OF MILITARY PROSECUTION RIGHT TO APPEAL

The foregoing discussion indicates that the accused has the right to seek redress under the current system. Nonetheless, this privilege does not apply to the prosecution. The prosecutor in a court-martial is not entitled to apply for a review to reverse an acquittal ordered by a court-martial nor can the prosecutor apply to enhance the sentence passed. A review is only with regard to a conviction and not against acquittal. Where a court-martial acquits an accused having found the prosecution failing to establish a *prima facie* case, the matter is *res judicata* and the reviewing authority is not empowered by law to direct the court-martial to reassemble and call the accused to enter his defence. This scenario indicates that the prosecution's post-trial right under the military justice system is limited compared to the rights enjoyed by the accused. In other words, there is no right given to the prosecution to challenge a decision that is not in its favour. Thus, the prosecution should strive to present its case as effectively as possible without the opportunity for a second chance.

TABLE 1. Statistic of the Malaysian Army Court-Martial Case from 2016 to July 2022

No.	Year	Total Case Number				
		Total cases registered/ carried forward from the previous year	The accused plead guilty	The accused was acquitted and discharged at the end of the prosecution case	The accused was acquitted and discharged at the end of the defence case	The accused was convicted and sentenced at the end of the defence case.
1.	2022 (July)	170	160	6	2	2
2.	2021	213	195	12	1	5
3.	2020	352	329	9	1	13
4.	2019	375	322	12	7	34
5.	2018	408	371	15	-	22
6.	2017	391	332	32	1	26
7.	2016	336	285	27	3	21
Total		2245	1994	113	15	123

Source: The Malaysian Army (2022)

The statistical data pertaining to court-martial cases within the Malaysian Army from 2016 to July 2022 is presented in Table 1 above. According to the data, there were a total of 113 cases in which the accused were acquitted and discharged without being required to present their defence at the end of the prosecution's case. Additionally, there were 15 cases in which the accused were acquitted and discharged at the end of the defence's case. Based on the aggregate of 128 cases, it is apparent that the prosecution is ineligible to initiate an appeal. It is worth noting that although the prosecution is not obliged to pursue an appeal in every case, they may choose to exercise their right to appeal when deemed appropriate, depending on the circumstances.

There is no definition given by Act 77 regarding the word "prosecutor". Nonetheless, Rule 2 of the Armed Forces (Court-Martial) Rules of Procedure 1976 defines "prosecutor" as "a legal officer of the Ministry of Defence and includes a service prosecuting officer appointed in writing by the convening authority". Convening authority is a qualified officer who either was given a Warrant by His Majesty or delegated by a qualified officer who has the said Warrant to convene a court-martial. The qualified officer can be the Chief of the Armed Forces Staff, the Chief of the Army, the Chief of the Navy, the Chief of the Air Force, and any officer not below the rank of colonel or its equivalent who is in command of a body of troops or of a naval command or of a body of the air force. However, Rule 51 (4) of the Armed Forces (Court-Martial) Rules of Procedure 1976 specified that if the prosecution is to be undertaken by a legally qualified prosecutor, the accused shall be notified of this fact in sufficient time to enable him, if he so wishes and it is practicable, to make arrangements for an advocate and solicitor to defend him.

Military law operates under the command of a commanding officer (CO). Based on Section 97 of the Armed Forces Act 1972 [Act 77] and Regulation 12 of the Armed Forces (Summary Jurisdiction) Regulation 1976, a CO is an officer who has powers of command over a person charged with an offence and the jurisdiction to deal summarily with certain offences against certain categories of accused. According to Omar (1997), the power given to the CO is like those of the Attorney-General. As such, the law confers on the CO of an accused the power of prosecutorial discretion, in which the CO alone is empowered by law to decide whether a particular case should be tried by court-martial or dealt with summarily by him or even condoned by him.

DEFINITION OF APPEAL

Appeal according to Garner (2004) in Black's Law Dictionary is "a proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal". According to Merriam-Webster (2003) of Merriam-Webster's Collegiate Dictionary, an appeal is a legal proceeding by which a case is brought before a higher court for review of the decision of a lower court. (Dahl & Whelan 1960) define an appeal in their military law dictionary as a proceeding by which a cause is brought from an inferior to a superior court for re-examination or review and reversal, retrial, or modification. Further elaboration specifically referred to the United States context is provided that the provision is made by the statutes of the United States and of the various states for taking appeals in criminal cases from the courts of original jurisdiction to a higher court for review. Thus, convicted persons are afforded every opportunity to rectify any errors that may have been made. The defence must file the application for appeal with reasons, within the short time after conviction. From this definition, Dahl & Whelan defined the term appeal as a broader concept that may include various post-trial mechanisms.

According to Marshall (2011), criminal appeals are a crucial feature of the modern criminal justice process. A conviction cannot be considered final until the right of appeal has been

either exercised up to the highest level or waived. Marshall further argues that the right to appeal is expanding. The right to appeal against convictions and sentences, in most jurisdictions, is considered a fundamental right, whether based on statutory provisions or enshrined in the Constitution. Taking into account the viewpoints of (Nobles & Schiff 2022), the system of appeals is generally understood as a means of supervising decisions made by lower authorities through higher authorities, to ensure accuracy, fairness, and consistency, and provide a mechanism for setting precedents. This system is typically implemented hierarchically, with appeals serving as a tool for superiors to correct decisions or oversee subordinates. As Dalton (1985) suggests appellate courts exist to rectify errors, develop legal principles, and bring geographically dispersed lower courts into a unified and authoritative legal system. The appellate courts are considered best positioned to determine when, where, and how the law requires clarification or review. As such, there is a need for the intervention of appellate courts to provide interpretations of the law that may sometimes be vague or unclear.

In the words of Alagan (2018), an appeal is a continuation of the trial. Based on the decision in the case of *Balasingam v Public Prosecutor* [1959] 1 MLJ 193, it is solely a continuation in the form of a rehearing, where the parties involved, including the appellate court, have the right to examine the reasons behind the findings. In the case of *Edlesten v LLC* [1981] 1 KB 18, it was decided that an appeal is a transfer of a case from a lower court to a higher tribunal with the hope of reversing or modifying the previous decision. Based on Shavell (1995), the appeals process whereby a litigant disappointed with the decision of a first-order tribunal can seek reconsideration before a higher tribunal is a widely observed feature of adjudication.

Based on the above definitions, an appeal is exclusively a continuation through a rehearing process wherein all parties involved including the appellate court have the right to scrutinize the rationale behind the finding of the lower court.

THE RATIONALE FOR THE APPEAL

The fact that only the accused has the right to seek redress while the prosecution does not introduce a potential element of bias and unequal treatment within the legal system. This unequal treatment arises from the disparity in the ability to challenge or contest a court's decision. By granting the accused the right to file a review, the legal system acknowledges that individuals facing criminal charges should have the opportunity to seek a review of their cases if they believe that errors or injustices occurred during the trial. This recognition aligns with the fundamental principle of ensuring fair and impartial proceedings. However, when the prosecution is excluded from the same process, it creates an imbalance in the system. The prosecution represents the interests of the services and has a vested interest in seeking justice. By denying the prosecution the ability to file a review or appeal, there is a potential limitation on their ability to rectify any perceived errors or address instances where they believe the court's decision may be flawed. According to Rashid et al. (2019), the prosecution is a responsibility and trust that must be carried out carefully because any negligence can jeopardise the rights and freedom of the individuals involved. However, Alexander Pope, a poet lent a famous line "To Err is Human" from his 1711 treatise *An Essay on Criticism* which signifies it is human nature to make mistakes Pope (1713 [1712]). Thus, even with meticulous conduct, there exists a possibility that errors, whether originating from the prosecution's endeavours or potential misinterpretations of the law by the bench, may arise. In such cases, the avenue for appeal becomes essential, providing a mechanism to rectify and address any unintended discrepancies in the pursuit of justice. The orthodox view is that appeal serves to correct trial errors and thus protect individual rights. Uniformity of law is also commonly advanced

as a purpose of appeal Shapiro (1980). As has been highlighted by Shavell (1995), the correction of errors is the social justification for examining the appeals procedure. Ideally, a balanced and fair legal system should provide avenues for both the accused and the prosecution to seek review and appeal if they believe that errors or injustices have occurred during the trial. This approach promotes equality, transparency, and the pursuit of justice for all parties involved. Based on observation made by (Isamail, H. et al. 2024), an appeal process ensures greater transparency and allows all parties to have a say during the proceedings.

According to the concept of “equality of arms,” as outlined in domestic and international law, it is the principle that both parties should enjoy equal treatment and equal procedural rights throughout the trial process Negri (2007). Article 6 of the European Court of Human Rights establishes the equality of arms concept in the context of the right to a fair trial. Whereas Article 14 of the International Covenant on Civil and Political Rights provides that all persons shall be equal before the courts and tribunals. This means that both the prosecution and the defence should have an equal opportunity to present their case, access relevant information, call witnesses, and challenge evidence. The principle of equality of arms aims to ensure a fair and balanced trial where neither party is disadvantaged in terms of their rights or the resources available to them.

As Fidell (2016) has highlighted, in the United States, the prosecution has the right to seek review by the highest court of the military justice system in any case, while the accused must show "good cause" to obtain a review, which denies equality of arms. Both the prosecution and the defence should have equal access to permissible procedures. However, in Malaysia, not only has the prosecution been denied the right to appeal but they have also been deprived of the same right to review or reconsideration of cases enjoyed by the accused. According to Kronenberg (1958-1959), allowing the prosecution to appeal is crucial as it materially contributes to the development of proper legal principles. The practice of bringing cases to the higher court for review is predominantly initiated by convicted or unfavourable parties. As rightly pointed out by Adams (1975), the accused cannot and certainly will not appeal for favourable decisions. Without this right in the military criminal justice system in Malaysia, there is a lack of visible legal development, which is a crucial aspect.

Furthermore, Article 7(2) of the Federal Constitution states that a person who has been acquitted or convicted of an offence shall not be tried again for the same offence. This *autrefois* convict and *autrefois* acquit protect the accused from repeated prosecutions for the same offences. Justice Black, in his dissenting opinion in *Bartkus v Illinois*, 359 U.S. 121, 151-155 (1959), described the principle that a defendant cannot be tried twice for the same offence as “one of the oldest ideas found in Western civilization” with roots in early Greek, Roman, and canon law. Under Rule 94 the Armed Forces (Court-Martial) Rules of Procedure 1976 also states that a person is not to be tried twice for the same offence. The basic question that arises in this particular context of double jeopardy is whether the prosecution may appeal against a sentence imposed on a convicted person. According to Louise (1999), the prosecution’s appeal of the same cause of action is merely a continuation of the trial court’s proceedings, and thus cannot be regarded as a violation of double jeopardy principles. A defendant is not exonerated of a crime until his case has been resolved by the court with the most authority. The double jeopardy principle only applies after the defendant has been acquitted or convicted by the highest hierarchically empowered tribunal. Thus, granting the right to appeal to military prosecution does not amount to a violation of double jeopardy protection.

APPEAL UNDER THE MALAYSIAN LEGAL SYSTEM IN MALAYSIA

Appeals play a crucial role in the Malaysian legal system, allowing either the accused or the prosecution to challenge a court's decision. In Malaysia, the right to appeal is not specifically guaranteed by the Federal Constitution, unlike other rights such as the right to freedom of speech, freedom of religion, and the right to legal representation. It is a well-established legal principle that the right to appeal exists only if provided by the relevant statute. In the case of *Dato Seri Anwar Ibrahim v Public Prosecutor* [1999] 1 CLJ 537, the Honourable NH Chan JCA ruled that “[1] There is no right of appeal at law from a decision of a court to any other court unless there is a statutory provision which gives a right to appeal”. In *Khor Ewe Suan & Anor v PP* (1964) MLJ 220, the court decided that there is no general right of appeal. In the case of *Koay Ban Siew v Public Prosecutor* [1948] MLJ 54, it was decided that appellate jurisdiction is only a creation of statute, and it extends only as far as the words of the statute necessarily require. According to Backer (2014), notwithstanding the above decision, it must be emphasised that the appellate jurisdiction is not only a creation of statute but also part of constitutional guarantees.

The highest-ranking prosecutor in Malaysia is the Attorney-General who is also referred to as the Public Prosecutor. Article 145 (3) of the Federal Constitution provides that “[t]he Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial”. Whereas Section 376(1) of the Criminal Procedure Code [Act 593] clearly mentions that the Attorney-General shall be the Public Prosecutor who has the control and direction of all criminal prosecutions and proceedings under the Criminal Procedure Code [Act 593]. From Article 145(3) of the Federal Constitution, it is evident that even the Public Prosecutor holds discretionary power to institute, conduct or discontinue any criminal proceedings, but he has no power in court-martials. By virtue of Sections 376(3) and (3A) of the Criminal Procedure Code [Act 593], the Public Prosecutor may appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor, and may also appoint fit and proper persons to be Assistant Public Prosecutors who shall be under the general control and direction of the Public Prosecutor. With respect to a criminal appeal, Section 378 of Act 593 provides that no person shall appear on behalf of the Public Prosecutor on any criminal appeal other than the Public Prosecutor, a Senior Deputy Public Prosecutor, or a Deputy Public Prosecutor.

Due to the absence of a constitutional guarantee, the right of appeal can only be exercised when explicitly enshrined in the relevant legislation. The laws that govern the appeal process in the criminal justice system in Malaysia are the Criminal Procedure Code [Act 593] and the Courts of Judicature Act 1964 [Act 91]. Nevertheless, it should be noted that since the Criminal Procedure Code [Act 593] exclusively applies to civilian courts in Malaysia, both the prosecution and members of the military are unlikely to benefit from the same rights under the Armed Forces Act 1972 [Act 77] (Saman & Dahari 2021). The Criminal Procedure Code [Act 593] is an act relating to criminal procedure with the object of setting out a body of rules, which must be followed in the investigation, inquiry, and trial of offences under the Penal Code and other Acts. Act 593 will not apply to offences under other Acts if there is a special procedure prescribed under the other Acts as expressed by the maxim *generalalia specialibus non-derogant*. Section 307 of the Criminal Procedure Code [Act 593] provides the right of appeal to any person who is dissatisfied with any judgment, sentence, or order by any Magistrate Court to the High Court.

According to Chapter XXX of the Criminal Procedure Code [Act 593], it states that any mention of a Magistrate and Magistrates' Court should be interpreted to include a reference to a Sessions Court judge or a Sessions Court, as applicable. However, it is important to note that there are differences in the right to appeal between Magistrates' Courts and Sessions Courts. In the case of a criminal matter decided by a Magistrates' Court, the appeal process begins with the High Court exercising its appellate criminal jurisdiction under Section 26 of the Courts of Judicature Act 1964 [Act 91]. Subsequently, the appeal can be pursued by the Court of Appeal, but only with the leave of the Court of Appeal. Additionally, such an appeal is limited to questions of law that have arisen during the appeal or revision, and the determination of these questions by the High Court must have affected the outcome of the appeal or revision. This was demonstrated in the case of *Ishak bin Haji Shaari v Public Prosecutor* [2006] 3 MLJ 405, where an application for leave to appeal was dismissed because the raised questions were matters of fact rather than law. Regarding a criminal appeal originating from a Sessions Court, the initial appeal is made to the High Court, in accordance with Section 26 of the Courts of Judicature Act 1964 [Act 91]. Subsequently, the appeal can be pursued to the Court of Appeal under Section 50(1)(b) of Act 91. In such cases, there is no requirement to obtain prior leave from the Court of Appeal. Section 87 of the Courts of Judicature Act 1964 [Act 91] however prohibits an appeal from the Session Courts to the Federal Court. All decisions of the High Court of its original jurisdiction are appealable to the Court of Appeal and up to the Federal Court, except for habeas corpus in which the appeal is straight to the Federal Court.

INTERNATIONAL PERSPECTIVE

Based on the report produced by the United Nations High Commissioner for Human Rights (UNHCHR) United Nations A/HCR/28/32 regarding the summary of discussions held during expert consultations on the administration of justice through military tribunals and the integral role of the justice system in combating human rights violations, the UNHCHR has made the following recommendations:

"The experts' presentations showed that, in some States, there were significant gaps in implementing the right to a fair trial. Questions were raised concerning the practice of summary proceedings for lesser offences, which in some States did not allow for the presence of legal counsel or the right of appeal. States were invited to take appropriate measures to ensure that the right to fair trial in military tribunals was in full conformity with the International Covenant on Civil and Political Rights".

Considering the above recommendations put forward by the UNHCHR, it is crucial to thoroughly examine the military criminal justice system in Malaysia to establish specific provisions that allow for appeals by both the accused and the prosecution. Various international conventions have emphasized the importance of fair procedures and equal rights for all citizens. Malaysia is currently working towards ratifying several international conventions pertaining to human rights and the criminal justice system.

Referring to the procedure of allowing appeals by the prosecution, several countries have implemented such practices. "Comparative analysis is adopted by comparing and contrasting the applicable laws in selected jurisdictions in order to improvise on the shortcomings and deficiencies of the laws..." (Randawar & Jayabalan 2018). (Nadzri & Hassan 2019), mentioned that "...considering Malaysia like other countries in the world that are currently influenced by the era of globalization and economic liberalization, it is necessary to look at various perspectives and emulate the experiences undergone by countries that have made significant progress and are highly

committed to updating their legal frameworks, taking into account their current needs and internal affairs”.

In the UK, there is the Court-Martial (Prosecution Appeals) Order 2009 which grants the prosecution the right to appeal to the Court-Martial Appeal Court against rulings made in military court proceedings where, if the ruling is not set aside, the accused would be acquitted. This power and procedure closely align with the civilian court system. Furthermore, in the United States, appeals filed by the United States Government itself are permitted under Article 62 of The Uniform Code of Military Justice (UCMJ), known as “Appeal by the United States”. In addition, from the perspective of Islam, (Rahman et al. 2019) emphasised that Islam is a complete religion with teachings capable of comprehensively addressing various challenges that arise in all aspects of life. Indeed, Islam provides a comprehensive legal system necessary for governing human life. According to (Shariff & Rahman 2018), in addition to the emphasised principles of Islamic justice, Caliph Umar Al-Khattab also addressed several Sharia principles related to prosecution procedures based on Saedon (1996) in his book, namely, in any judicial assembly or trial, both the prosecuting party and the accused party (in criminal trials) have the right to present arguments and evidence. To elaborate, both the party initiating the legal proceedings i.e., the prosecution and the accused or defendant are afforded the fundamental right to present their arguments and evidence in any courtroom or trial. This highlights the significance of a just and unbiased legal proceeding in which all parties are afforded the chance to present their arguments and defend their stances. This principle is consistent with the Islamic notion of justice as a whole, which guarantees that legal proceedings are carried out openly and impartially.

ACTION TO PROMOTE PEACE, JUSTICE, AND STRONG INSTITUTIONS UNDER SDG 16

Under SDG 16, there are twelve targets for promoting peace, justice, and strong institutions through action. The very least we can do to assist in achieving SDG 16 is to place an emphasis on Target 16.3, which is to promote the rule of law both at the national and international levels and ensure equal access to justice for all. Given that the global goal is to ensure equal access to justice for all, the proposal for the military prosecution appeal right is not only long overdue but also fully aligned with the inherent objectives of SDG 16. Granting the military prosecution, the right to appeal will ensure exclusive accessibility to justice, particularly within the military justice system and the Malaysian criminal justice system as a whole. This would ensure that everyone has equal access to justice-seeking opportunities and eliminate any superfluous exclusions.

CONCLUSION

The findings underscore the fact that the current Malaysian military justice system fails to grant the military prosecution the right to appeal against a court-martial decision. This deficiency significantly impedes the prosecution’s ability to seek justice within the military justice system, thereby contravening the principles outlined in SDG Goal 16. Considering the discussion, it is evident that few countries have taken proactive measures to reform their military criminal justice systems for quite some time. It is now time for Malaysia to follow suit and initiate similar steps to modernize its military justice system, focusing on enhancing the rights of not only the accused but also the prosecution. Drawing on insights from Vashakmadze (2018), the objective of reforming the military criminal justice system is to improve its effectiveness, ensure the delivery of high-

quality justice by military courts, and align it with changes in domestic laws, international human rights standards, or the specific needs of the relevant military institution.

In conclusion, the time has come for Malaysia to embark on a comprehensive overhaul of its military criminal justice system, taking inspiration from the practices of other countries. By undertaking this reform, Malaysia can demonstrate its commitment to upholding the principles of fairness, equality, and accountability within its military justice system. This step would align the country with international practices and standards, while also enhancing its reputation as a responsible member of the international bodies. Moreover, a reformed military justice system that allows for appeals by the prosecution would foster a more balanced and equitable legal framework, where both the accused and the prosecution have equal opportunities to seek justice and ensure that the rule of law prevails. By putting light on the absence of the prosecution's right to appeal and its significant consequences for SDG Goal 16, it is hoped that this article will contribute to the ongoing discussion around Malaysia's military justice system. The recommendations made in this study seek to improve the military justice system's effectiveness while promoting peace and justice for all military members, both of which are essential for accomplishing the goals specified in SDG Goal 16.

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