



AN OVERVIEW OF THE MILITARY JUSTICE SYSTEM IN MALAYSIAN ARMED FORCES

LEGAL OFFICE

MALAYSIAN ARMED FORCES HEADQUARTERS



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"Verily! Allah commands that you should render back the trusts to those, to whom they are due; and that when you judge between men, you judge with justice. Verily, how excellent is the teaching which He (Allah) gives you! Truly, Allah is Ever All-Hearer, All-Seer"

An-Nisa -58

HISTORICAL BACKGROUND

1. Historically the first military legislation formulated by the British Forces came into force in 1933 by virtue of the Malay Regiment Enactment No 11/33 (MRE) which authorized the raising of the first Malayan Infantry Experimental Company. The MRE survived through Malaysian history as then superseded by the Armed Forces Act 1972 (Act 77) when British vacated Peninsular Malaysia in early 1971. Since 1933 to the present, military law has existed as a separate autonomous legal system, a *lex fori* within the country's judicial system. The military law covers a wide spectrum of legal principles, rules and regulations.

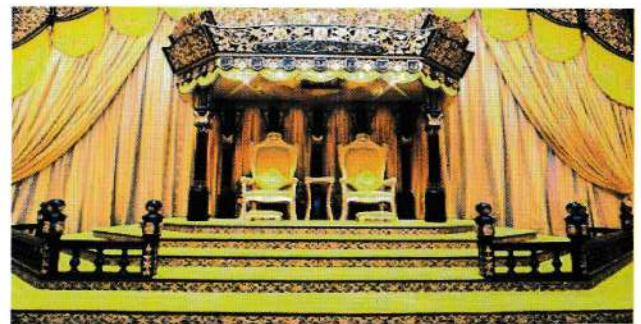
2. This separate legal autonomy is enshrined in Article 145(3) of the Malaysian Federal Constitution (FC) which excludes the jurisdiction of the Attorney General in respect of court martial. Presently the Malaysian Armed Forces (MAF) is governed by the Act 77 and its legislation.



FIRST MALAYAN INFANTRY EXPERIMENTAL COMPANY

SOURCES OF MILITARY LAW

3. The Act 77 superseded the MRE which itself was a progeny of the British Army Act 1955. It sought to consolidate eight different legislations then in force prior to 4th May 1973 and repealed the following prior statutes:
 - a. Malay Regiment Enactment.
 - b. Federation Regiment Enactment 1952.
 - c. Military Forces Ordinance 1952.
 - d. Navy Ordinance 1958.
 - e. Air Forces Ordinance 1958.
 - f. Territorial Army Ordinance 1958.
 - g. Naval Volunteer Reserve Ordinance 1958; and
 - h. Air Force Volunteer Reserve Ordinance 1958.
4. Briefly, the sources of Military Law are to be found in the following:
 - a. Federal Constitution.
 - b. Act 77 and its subsidiary legislation.
 - c. Penal Code.
 - d. Criminal Procedure Code.
 - e. British Army Act 1955.
 - f. Judicial precedents, Armed Forces Council Instruction, Armed Forces Orders, Unit Orders; and
 - g. Customs of the service.
5. By virtue of the Federal Constitution, Article 137 creates the Armed Forces Council (AFC) which shall be responsible under the general duty of His Royal Highness Yang di-Pertuan Agong (YDPA) for the command, discipline and administration of, and all matters relating to the armed forces except matters relating to operation of war. Hence, Article 41 declares that the YDPA shall be the Supreme Commander of the MAF. Under the powers given by the FC, the AFC issues rules, regulations, instructions and orders, etc which have the force of law.



THRONE OF HIS ROYAL HIGHNESS

PRINCIPLES AND JURISDICTION OF MILITARY LAW

6. In administering justice in the service and in exercising its functions, certain principles are employed in application of military law as follows:
 - a. **Concurrent Jurisdiction.** The military justice system does not deprive nor absolve a soldier from his civil rights and liabilities. Apart from that, it also extends to certain Foreign Forces attached to the MAF.¹ By joining the armed forces, a person does not cease to be a citizen. With a few exceptions, his position under the civil law remains unaltered and if he commits a civil offence, he can like all citizens be tried and punished by a civil court. The soldier however submits himself to certain additional statutory obligations which comprise the disciplinary code necessary to maintain good order and obedience. Therefore, by submitting to military jurisdiction, the soldier does not abrogate civil rights and protection afforded under the general civil law and where his civil rights have been infringed at the expense of military injustice, he may seek remedy in the civil courts by way of prerogative writs of certiorari and prohibition.² He must however accept the Act 77, Rules, Regulations and Orders made thereunder as these express his obligations. They announce his military rights. To

¹ s.210 - 213 Act 77

² Judgment of Lord Goddard in R v Secretary of State for War, Ex parte Martyn (1949) 1 AER 242.

the extent, neither his liberty nor his person or property may lawfully be infringed.³

b. **Military Offences.** In respect of disciplinary matters, s.103 Act 77 provides that a court martial shall have power to try any person subject to service law for any offence triable by court martial and thereafter to award any punishment authorized by the Act. The procedural aspects of court martial is provided by s.119 Act 77 which confers power on the Minister of Defence to make rules of procedure in respect of the investigation of charges, trial by court martial and other provisions concerning sentencing. In the exercise of powers, the Minister made the Armed Forces (Court Martial) Rules of Procedure 1976 (RP).⁴ Rule 3 of RP expressly stipulates that all offences under the Act 77 shall be inquired into and tried according to the RP subject to any written civil law regulating the manner or place of inquiring into or trying such offences.

c. **Territorial Jurisdiction.** Unlike the criminal jurisdiction of the civil courts which is limited to local jurisdiction and to the High Seas,⁵ s.107 Act 77 provides that a court martial may be convened within and outside the territories of the federation. There is no legal objection to the convening of a court martial to preside any place in the world. For this reason, military law has been successful in maintaining discipline of the MAF deployed for active duty in Cambodia, Somalia, Bosnia-Herzegovina, Lebanon, Afghanistan, Namibia, Congo, Timor Leste and etc.

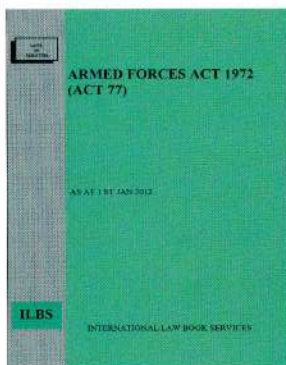
d. **Command Function.** Military law as a means of administering justice seen as a 'command function' to be applied by military commanders in regulating discipline amongst subordinates. Thus, the military commanders employ military law as a means to assist him disciplining his men to achieve the highest standards of a military code of conduct.

e. **Hierarchical Jurisdiction.** Military law is limited in jurisdiction, i.e. the administration of law is relative to the peculiar rank structure, hierarchy of command and by nature of offences committed. For

³ Heddon v Evan TLR (1919) Vol. XXXV.

⁴ LN(A) 163

⁵ s.59 and 76 Subordinate Courts Act 1984 and s.9 Criminal Procedure Code (F.M.S Cap 6) in respect of the territorial jurisdiction of lower courts; s.22 Court of Judicature Act 1964 provides for similar local jurisdiction including offences committed on the High Seas.



ARMED FORCES ACT

8. **Rules and Regulations.** There are various enabling provisions contained in the AFA which allows for the making of the rules and regulations which are necessary to regulate service law:

a. **Armed Forces (Field Punishment) Regulations 1976.** It regulates the procedures and the nature of the punishment to the offender. Through this regulation, the offender is liable to undergo duties or drills in addition to those which he might be required to perform and may include confinement not exceeding 90 days in such place and manner as may be required.

b. **Armed Forces (Board of Inquiry) Rules 1976.** These rules regulate the procedure to investigate and report on the fact relating to the absence of any servicemen who has been absent without leave for 21 days and the deficiency (if any) in the arms, ammunition, clothing, equipment, instruments or service necessities of the serviceman or relating to any manner which may be referred to except where the subject matter is of investigation by the Royal Malaysian Police, Civil Authority or of proceeding under Act 77 in a civil court.

c. **Armed Forces (Summary Jurisdiction) Regulations 1976.** To regulate the summary dealing of charges, jurisdiction and sentences

example, a military offence can only be investigated and tried by a particular authority according to prescribed methods.

f. **System of Check and Balance.** Military law is governed by a system of check and balance where almost all discipline proceedings are subjected to system of approvals, confirmation and reviews.

g. **Choice of Legal Proceedings.** Military law affords an accused soldier a right to demand trial by court martial and has the right to be defended by a lawyer of his own choice.

LAWS APPLICABLE IN THE MILITARY LEGAL SYSTEM

7. **Armed Forces Act 1972 (Act 77).** - The Act 77 which is modeled on the British Army Act 1955 received the royal assent on 28 April 1972 and was gazetted on 4th May 1972. The Act which came into force on 1st June 1976 is the main source of military law that provides law relating to establishment, government and discipline of the armed forces. It has ten parts consisting of 217 sections. The Act is only applicable to the armed forces personnel and does not apply to civilians unless they embark as passengers on board military ships and aircrafts or employed during active service. The Act is now the statutory legislation governing the regular forces, the regular reserve forces and the volunteer forces. Briefly it covers various aspects as follows:

- Terms of service.
- Service offences.
- Administration of military justice.
- Jurisdiction and procedures.
- Confirmation and appeals.
- Pay, forfeitures and deductions.
- Redress of complaints.
- Reserve Forces and Volunteer Forces.

for the Subordinate Commanders, Commanding Officers and Appropriate Superior Authority (ASA).

d. **Armed Forces (Imprisonment and Detention) Rules 1976.** It regulates the procedures of imprisonment and detention of a convicted person who is subject to service law with regard to places in which and the establishment or forms of custody, committal of persons under service sentence of imprisonment or detention, provision, classification, regulation and the management of service establishment, treatment, employment, discipline and control of persons serving service sentence of imprisonment and detention etc.

e. **Armed Forces (Court Martial) Rules of Procedure 1976.** It regulates matters with regard to arrest, investigation of offences and charges, the taking of evidence, trial procedures of court martial, petition, review, rights and duties of court officers.

LEGAL PERSONALITIES

9. **Yang di-Pertuan Agong (YDPA).** His Royal Highness is the Supreme Commander of the Armed Forces and has power to grant pardons, reprieves and respites in respect of all offences which have been tried by court martial. His Royal Highness also on the recommendation of the AFC at any time without assigning any reason therefore cancel any commission granted to any officer.⁶

10. **Armed Forces Council.** The AFC established under Article 137 FC shall be responsible under the general authority of the YDPA for the command, discipline and the administration of, and all other matters relating to the armed forces, other than matters relating to their operational use.

11. **Judge Advocate General (JAG).** The JAG appointed by the YDPA to perform in respect of the armed forces including advising the AFC, Confirming Officers and Reviewing Authority on the validity of the findings and sentences of Court Martial, and to advise any other matters in which from time to time referred to him, appointing persons having legal experience to act as judge advocate at court martial.

12. **Judge Advocate (JA).** A JA is appointed by the JAG upon the request of the Convening Authority to act at court martials. The JA is to advise the court upon all question of law or procedures which may arise.

⁶ s.9 of the Act gives absolute power to the Yang di-Pertuan Agong on the recommendation of the Armed Forces Council at any time without assigning any reason therefore cancel any commission to any officer.

13. **Commanding Officer.** An officer who has powers of command over a person charged with an offence and the jurisdiction to deal summarily certain offences and certain categories of accused.

14. **Subordinate Commander (SC).** This refers to the officer commanding a squadron, battery, company or equivalent sub unit, or any officer appointed to be a subordinate commander by the AFC or by an officer in command not below the rank of Brigadier General or corresponding rank. The SC has the power to investigate and to deal summarily certain offences and against categories of accused provided that the commanding officer delegate those powers to him.

15. **Appropriate Superior Authority.** An officer who has the jurisdiction to deal summarily certain offences and against certain categories of accused. In this case, an officer not below the rank of Col or equivalent may be appointed and act as ASA.

16. **Convening Authority.** The convening authority is a qualified officer who either was given a warrant by the YDPA or delegated by the qualified officer who has the said warrant to convene a court martial.

17. **Approving Authority.** This refers to officer to approve certain punishments awarded by the commanding officer.

18. **Confirming Authority.** This is an authority provided under the act to confirm any finding or sentence passed by the court martial. A finding or sentence by a court martial shall not be treated as a finding or sentence of the court martial until confirmed and promulgated.

19. **Reviewing Authority.** A finding and sentence passed during the summary dealing either by the subordinate commander, commanding officer or a court martial can be reviewed by the reviewing authority. The authority in either situation can quash or substitute.

COURT MARTIAL PROCEEDING

20. The procedure at a court martial is substantially similar to the proceedings of a trial before a civil court. In many ways, the trial procedures in both legal systems are similar although they are not the same.

21. A court martial is established by the convening authority to try an accused person under the following circumstances:⁷

⁷ s.96 Act 77

a. Where the charge is against an officer whose rank is a Lt Col or its equivalent and above and the CO has not dismissed it.

b. Where the charge is one which cannot be dealt with summarily.

c. Where the charge is against an officer below the rank of Lt Col and its equivalent and against a warrant officer and the CO has not dismissed it and the ASA does not take steps to deal summarily the charges although he has the jurisdiction to do so.

d. Where the ASA afforded the election to be tried by a court martial during the summary trial and the accused elects for court martial.

e. Where the charge against an appointed officer or a servicemen or volunteer below the rank of warrant officer after investigation is not one which can be dealt with summarily and the CO has not dismissed it or the charge is one which can be dealt with summarily but the CO is of the opinion that it should not be so dealt with or;

f. If, after the charge has been dealt with summarily by the CO, the accused elects to be tried by court martial.



COURT MARTIAL

COMPOSITION OF THE COURT MARTIAL

22. A court martial is generally a 'trial by his peers'. His peers may or may not be legally qualified. It is stated that the officers forming the court must belong to the same service as the accused except where in the opinion of the convening authority/officer the necessary number of officers of the same service having the requisite qualification at the place where the court martial is convened is not available in which case the convening officer may, with the consent of the proper authority of another service, appoint officers of other services.

23. The court martial may sit with the assistance of a judge advocate where the convening authority is of the opinion that a judge advocate ought to sit with the trial panel at a court martial.⁸

24. Under the Act 77, the composition of a court martial varies according to the rank of the accused. Generally, a District Court Martial (DCM) trying a serviceman comprises a legal minimum of three commissioned officers whereas a General Court Martial (GCM) trying a warrant officer or commissioned officer or any offences with the maximum or only punishment is death, must comprise of a legal minimum of five commissioned officers.⁹ In a DCM, the president of the court martial generally shall not be below the rank of Major and in a GCM, he must not below the rank of Lt Col.¹⁰

25. A court martial is ordinarily held in open court and is considered a solemn event treated with decorum, dignity and the highest order of discipline. It is assembled by order of the convening authority and once properly constituted, it acts in a judicial capacity as a court of law and court of justice.

RIGHT OF THE ACCUSED

26. Any military persons who have been formally charged with an offence and after due inquiry the case is remanded for trial by a court martial has the right to:

- a. Obtain copies of documents which would be tendered as part of the evidence for the prosecution.¹¹

⁸ s.151 of the Act which deals with the powers conferred on the Judge Advocate General to appoint the Judge Advocate to act at any court martial.

⁹ s.103 Act 77.

¹⁰ s.105(5) Act 77.

¹¹ s.51A Criminal Procedure Code

b. A written statement of facts favourable to the defence of the accused signed under the hand of the prosecutor or any person conducting the prosecution.¹²

c. Right to counsel of his own choice/defending officer.¹³

d. Right to obtain copy of charge sheet.¹⁴

REMEDIES AGAINST THE DECISION OF COURT

27. In the military justice system, there are no express provisions for appeal against the findings and/or sentences meted out by the court martial. Nevertheless the accused has the right to petition for revision in respect of findings or sentences of court martial under certain circumstances which are:

a. **Petition to the Confirming Officer.**¹⁵ This will take place after an accused person who has been sentenced by a court martial before confirmation.

b. **Petition to Reviewing Authority.**¹⁶ An accused person who has been sentenced by a court martial may petition after promulgation against the sentence to a reviewing authority. The said petition must be filed within six months of the promulgation.

c. **Judicial Review.**¹⁷ Court Martial proceedings are subject to the control and the supervision of the civil courts by way of judicial review. Judicial Review is a process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions. Judicial Review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled to an application for judicial review to consider whether the decision itself, on the merits of the case was fair and reasonable.

¹² Ibid

¹³ This right is guaranteed under Article 5 of the Federal Constitution. The accused also shall be afforded a proper opportunity for preparing his defence and shall be allowed proper communication with his defending officer or counsel and with his witnesses.

¹⁴ rp.51(S) LN(A) 163; The accused also shall be given if he so requires, a list of ranks, names and units of the president and members who are to form the court and any waiting members.

¹⁵ s.124 Act 77.

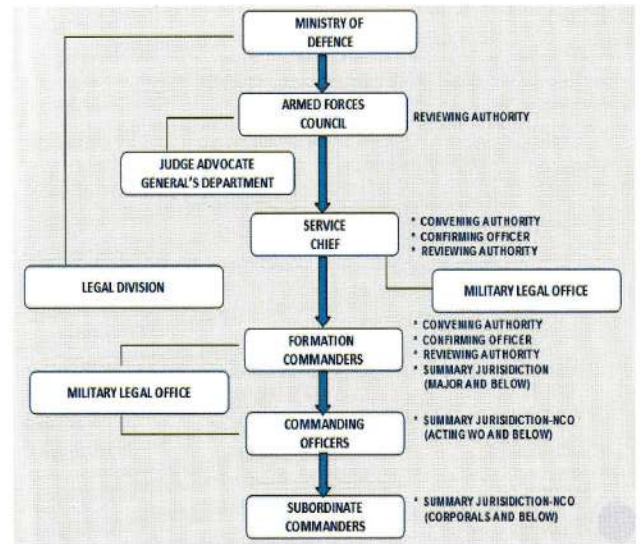
¹⁶ s.128 Act 77.

¹⁷ As to the nature of Judicial Review see 9 *Halsbury's Laws of Malaysia Administrative Law (Original Title Scheme)* [160.059]

PERSONNEL OF A COURT MARTIAL

28. Court martial comprises of:
- President.
 - Judge Advocate.
 - Members of the court (minimum of two).
 - Officer under instruction.
 - Prosecuting Officer.
 - Defence Counsel/ Defending Officer.
 - Recording Officer.
 - Court Clerk.
 - Court Orderly.

MAF LEGAL ORGANIZATION



REFERENCES

Armed Forces Act 1972.

Armed Forces (Court Martial) Rules of Procedure 1976 (PU(A) 163.

Teo Say Eng, Colonel Wan Mazlan Jaafar, "Military Legal Proceedings in Malaysia", *Lexis Nexis Malaysia Sdn Bhd* (2009).

Lt. Colonel Syed Ismail Syed Omar, "Military Law: Jurisprudence And Jurisdiction". (1997) 2 MLJ lvii.

Lt. Colonel Syed Ismail Syed Omar, "Court Martial: Comparative Aspects of Trial Practice (1998) 1 MLJ xxv.