

An Inquest into the Distinctive Features of Malaysian Military Law

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To Link this Article: <http://dx.doi.org/10.6007/IJARBSS/v9-i6/6219>

DOI:10.6007/IJARBSS/v9-i6/6219

Published Date: 30 June 2019

Abstract

Military forces all over the world have independent legal systems which are exclusively designed to warrant the smooth running of the armed forces administratively and to ensure utmost respect to the backbone of the military, namely discipline. Thus, when a person decides to be a member of armed forces, he should be mentally and physically prepared that he is going to be subjected to an additional law, namely military law. Anywhere in the world, this law is administered by a system which is independent of the standard civil legal system. This article is intended to discuss the unique characteristics of Malaysian Military Law in four (4) dimensions namely the threefold objectives of military law, the autonomous features of military law, the legality of command power, and the unique characters of Malaysian military judicial hierarchy system.

Keyword- Armed Forces Act 1972, Military Law, Military Justice System

Introduction

Malaysian military law, by virtue of history, derives its origin from the British military legal system with a modicum modification to suit local conditions. The first formal legal document of establishing a force was the Malay Regiment Enactment (MRE) Enactment enacted by the British Malayan Government in 1933. The Enactment copied the British articles of war with some modifications to meet the local conditions. It was intended to raise one experimental platoon consisting of Malays to be part of the British Army in defending the British Malayan Government. By December 1941, the Malay Regiment had increased the strength to two battalions, which fought in defence of the country during the Second World War. By 1958, four other Ordinances were legislated to form the regular forces namely the Federation Regiment Ordinance 1952, The Military Forces Ordinance 1952, the Air Force Ordinance 1952 and the Navy Ordinance 1952.

After the attainment of independence on 31st August 1957, it became essential to revise the MRE and other ordinances in keeping with the constitutional changes brought in the

country. Subsequently, the Armed Forces Act 1972 (AFA 72) was enacted. The Act was published in the Gazette on 4th May 1972 and came into force on the 1st July 1976. The main object of the Act was 'to amend and consolidate the law relating to the establishment, government and *discipline of the armed forces of Malaysia*'. It repealed the then existing law enactment and ordinances namely the Malay Regiment Enactment 1933, Federation Regiment Ordinance 1952, the Military Forces Ordinance 1952, the Navy Ordinance 1958, the Air Force Ordinance 1958, the Territorial Army Ordinance 1958, the Naval Volunteer Reserve Ordinance 1958 and the Air Force Volunteer Reserve Ordinance 1958.

The AFA 72, for the most part, was based on the British Army Act 1955, the United Kingdom Army and Air Force Act, small parts of United Kingdom Naval Discipline Act and the Indian Navy Act, thus making the Malaysian military legal system operates in the same way of that British system before Malaysian independence (Suppiah, 1984, p.7). As it is now, the Malaysian Constitution and the AFA serves as the main legislation to administer and regulate the Malaysian Armed Forces (MAF). Both legislations retain special criterions of military law in various aspects viz the threefold objective of military law, its existence as an autonomous legal system, the legality of command power and the unique system of judicial hierarchy.

The Threefold Objectives of Military Law

One may think that the component that makes up military law is no more than the enforcement of discipline and command orders, the effect of non-compliance; one may face criminal charges for disobeying military code of conduct. That proposition is relatively based on the basis that most writings and publications on military law discuss military discipline offences, commanding officer power to investigate and pass sentence summarily and proceedings of the court-martial. This can be seen in the books written by Suppiah, Teo Say Eng and Colonel Wan Normazlan which in great depth provides exposure to the military court procedure (Suppiah, 1994; Eng and Normazlan, 2009). In addition, significant influence of such thinking and assumption mooted from the fiction screenplays and movies, such as, to name few, *Anatomy of a Murder* (Preminger, 1959), *Billy Budd* (Ustinov, 1962), *Breaker Morant* (Beresford, 1980), *Caine Mutiny* (Dmytryk, 1954), *Rules of Engagement* (Friedkin, 2000), *Court Martial of Billy Mitchell* (Preminger, 1955), *Hart's War* (Hoblitt, 2002) and the famous *A Few Good Men* (Reiner, 1992). That notion is somewhat incorrect. Hence military law comprehends not only the discipline part but also to include, the components of administrative law and operational law.

The military discipline law is necessary for MAF operational capability by dealing with offences that affect military discipline. This includes offences that are unique to the military and other offences that occur within the military environment. The discipline law provides frameworks within which penal and disciplinary offences are investigated and judged, regardless of crimes which are committed during times of peace or operational activities in Malaysia or abroad. The AFA fortifies the system of discipline by providing rules and regulations to the investigation of disciplinary offences, types of crimes, punishments available, the creation of courts and service tribunals, trial procedures in the courts and rights of review and appeal. The military justice system, specifically under the discipline system provides the MAF with a Malaysian legal framework which is able to be applied in operations anywhere in the world. This is essential because the MAF may conduct operations in countries where the civil system has broken down. The system applies to all MAF members in times of

peace and war, whether in Malaysia or overseas. Offences committed by MAF members that considerably affect the maintenance and ability to enforce Service discipline in the MAF are prosecuted under the AFA 72 within the military justice system.

The military administrative law consists of the provisions governing the establishment of military institutions, the service terms of contract, the enlistment of soldiers, the appointment of officer cadets, the commission of officer, the rules relating the budget, expenditure, procurement and logistics, and miscellaneous military customs, tradition and administrative matters to ensure the smooth running of military forces. Thus, the military administrative law's objective is to ensure that the establishments and resources of the forces run smoothly when the military service is in need. This includes regulations and provisions relating to the training of officers and servicemen, education for soldiers and officers, welfare, religious and sports activities which are regulated at the various levels of military establishments.

The third component of military law is the military operations law is that body of law dealing with planning and executing the deployment and employment of MAF elements in both peacetime and combat military operations. By its nature, it transcends traditional military legal disciplines and incorporates relevant aspects of international law, criminal law, administrative law, acquisition law and fiscal law. Its function is to enable the Legal Staff Officers to provide a broader range of informed legal advice to the commander, thus, contributing more positively to the overall success of the mission.

To sum up, the object of military law does not confine to the enforcement of discipline, but to include a various aspect of military administrative and operational law to ensure the highest level of the capabilities of the force.

Military Law Exists as a Discrete System from the Normal Civil System

Ever since 1933 till present, military law in Malaysia has existed as a separate autonomous legal system, as such to be a *lex-foi* within the country's judicial system (Syed Ismail, 1997). It is considered a legal system which is recognised by the constitution, the same standing as the Syariah court system, native court system and tribunals made under various legislations. According to Article 145 (3) Federal Constitution, "*the 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*". Thus, the Federal Constitution specifically excludes the powers of the Attorney General to institute any proceeding against any persons in the court-martial system.

In *Peter Chong Ngen Onn & ORS v Col Adam Bin Abu Bakar & Ors* [1977] 2 MLJ 142, "*the appellants who were the members of the armed forces, applied to the High Court for an order prohibiting the court-martial from proceeding with the hearing of charges against them under the Malay Regiment Enactment. It was alleged that the court-martial had no jurisdiction or had exceeded its jurisdiction and had acted contrary to the general law of the land and the rules of natural justice*". The application was dismissed at the High Court, and the appellants appealed to the Federal Court. In dismissing their application, the court ruled that: (1) the court will not intervene in matters relating to military law prescribing rules for the guidance of officers; (2) the court could only interfere with military courts and matters of military law

in so far as the civil rights of a soldier might be affected; and therefore even if it is shown that a court-martial had not been convened in accordance with the Rules of Procedure the court had no jurisdiction to interfere.

In coming to that conclusion, the panel of judges presided by Suffian LP referred to the case of ***The King v the Army Council Ex parte Ravenscroft*** [1917] 2 KB 504 and the case of ***R v Secretary of State for War Ex parte Martyn*** [1949] 1 All ER 242. In ***The King***, Viscount Reading C.J (at pages 509, 510 and 511) said:

"It is to be observed that the complaint of the [applicant] before this court is that he had no notice of the reassembly of the court of inquiry, and therefore no opportunity of cross-examining the witnesses and giving his own explanation. These matters would be very relevant if we were considering the procedure of a civil court. He relies on the Regulations for Courts of Inquiry which, as he says, have been infringed. ... It appears to me that this is a military matter. The [applicant] was under military law. His complaint, if any, is against his superior officer who directed the convening of the court of inquiry and the officer who in his view wronged him by not giving him a proper opportunity of presenting himself on the last two occasions when the court of inquiry met."

However, it is to be noted that, if the military authorities have not taken any action in any military legal proceeding, the civil authorities may take action against offenders in criminal cases. For example in the case of ***Robin AK Bandang & Ors v Public Prosecutor***, [1998] 4 MLJ 629 the appellants (members of the armed forces) were charged under S 376 of the Penal Code for the offence of rape. The session's court judge held that it had jurisdiction to try the appellant. They appeal against the decision on the ground that *"it was mandatory for a court-martial to try the offence of rape when committed by a person subject to service law"*. In this case, the appellants were never investigated and charged by the military authorities. There was no evidence that they have been investigated by the military police or commanding officers neither any decision been made to deal the case summarily or to be tried by a court-martial. KN Segara J then held that in dismissing the appeal that *"the Attorney General has no power under Art 145 (3) of the Federal Constitution to institute or conduct any proceeding for an offence before a court-martial"*. However, in the present case, *"the Attorney General, has the discretion to institute a proceeding for an offence under S 376 of the Penal Code and the sessions court has jurisdiction to hear the case under S 63 of the Subordinate Courts Acts 1948"*.

The Legality and Sanctity of Command Power

In the military, the word ***command*** is given various meanings in various contexts. The first meaning is that it refers to the ***authority*** that a commander lawfully exercises over his subordinates by virtue of rank or assignment. It includes the authority and responsibility for effectively using available resources and for planning the employment of, organising, directing, coordinating, and controlling military forces for the accomplishment of assigned missions. It also includes responsibility for health, welfare, morale, and discipline of assigned personnel. The second meaning of command is that it denotes ***an order*** given by a commander; that is, the will of the commander expressed for the purpose of bringing about a particular action. The third, command means a unit or units, an organisation, or an area under the command of one individual, for instance, area command and combatant command (command authority).

Ironically, although command connotes different meaning in a different context, it carries legally enforceable instructions and order by those holding the command power. It also carries responsibilities to be upheld by those having and possessing the command power. The person who holds the command power is called commander, commanding officer or officer commanding of a unit. In Malaysian Armed Forces, the Armed Forces Act 1972 provides the judicial and legal authority exercisable by the Subordinate Commander, Commanding Officer, Brigade Commander, Division Commander, Formation Commander and Area Commanders. In general, a commander may administer military justice '*in capax*,' i.e. wearing "different caps on different occasion" in a separate legal capacity. There is no equivalent of this structure to the civil justice system.

The Commanding Officer (CO) occupies a vital position to administer justice in the military legal system. Unlike a superior in a civilian government organization, the CO exercises discretion in deciding whether an offence should be charged and how an offender should be punished. He has several options for the resolution of disciplinary problems. The Commanding Officer may choose to take no action if the circumstances surrounding an event may warrant that no adverse action be taken. The preliminary inquiry might indicate that the accused is innocent, that the only evidence is inadmissible, or the CO may decide that other valid reasons exist for not prosecuting the alleged accused. The CO has several options for the resolution of disciplinary problems whereby he may initiate administrative action against a military offender, dispose of the offence summarily with minor punishment, or dispose of the case with the help of a court-martial. He may choose from two potential levels of court-martial: district, or general court-martial. These courts-martial differ in the procedures, members, rights, and possible punishment that can be adjudged.

It has long been recognized as a custom of the service that military offences can be condoned. For the purpose of barring a trial, condonation means such conduct on the part of a competent authority i.e., an authority having the power to determine that the charge should not be proceeded with, if with full knowledge of the facts, competent authority removes an officer, or allows him to resign, he should not afterwards be tried by court-martial for his offence. Condonation by the competent authority, if proved, operates as a bar to the trial of military offender. The commanding Officers power to condone an offence has no equivalent in the civil system.

In addition, a Division Commander is the Commanding Officer to the Brigade Commanders and Division Troops under the Division Formation. Among others, this power includes the power to investigate of charges and the Prosecutorial Discretion like the powers of Attorney General having the power to determine that the charge should proceed or discontinued. This structure is no equivalent in the civilian legal system.

The Unique System of the Judicial Hierarchy

Summary Trial

The Malaysian Armed Forces embrace an exclusive system of judicial hierarchy. Commanders at various levels and ranks are equipped with judicial powers to investigate, try cases and pass sentences within the limit provided by AFA and its subsidiary rules and regulations. The bottommost in the hierarchy are the **subordinate commanders** who by definition are the officers commanding a squadron, battery, company or any other officers

appointed to act as subordinate commanders (The Armed Forces (Summary Jurisdiction) Regulations 1976 Commonly, Regulation 2). A company consist of about 100 soldiers, typically in three platoons, and usually is commanded by an officer of the rank of Major. Regulation 10 prescribed that their jurisdictions are limited to the investigation and dealing summarily with the charges against the servicemen below the rank of corporal and may pass the following sentence, namely:

- a. a fine not exceeding the aggregate of seven days' pay;
- b. in the case of a non-commissioned officer reprimand;
- c. where the offence has occasioned any expense, loss or damage, stoppages not exceeding one hundred dollars; or
- d. minor punishment.

The second in the ladder and the most dominant judicial empowerment in the system are the **commanding officers**. Generally, the Commanding Officers have the power to investigate cases brought before him, appoint an investigating officer, deals cases summarily, pronounce sentences and if the charges cannot be dealt summarily, to submit to the convening authority for a court-martial to be convened. Upon conviction, the commanding officers have the power to pass sentences against the non-commission officer below the rank of acting warrant officer II. If the charge is against the warrant officer or commissioned officer of the rank of Major and below, he needs to submit the case to the next higher authority, namely the Appropriate Superior Authority.

The judicial power of the **appropriate superior authority** empowers the Brigade or Division Commander (Formation or Area Commander in the case of Royal Malaysian Navy) to investigate charges and try cases summarily against an officer of the rank of 2nd Lieutenant up to the rank of substantive Major or charges against a substantive Warrant Officer, provided that the charge against them are those charges that can be tried summarily under Regulation 15. The power is conferred by Section 98 (1), (2) and (5) of the AFA 72 and if convicted, the appropriate superior authority may award the following sentences:

- a. Forfeiture of seniority for the officers.
- b. A fine not exceeding 14 days' pay.
- c. A stern reprimand.
- d. Reprimand.
- e. Stoppages.

Although the cases can be summarily tried, Division Commander may (if necessary) refer such cases to be tried by the Court Martials. An officer of the rank of Lt Col (substantive) cannot be summarily tried. Any charges against the officer can only be tried by a Court Martial.

Thus, as compared to the civilian legal system, the military legal system provides three tiers of summary trial for different types of soldiers and officer depending on the rank of the accused persons and severity of the offences. It is to ensure cases been disposed of at the speediest time frame so as not to delay justice.

Duties of the Higher Authority

When a commanding officer decides that a case should be dealt with by the court-martial or by the appropriate superior authority, he should submit the case to **the higher authority** for

further direction (The Armed Forces (Court Martial) Rules of Procedure 1976, Rule 38). When the higher authority receives the applications, the division commander (or the formation or the area commander as the case may be) as the higher authority, may, in the case of a soldier considers and approves the application and convenes a Court Martial or to refer the application back to the commanding officer with a direction that the case to be summarily tried in accordance to Section 97 (11) and Section 99 of the Act or to refer the application back to the commanding officer with a direction for the charge to be dismissed (AFA 72, Section 97 & 99). In the case of an officer or substantive warrant officer, the higher authority may consider the application and decide the manner in which the case to be handled either it is to be summarily tried or to convene a Court Martial (AFA 72, Section 98 (1), (2) and (3)). He may also refer the application back to the commanding officer with a direction for the charge to be dismissed or to prefer other charges. The function of the higher authority in both cases is to ensure that the accused person has not been arbitrarily charged and the evidence been judicially considered before the convening of a court-martial or summarily dealt with before the appropriate superior authority.

Trial by A Court Martial

A Court-martial may be convened by any qualified officer so authorized by His Majesty by Warrant or by any officer under the command of an officer authorized as aforesaid to whom the last-mentioned officer has, in the exercise of a power conferred by the Warrant issued to him, delegated his power to convene court-martial (AFA 72, Section 104 (1)). The Royal Warrant granted under Section 104 (1) of the AFA 72, authorises division commanders (or formation or area Commanders) to convene a military court-martial to try cases under the territorial jurisdiction of division headquarters and division troop. The implementation of this power is 'ministerial' in nature, for example, issuance of convening order, the appointment of members of the Court and determination of the accused rights. The duties are provided in Rule 48 to the Rules of Procedure (Court Martial) 1976. Division commander is also empowered to dissolve any court-martial convened by division headquarter.

Review of Sentence and Appellate Jurisdiction

Unlike the civil system whereby an appeal to a decision goes to the higher court for appeal or judicial revision, the military justice system is different from that of the civil court system. When a person convicted of an offence, the findings and sentence are subjected to the approval of approving authority (for summary trial), confirming authority (for court trial) and reviewing authority (for both summary and court-martial trial). Thus, review and appeal of a sentence can be done at various levels.

Powers of approving authority

An "approving authority" is defined as any officer not below the rank of colonel or its equivalent designated by the Armed Forces Council as an approving authority (AFA 72, Section 10). The law requires specific punishments awarded under the particular section by the commanding officer to be approved before such punishments can be carried out. Authority to approve the sentence is given to the Division/Formation Commanders for the following sentences namely detention sentence to NCO (Cpl to Acting Warrant Officer) detention sentence of more than 28 days, punishment of reduction to rank (except for LCpl) and forfeiture of long service and good conduct medal (AFA 72, Section 97 (3)).

Reviewing Authority

An accused person who is found guilty of an offence in a court-martial can make an application for the findings and sentence to be reviewed. In such a case, the offender shall file a petition for review within six months after the confirmation of the sentence. If division commander approves the petition, he may reduce the sentence of a court-martial or replace the sentence of court-martial with another lighter sentence or at the lower scale than the original sentence pronounced by the Court Martial (AFA 72, Section 128). In the case of a decision made in summary trial, the AFA 72 empowers the Division Commander to cancel a decision of a summary trial if he thinks that the findings of the trial are inconsistent with and erred in law. The power also includes replacing the punishments awarded with other lesser punishments in the scale of punishments.

Confirming Officers

Every finding of guilt and sentences awarded by a Court Martial will only be enforceable after confirmation. In confirming the findings/sentence of Court Martial, if the division commander finds that the decision of the court is inconsistent with the law, he may not confirm the sentence (AFA 72, Section 125). He may also reduce the sentences awarded by the court-martial or replace the sentence with another sentence provided the latter is lighter than the original sentence. Usually, the convening authority is also the confirming officer (AFA 72, Section 125).

Conclusion

To conclude with, the military organisation is very much different from the civilian organisation. It is self-administered to ensure the efficient running of the force in peacetime and wartime. It provides a unique and independent legal system germane in various situation, intra and extraterritorial for the achievement and victory of the objective and direction set by the nation.

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