

MISCARRIAGE OF CRIMINAL JUSTICE: THE APPEAL PROCESS AND POST-CONVICTION REVIEW

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ABSTRACT

Concerns about miscarriages of criminal justice are not unfamiliar within the criminal justice system. Cases that involve miscarriages of justice shall persist regardless of amendments made to any legal system. However, in the Malaysian context, official consideration was not sufficiently generated for systemic reform dealing with post-appeal avenues in cases of miscarriage of criminal justice, despite certain weaknesses having been identified. The objective of this article is to analyse the weaknesses in laws pertaining to post-appeal avenues in cases of criminal miscarriage of justice, and provide suggestions for minimising such instances. The research is conducted using doctrinal methodology where legal sources of different countries have been scrutinized. Weaknesses in the Malaysian post-conviction avenues are exhibited in the limited powers of the final appellate court to review its decision, in the review of criminal proceedings, and the granting of royal pardon by the Yang di-Pertuan Agong. The analysis of the response to miscarriages of criminal justice and post-conviction avenues in Malaysia undertaken with the objective that a proper legal mechanism be established, where the victims' right to prove their innocence and obtain a fair trial is ensured. It is hoped that the suggestions given are viewed with an open mind with due regard for the relevant ethical and procedural aspects.

Keywords: Miscarriage of Criminal Justice, Post-Appeal Avenues, Innocence, Legal Mechanism.

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KECUAIAN KEADILAN JENAYAH: PROSES RAYUAN DAN SEMAKAN SELEPAS SABITAN

ABSTRAK

Kebimbangan tentang kecuaiian keadilan jenayah bukanlah sesuatu yang asing dalam sistem keadilan jenayah. Kes-kes yang melibatkan kecuaiian keadilan akan berterusan tanpa mengira pindaan yang dibuat kepada mana-mana sistem perundangan Walau bagaimanapun, dalam konteks Malaysia, pertimbangan rasmi tidak dicetuskan secukupnya bagi pembaharuan sistemik untuk menangani keperluan pasca rayuan dalam kes-kes kecuaiian keadilan jenayah, walaupun kelemahan tertentu telah dikenal pasti. Objektif artikel ini adalah untuk menganalisis kelemahan undang-undang yang berkaitan dengan keperluan pasca rayuan kecuaiian jenayah keadilan dan memberikan cadangan untuk meminimumkan kes tersebut. Penyelidikan ini dijalankan melalui metodologi doktrinal di mana sumber undang-undang negara yang berbeza telah diteliti. Kelemahan dalam keperluan pasca sabitan di Malaysia ditunjukkan dalam kuasa terhad mahkamah rayuan muktamad untuk menyemak keputusannya, mengkaji semula prosiding jenayah, dan pemberian pengampunan diraja oleh Yang di-Pertuan Agong. Analisis tindak balas terhadap kecuaiian keadilan jenayah dan keperluan selepas sabitan kesalahan di Malaysia yang dilakukan dengan objektif bahawa mekanisme undang-undang yang sewajarnya harus diwujudkan, di mana hak mangsa sistem keadilan jenayah untuk buktikan mereka tidak bersalah dan mendapatkan perbicaraan yang adil terjamin. Adalah diharapkan bahawa cadangan yang diberikan dapat dilihat dengan fikiran terbuka bagi relevan etika serta aspek prosedur.

Kata Kunci: Kecuaiian Keadilan Jenayah, Ruang Selepas Rayuan, Tidak Bersalah, Mekanisme Undang-Undang.

INTRODUCTION

Despite countless measures taken by countries to reform their legal system, the issue of miscarriage of justice is found to recur. For example, in the history of the criminal justice system of the United Kingdom, despite of numerous legal amendments, cases of miscarriage of justice are not unheard of even to this day. In Malaysia, the criminal appeal process is governed by certain provisions of law such as the Courts of Judicature Act 1964 ('CJA') and the Malaysian CPC ('CPC'). Additionally, should an accused fail in his appeal to overturn his conviction, he still has the right under the Malaysian Federal Constitution to seek a royal pardon.

It is difficult to define miscarriage of criminal justice for the term itself does not have a common definition. Its definition differs based on how people perceive it.¹ According to Walker, miscarriage of justice is as follows:

“occurs whenever suspects...defendants or convicts are treated by the State in breach of their rights, whether because of deficient process or the laws which are applied to them, or because there is no factual justification for the applied treatment or punishment, or whenever they are treated adversely by the State to a disproportionate extent in comparison with the need to protect the rights of others, or whenever the rights of others are not effectively or proportionately protected or vindicated by State action against the wrongdoers or/by the State law itself.”²

¹ Hannah Quirk, “Identifying Miscarriages of Justice: Why Innocence in the UK Is Not the Answer,” *The Modern Law Review* 70, no. 5 (2007): 759-777, <https://doi.org/10.1111/j.1468-2230.2007.00662.x>; Fiona Leverick and James Chalmers, *Causes of Wrongful Conviction. Post Corroboration Safeguards Review Report of the Academic Expert Group, 1941–1945* (Edinburgh: The Scottish Government, 2014); Michael Naughton, “*The Innocent and the Criminal Justice System: A Sociological Analysis of Miscarriages of Justice*” (UK: Palgrave Macmillan, 2013). According to Naughton, miscarriage of justice is “a particularly nebulous concept. It is used to cover a range of differing situations and scenarios that are often lumped together under the same euphemism.”

² Clive Walker, “Miscarriages of Justice in Principle and Practice,” in *Miscarriages of Justice: A Review of Justice in Error*, ed. Clive Walker and Keir Starmer (London: Blackstone, 1999).

According to Naughton, miscarriage of justice inclineds towards retroactive applied legislation.³ One of the main features of miscarriage of justice is that whatever indictment and/or conviction of an offense has occurred or been given, miscarriage of justice cannot be said to have occurred unless or until, the court has quashed the criminal conviction when the case is re-appealed to court.⁴ Of all definitions given, the probable exclusive definition of a miscarriage of justice was propounded by Frost. According to him, the literature review on miscarriage of justice in the past has largely focused on wrongful convictions with the presumption of innocence until proven guilty (doctrine of presumption of innocence) in the criminal justice system.⁵

Nevertheless, the starting point for the occurrence of a miscarriage of justice can take place at the first instance when an individual reports a case and subsequently, the police in their capacity fails to act on it.⁶ These include wrongful execution of arrests, rejection of complaints and wrongful sentences. Therefore, miscarriage of justice is a phenomenon that can extend beyond the criminal procedure to the execution of imprisonment and beyond.

³ Micheal Naughton, "Redefining Miscarriages of Justice: A Revived Human-Rights Approach to Unearth Subjugated Discourses of Wrongful Criminal Conviction," *The British Journal of Criminology* 45, no. 2 (2005): 165 – 182, <https://doi.org/10.1093/bjc/azh066>.

⁴ Naughton, "Redefining Miscarriages of Justice," 165 - 182.

⁵ Brian Forst, "Managing Miscarriages of Justice from Victimization to Reintegration," *Albany Law Review* 74, no. 3 (2011): 1209.

⁶ Gary Edmond, "Constructing Miscarriages of Justice: Misunderstanding Scientific Evidence in High Profile Criminal Appeals," *Oxford J Legal Studies* 22, no. 1 (2002): 53, <https://doi.org/10.1093/ojls/22.1.53>; Sam Poyser & Rebecca Milne "The Role of Police Investigative Processes in Causing Miscarriages of Justice", *The Psychology and Sociology of Wrongful Convictions*, (2018): 311–351, <https://doi.org/10.1016/B978-0-12-802655-7.00010-1>

With that being said, the criminal justice system bears the responsibility for protecting innocent people from harm and to punish those who violate the law by penalising them with punishments commensurate with the crimes committed. Nevertheless, the miscarriage of criminal justice is a real phenomenon and that can surface at times. Existing discourses on wrongful convictions are not often undertaken by social scientists, rather by legal academics, practitioners and journalists.⁷ Exposure of cases of miscarriage of justice is crucial in raising public awareness of such cases and providing information for social scientific analysis.⁸ Hence, this article discusses the Malaysian post-appeal options currently available and their effectiveness in dealing with cases of miscarriage of criminal justice subsequently providing several legal mechanisms needed to be established to achieve justice.

THE BURDEN OF PROOF IN A CRIMINAL CASE AND THE BLACKSTONE RATIO

The criminal justice system lies on the principle that an accused is innocent until proven guilty. This is also known as the doctrine of presumption of innocence which requires the prosecution to prove the guilt of the accused beyond a reasonable doubt. The presumption of innocence is the principle that one is considered innocent unless proven guilty.⁹ The presumption of innocence, the privilege against self-incrimination and the right to silence are important elements of the ‘accusatorial system of justice’ which generally prevails in the common law world’ as decided in *Lee v New South Wales Crime Commission*.¹⁰

⁷ Clive Walker and Keir Starmer, eds., *Miscarriages of Justice: A Review of Justice in Error* (London: Blackstone, 1999).

⁸ Edmond, “Constructing Miscarriages of Justice,” 53.

⁹ Kai Ambos et al., *Core Concepts in Criminal Law and Criminal Justice: Anglo-German Dialogues* (Cambridge: Cambridge University Press, 2020).

¹⁰ [2013] 302 ALR 363.

The principle of the presumption of innocence is celebrated in the House of Lords case of *Woolmington v The Director of Public Prosecutions* [1935] UKHL 1. This case has been regarded as the first official recognition under English law that an accused was found innocent until proven guilty by the court¹¹. John Sankey LC, 1st Viscount Sankey had memorably stated in *Woolmington's* judgment, also known as the 'golden thread' concept that the prosecution has a responsibility to prove its case beyond reasonable doubt.

The doctrine of presumption of innocence in *Woolmington* has been applied in the Malaysian courts. In *Public Prosecutor v Yuvaraj*,¹² the Privy Council held that the principle that the prosecution must prove its case against an accused beyond reasonable doubt was fundamental to the administration of justice under the common law. This denotes that the presumption of innocence is a fundamental right at common law just as access to justice is a common law fundamental right.

It is a right that falls within *Article 5(1) of the Malaysian Federal Constitution*. In *Public Prosecutor v Gan Boon Aun*,¹³ the Federal Court held that the doctrine of presumption of innocence in favour of the accused is indisputable in terms of the law as its enforcement is fundamental and a major step in the administration of criminal law. The criminal law recognises that the devotion to punish an offender can result in an innocent person accused of an offence being punished.

As far as the 'Blackstone Ratio' is concerned, it can be summed up as follows: - "*it is better that ten guilty persons escape than that one innocent person shall suffer*".¹⁴ Blackstone's Ratio seemed to proclaim that criminal law can err in two circumstances, either in convicting an innocent person; or it may err in acquitting the guilty person in a criminal case.¹⁵

¹¹ Pamela R. Ferguson, "The Presumption of Innocence and Its Role in the Criminal Process" *Criminal Law Forum* (2016) 27:131–158

¹² [1969] 2 MLJ 89.

¹³ [2017] 3 MLJ 12.

¹⁴ William Blackstone, *Commentaries on the Laws of England* (Philadelphia: J.B. Lippincott Co., 1893).

¹⁵ Fritz Allhoff, "Wrongful Convictions, Wrongful Acquittals, and Blackstone's Ratio," *Australasian Journal of Legal Philosophy* 43 (2018): 39-58.

Blackstone's idea is that these two errors need to be assessed from different perspectives. Apart from Blackstone's aphorisms, Blackstone himself is more inclined to acquit the guilty than to impose a conviction on the innocent but it is undeniable that there are those who have different beliefs and notions in this respect. Hence, the Blackstone Ratio is considered a heated topic worthy of debate in jurisprudence and philosophy because of the existence of polarising opinions that depend on the perception of each individual.¹⁶

Nevertheless, the Blackstone Ratio plays a significant role as it encourages legal practitioners, academics, and the public to take into account its impact the criminal justice system especially in cases involving misconduct of criminal justice. This is said to be so because a decision made by a court in these two circumstances, i.e., convicting an innocent person or erring in acquitting a guilty person will produce different consequences.¹⁷ For example, societal sentiments are considered more aggressive if they find that the criminal justice system has convicted innocent people.¹⁸

The doctrine of presumption of innocence is the principal shield protecting people of all walks of life against wrongdoing, and thus we must be wary of attempts to violate this doctrine in our criminal justice system. Besides that, it is closely related to miscarriage of justice. The doctrine of presumption of innocence exists for many reasons, e.g. to balance injustices that may occur during criminal proceedings, to uphold the right of liberty for all people in society, and to maintain the trust and respect of society towards the implementation of the law in our country.

¹⁶ Daniel Epps, "The Consequences of Error in Criminal Justice," *Harvard Law Review* 128, no. 4 (2015): 1067.

¹⁷ Tom R. Tyler, *Legitimacy and Criminal Justice: International Perspectives* (New York: Russell Sage Foundation, 2007).

¹⁸ Jan W. de Keijser et al., "Wrongful Convictions and the Blackstone Ratio: An Empirical Analysis of Public Attitudes," *Punishment and Society* 16, no. 1 (2014): 34, <https://doi.org/10.1177/1462474513504800>.

MISCARRIAGE OF JUSTICE

Hamilton once said that “steady, upright, and impartial administration of the laws” is crucial because “no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be the gainer today”.¹⁹

Although the criminal justice system in the minds of the public delivers justice effectively and fairly, the truth, however, is that it is likely to be biased in certain circumstances. The Oxford Dictionary of Law defined the term ‘miscarriage’ as ‘a failure of justice or a failure of the administration of justice’²⁰ while the Black’s Law Dictionary defined miscarriage of justice as “a grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime”.²¹

In fact, the term ‘miscarriage of justice’ does not have a fixed and universal definition because the definition differs according to the individual’s perspective.²² Views on the definition of miscarriage of justice also depend on the way each individual interprets the words ‘criminal justice’ and ‘justice’. Interpretation of these two words requires consideration of the nature and purpose of the criminal justice system.

¹⁹ Muhammad Hassan and Johan Shamsuddin bin Sabaruddin, “Jurisdiction of Military Courts over Civilian Terrorists in Pakistan: A Miscarriage of Justice,” *IIUM Law Journal* 27, no. 1 (2019): 69, <https://doi.org/10.31436/iiumlj.v27i1.415>.

²⁰ Jonathan Law, ed, *Oxford Dictionary of Law*, 10th ed. (UK: Oxford University Press, 2022).

²¹ Bryan A. Garner, ed., *Black’s Law Dictionary*, 7th ed. (St. Paul, MN: West Group, 2000).

²² Quirk, “Identifying Miscarriages of Justice,” 759-777; Leverick and Chalmers, *Causes of Wrongful Conviction*.

According to Packer,²³ the Blackstone Ratio discussed above has formed the basis of the concept of 'due process' in the criminal justice system. This concept emphasises the doctrine of presumption of innocence, individual rights and individual protection from governmental actions. The 'crime control' model described by Packer also prioritises the significance of criminal justice agencies, particularly the police in carrying out their role with regard to suspects without hindrance from excessive reverence for the rule of law and legal procedures.²⁴

It can be argued that the United Kingdom operates under a system of due process of law, which aims to favour the innocent. Yet, in reality, there is a gap between theory and reality regarding how a criminal justice system works, particularly in achieving justice.²⁵

The notion of 'justice' propounded by the Oxford Dictionary of Law and Packer leads to the question - what is justice in the criminal justice system? If a state attempts to impose sanctions on a person, the action of imposing such sanctions is intrinsically coercive and prejudiced. Thus, the control of factors up to a tolerable and acceptable level has provided a limited but precise definition of the concept of 'justice'.

This suggests that 'justice' is determined by the integrity of the legal procedure as well as its end result.²⁶ The procedural integrity mentioned earlier can be referred to as the way an individual is treated and whether his rights are protected as provided by law. Yet, there is no denying that there are rights that have been and can be violated by the criminal justice system. This is so because, in the event of a crime, it will have a detrimental impact on the society that enjoys their right to live in peace.

²³ Herbert L. Packer, *The Limits of the Criminal Sanction* (California, Stanford University Press, 1968).

²⁴ Sam Poyser, "Watchdogs of the Wrongly Convicted: The Role of the Media in Revealing Miscarriages of Justice," (PhD diss., University of Portsmouth, 2012).

²⁵ Herbert L. Packer, *The Limits of the Criminal Sanction* (California, Stanford University Press, 1968).

²⁶ Walker and Starmer, *Miscarriages of Justice*.

Thus, the criminal justice system can act against the rights of the individual who committed the crime to protect the rights of others.²⁷ For example, a serial killer can be deprived of his right to freedom by imprisoning him and punished by the criminal justice system because if he is not imprisoned, then the society's right not to endanger their lives will be compromised. This leads to the next question, how is the term 'miscarriage of justice' understood and what is its true definition?

As mentioned earlier, definitions of miscarriage of justice are inconsistent and it does not have a fixed definition. 'Justice' must be defined along with rights, as well as 'miscarriage of justice'.²⁸ Walker defines miscarriage of justice as follows:

"a miscarriage...occurs whenever suspects...defendants or convicts are treated by the State in breach of their rights, whether because of deficient process or the laws which are applied to them, or because there is no factual justification for the applied treatment or punishment, or whenever they are treated adversely by the State to a disproportionate extent in comparison with the need to protect the rights of others, or whenever the rights of others are not effectively or proportionately protected or vindicated by State action against the wrongdoers or...by the State law itself".

The concept of miscarriage of justice advanced by Walker is comprehensive because according to him, miscarriage of justice can occur not only within the scope of the judicial system but also within the agencies of the criminal justice system, e.g. the police misusing their powers, arrests that did not lead to charges, and failure to use the proper legal procedures provided.

²⁷ Clive Walker and Keir Starmer, eds., *Miscarriages of Justice: A Review of Justice in Error* (London: Blackstone, 1999).

²⁸ Clive Walker and Keir Starmer, eds., *Miscarriages of Justice: A Review of Justice in Error* (London: Blackstone, 1999).

From Walker's definition, it can also be understood that a conviction achieved through a pre-trial or trial phase that violates an individual's rights is also a miscarriage of justice, even if the accused has indeed committed a crime. 'Justice' not only emphasises 'results' but also emphasises the importance of 'procedure'. Hence, the term 'miscarriage of justice' should not be limited to the 'results' achieved in the end only.

According to Michael Naughton, miscarriage of justice is more of a tendency in terms of legislation applied retroactively.²⁹ One of the main features of miscarriage of justice is that whenever a conviction of criminal offense has been given, miscarriage cannot be said to have occurred unless or until the court has quashed the criminal conviction when the case is appealed to the court.

The most notable example of a case of miscarriage of justice in the history of the United Kingdom is the case of the Birmingham Six who have failed to uphold justice for themselves despite having appealed twice³⁰. The Birmingham Six were only formally acknowledged by the government that they were victims of a miscarriage of justice after the court overturned their convictions.³¹

²⁹ Naughton, "Redefining Miscarriages of Justice," 165 - 182.
es of Justice," 165 - 182.

³⁰ Naughton, "Redefining Miscarriages of Justice," 165 - 182.

³¹ Rowan Moore, "Why the Birmingham Six's story must not be forgotten," The Guardian, March 26, 2022, <https://www.theguardian.com/uk-news/2022/mar/26/why-the-birmingham-six-story-must-not-be-forgotten>.

The release of the Birmingham Six subsequently led to the establishment of the Royal Commission on Criminal Justice (RCCJ) led by Lord Runciman in March 1991³² to restore public confidence in the criminal justice system. From cases of miscarriage of justice that occurred, Naughton concludes the study of miscarriage of justice is legalistic and retrospective³³. The word 'legalistic' is used because whether a case is considered to be a legal abuse of justice is determined entirely by the law and court's procedure.

If the laws and procedures of the courts undergo any changes, then, the definition of miscarriage of justice will change in line with the contemporary laws. 'Retrospective', on the other hand, means that there is no way to know how many cases of miscarriage will be dismissed in the future or how many cases are still in the midst of awaiting dismissal proceedings. These cases are inclined to be considered as cases of miscarriages of justice until they have successfully obtained an appeal from the courts.³⁴

There is no denying that Naughton's opinion has its indisputable logic. Nevertheless, it is found that Naughton has ignored the statement where a miscarriage of justice not only occurs during the process of prosecution but it can occur due to other factors. As compared to Naughton, Frost has supplied his more exclusive views on what constitutes a 'miscarriage'.

³² Field, S., & Thomas, P. A, Justice and Efficiency? The Royal Commission on Criminal Justice, *Journal of Law and Society* (1994) 21:1-19.

³³ Naughton, "Redefining Miscarriages of Justice," 165 - 182.

³⁴ Naughton, "Redefining Miscarriages of Justice," 165 - 182.

According to Frost, the literature review on miscarriage of justice has largely focused on false convictions with the presumption of innocence until proven guilty (the doctrine of presumption of innocence) in the criminal justice system.³⁵ Nevertheless, the starting point for the occurrence of a miscarriage of justice can begin the first instance when an individual reports a case to the police but, the police, in their capacity have failed to act on the reported case.³⁶ These include wrongful execution of arrests, rejection of complaints, and wrongful sentences. Miscarriage of justice is a phenomenon that can extend beyond the process of prosecution to the process of imprisonment and beyond.

Case laws in Malaysia and the United Kingdom had their fair share in discussing what constitutes a miscarriage of justice. The definition of miscarriage of justice in Malaysia can be seen in the cases of *Ti Chuee Hiang v Public Prosecutor*³⁷ and *Kiew Foo Mui & Ors v Public Prosecutor*.³⁸

Tan Sri Edgar Joseph Jr propounded that the expression ‘failure of justice’ is synonymous with the expression ‘miscarriage of justice’. In the Court of Appeal case of *Juraimi bin Husin v Public Prosecutor; Mohd Affandi bin Abdul Rahman & Anor v Public Prosecutor*,³⁹ Justice Gopal Sri Ram who presided over the trial defined miscarriage of justice as a violation of some principle of law or procedure which must be an erroneous proposition of law so that if the proposition is corrected, then the findings of the case cannot be tried or the disregard of some principle of law or procedure, which may have the same effect.

³⁵ Forst, “Managing Miscarriages of Justice,” 1209.

³⁶ Edmond, “Constructing Miscarriages of Justice,” 53.

³⁷ [1995] 2 MLJ 433.

³⁸ [1995] 3 MLJ 505.

³⁹ [1998] 1 MLJ 537.

The question of whether the findings of fact of the case by the trial court is a question of law. Similarly, before *Juraimi*, Lord Thankerton in the Privy Council case of *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy*⁴⁰ said that “in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure.” In *Romi bin Ali v Public Prosecutor*,⁴¹ the Court of Appeal propounded that the phrase “miscarriage of justice” has generally been described as a judicial action or judgment that is blatantly incorrect, unjust, or inappropriate. Miscarriage of justice is mostly when someone is found guilty and sentenced to punishment for a crime they did not commit⁴². Only when the court determines that it is reasonably likely that the error would have resulted in a decision more favourable to the appealing party after considering the complete cause and all available evidence may a miscarriage of justice be proclaimed.⁴³

MISCARRIAGE OF JUSTICE IN THE ISLAMIC PERSPECTIVE

Similarly, both procedural requirements and justice take precedence in the administration of the Islamic criminal justice system. Justice has been cited in various verses of the *Quran*.

This is reflected in the usage of words such as ‘*Adl*, *Qist* and *Taswiyah*’ in the *Quran*.⁴⁴ The said words serve as the Quranic basis for the general principle of general justice⁴⁵. This serves as a guideline for believers to pursue justice for it is the goal of Islamic law and the Islamic society as a whole.⁴⁶

⁴⁰ [1946] AC 508.

⁴¹ [2018] 6 MLJ 123.

⁴² [2018] 6 MLJ 123, paragraph 34.

⁴³ *People v Watson* 46 Cal 2d 818 836 (Cal 1956).

⁴⁴ Ramizah Wan Muhammad, “What Makes a Law “Islamic”? A Preliminary Study on the Islamicity of Laws in Malaysia,” *IIUMLJ* 27, no. 1 (2019): 219, <https://doi.org/10.31436/iiumlj.v27i1.420>.

⁴⁵ Al-Quran Surah Al-Nisaa’4:135 & Al-Quran Surah al-Mai’dah 5:8

⁴⁶ Absar Aftab Absar, “Restorative Justice in Islam with Special Reference to the Concept of Diyya,” *Journal of Victimology and Victim Justice* 3, no. 1 (2020): 42, <https://doi.org/10.1177/2516606920927277>.

It is paramount that in order to achieve justice, fair punishments must be implemented on those who deserve it and no one should be penalised and punished for a crime not committed by them. Prophet Muhammad SAW said: -

“No soul burdened with sin will bear the burden of another. And if a sin-burdened soul cries for help with its burden, none of it will be carried—even by a close relative. You ‘O Prophet’ can only warn those who stand in awe of their Lord without seeing Him and establish prayer. Whoever purifies themselves, they only do so for their own good. And to Allah is the final return.”⁴⁷

Procedural aspect-wise, to achieve justice is also to allow an accused to achieve fairness by guaranteeing his rights as an accused. Examples of an accused or suspect’s rights include rights under detention, investigation, arrest, and fair trial, rights of the accused to defend himself, rights of the accused to compensation, right of the accused to liberty, protection of life and honour, and right of appeal.⁴⁸

These are among the rights guaranteed for the accused in achieving justice while keeping in mind that the accused or defendant must also be treated with fairness at all stages of proceedings, including the collection of evidence and investigations.⁴⁹

⁴⁷ Qur’ān, 35:18.

⁴⁸ Muhammad Munir, “Fundamental Guarantees of the Rights of the Accused in Islamic Criminal Justice System,” *Hamdard Islamicus* 40, no. 4 (2017) 47; Ashraf Md. Hashim, *Rights of Suspect and Accused under Islamic and Malaysian Law* (Petaling Jaya: International Law Book Services, 2004).

⁴⁹ Ahmad Bin Muhammad Husni1, Amin Bin Muhammad Husni, and Mohd Sabree Nasri, “Rights of the Accused in the Islamic Legislation: A Comparative and Analytical Study,” *Scholars International Journal of Law, Crime and Justice* 2, no. 7 (2019): 213-218, <https://doi.org/10.21276/sijlcj.2019.2.7.3>.

Based on the above, it can be said that the concept of miscarriage of justice in the Islamic context is an all-inclusive one as not only it emphasises the need to protect the innocent and to prosecute the guilty but also the procedural fairness and rights conferred upon an accused, regardless whether he is guilty or not. This reflects the religion of Islam or Islam itself as an all-embracing notion, which encompasses not only the ritualistic aspect but also the system of life, including its jurisprudence and moral standards.

Everyone has his or her own opinion in defining what is miscarriage of justice and how this phenomenon can affect the criminal justice system in a country. It is more reasonable if the definition of miscarriage of justice put forward by Frost and the Islamic criminal is accepted as compared to other definitions that seem to have a restricted and narrow interpretation of miscarriage of justice.

Both concepts have their similarities in values as the definition in both the Islamic perspective and Frost provides a more substantial and wider sense wherein the notion of justice takes precedence when dealing with criminal cases without prejudice to each individual. Therefore, for the purposes of this article, miscarriage of justice will be defined as the failure of the criminal justice system to uphold justice on behalf of the defendants or the public at large.

POST-APPEAL AVENUES OF CRIMINAL MISCARRIAGES OF JUSTICE IN MALAYSIA

The Criminal Appeal Process in Malaysia

A person convicted of an offence is given a two-stage right of appeal. The final appellate court of a case will usually depend on the decision of the court of the first instance. Section 26 of the Courts of Judicature Act 1964 sets out the appellate criminal jurisdiction of the High Court to hear criminal appeals from subordinate courts viz sessions and magistrate's courts.

For example, if the accused's case is heard in a subordinate court, the first stage of appeal will be heard by the High Court. Following this appeal, the Court of Appeal will be the last appeal for this case. In paragraph 22 in *Abdul Ghaffar Md Amin v Ibrahim Yusoff & Anor*,⁵⁰ Abdul Hamid Mohammad CJ propounded that "since there is no further appeal to this court, then the Court of Appeal becomes the apex court as far as actions and suits in respect of motor vehicle accidents are concerned."

Furthermore, Section 50(1)(b) of the CJA provides that the Court of Appeal has jurisdiction to hear and decide any appeal against a decision made by the High Court in the exercise of its appeal or review jurisdiction in respect of any criminal matter decided by the Sessions Court. Section 50(2) of the CJA explained above is also relevant in the context of this first stage of appeal. On the other hand, according to Section 50(1)(a) of the CJA, if a criminal case is tried in the High Court, the first stage of appeal is in the Court of Appeal while the Federal Court will be the last appellate court.

When a person convicted of an offence has exhausted his appeal up to the Federal Court, his legal rights shall come to a halt as the judgment of the Federal Court is final for the case brought by the accused and the accused will be bound by the judgment.

The Court of Appeal in *Tai Chai Yu v The Chief Registrar of the Federal Court*⁵¹ in dismissing the Appellant's appeal elucidated that the Appellant has no *locus standi* to challenge the decision made by the Federal Court for the Federal Court has no jurisdiction to re-open and review its decision in a case. Neither the Federal Constitution nor the CJA confer to provide such jurisdiction upon the Federal Court.

⁵⁰ [2008] 5 CLJ 1.

⁵¹ [1998] 2 MLJ 474.

When the final decision of the Federal Court has been pronounced, the accused will be bound and tied to its decision. Therefore, this raises the question as to whether victims of miscarriage of justice owe a recourse to quash their conviction once their case has been appealed to the final appellate court.

The Federal Court's power to review

One of the post-conviction avenues that a victim of miscarriage of justice can opt for is to invoke the Federal Court's inherent power to review its own decision. They could still apply to the appellate court to review their own decision, should they be unsatisfied with the decision or judgment given.

The power of the Federal Court to review its own judgments is subjected to Rule 137 of the Rules of the Federal Court 1995 (RFC 1995). This Rule has recognised the right of the Federal Court of Malaysia to review and revise previous judgments given by them to avoid a miscarriage of justice or abuse of process. Rule 137 reads as follow:

“For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.”

Before explaining further Rule 137 of the RFC 1995, it is important to identify the status and relationship between the CJA and the RFC 1995. The CJA is an Act relating to the Superior Courts in Malaysia. It is an Act that provides the jurisdiction of all superior courts such as the High Court, Court of Appeal, and the Federal Court while the RFC 1995 is a subsidiary legislation enacted from Sections 16 and 17 of the CJA. Rule 137 is part of the RFC 1995 made in the exercise of powers conferred by Section 17.

Section 3 of the Interpretation Act also stipulates that ‘rules of court’ means ‘rules or subsidiary legislation regulating the practice and procedure of a court’ as decided in *Dato’ Seri Anwar bin Ibrahim v Public Prosecutor*.⁵² This brings us to one question – whether the RFC 1995 being a subsidiary legislation could override the CJA, giving the Federal Court the jurisdiction to review its own decision.

In the case of *Amalan Tepat Sdn Bhd v Panflex Sdn Bhd*,⁵³ the Federal Court held that the decisions made by the Federal Court are not subject to further review since neither the Malaysian Federal Constitution nor the CJA provides any provision which confers the Federal Court the power to review its own decision.

The judges in that case unanimously held that by construing the words of the Malaysian Federal Constitution or the CJA in its ‘natural and obvious sense’, the Federal Court does not possess the autonomy to review, re-examine, reconsider or rehear an appeal it had already heard and disposed of, unlike what it appears to the plain reading of Rule 137.

It is trite law today that the status of the RFC 1995 as a subsidiary law does not hamper its purpose of granting powers to the Federal Court to review its own decision. In the case of *Chu Tak Fai v PP*,⁵⁴ the Federal Court held that the Federal Court has the powers and jurisdiction to hear and review a case brought before the court under Rule 137.

Augustine Paul, FCJ in *Tan Sri Eric Chia Eng Hock v PP (No1)*⁵⁵ also provided that nothing in the RFC 1995 shall affect the inherent powers of the Federal Court in listening to any application made as may be necessary to prevent injustice or any abuse of the process of the court. The Federal Court in *Lim Lek Yan @ Lim Teck Yam v Yayasan Melaka and another application*⁵⁶ proceeded to held that an application for a review under Rule 137 should only be made in a fit and proper case.

⁵² [2011] 1 MLJ 158.

⁵³ [2012] 2 MLJ 168.

⁵⁴ [2007] 1 MLJ 201

⁵⁵ [2007] 2 MLJ 101.

⁵⁶ [2010] 1 MLJ 173.

The inherent powers conferred to the Federal Court in Rule 137 is trite and shall not be doubted, as propounded by the Federal Court in *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications*,⁵⁷ who wished “that this case will put that issue to rest for good.” Following the principles presented in *Dato' See Teow Chuan*, cases such as *Halaman Perdana Sdn Bhd & Ors v Tasik Bayangan Sdn Bhd*⁵⁸ and the case of *Datuk Seri Anwar Ibrahim v. Government of Malaysia & Anor*⁵⁹ upheld the same decision.

Based on the above-mentioned cases, despite the Federal Court having its inherent powers to review its earlier decisions, it however must exercise its discretionary power with caution and in a restricted and narrow manner. Should the Federal Court act in the contrary, it would open floodgates for the unsuccessful party to apply for a review on very flimsy and unjustifiable reasons.

An accused bringing his application under Rule 137 has the burden to satisfy the Federal Court that the requirements of Rule 137 have been fulfilled. Rule 137 imposes a very high threshold test and can only be exercised in special or exceptional circumstances, affirmed by the Federal Court case of *Bellajade Sdn Bhd v. CME Group Bhd & Another Application*.⁶⁰ The rationale is to prevent injustice and abuse of judicial procedure. Thus, the courts have identified a number of special circumstances in which Rule 137 can be raised: -

- (1) Lack of quorum or quorum failure: For example, in *Chia Yan Tek & Anor v Ng Swee Kiat & Anor*,⁶¹ it was held that the judgment pronounced after the retirement of two out of three presiding judges constitutes a nullity because the court was not properly constituted.

⁵⁷ [2013] 4 MLJ 351.

⁵⁸ [2014] 3 CLJ 681.

⁵⁹ [2020] 1 LNS 2116.

⁶⁰ [2019] 8 CLJ 1.

⁶¹ [2001] 4 MLJ 1.

- (2) Court judgment obtained by fraud or suppression of material evidence: For example, in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun*,⁶² the Applicant applied to set aside a court's order on the basis that the judgment was tainted with apparent bias on the part of the presiding judge and there were certain irregularities in the documents presented. It was eventually held that the Federal Court's jurisdiction and power can be invoked in limited circumstances to re-open, re-hear and re-examine its previous judgment, decision or order obtained by fraud or suppression of material evidence.
- (3) Bias: In *Taylor and another v Lawrence and another*,⁶³ it was found that bias has been established between the close relationship with the presiding judge and the Plaintiff's solicitors. Hence, the Court of Appeal (in this case) can reopen the appeal that has been already determined to avoid injustice and miscarriage of justice.
- (4) Clear infringement of the law: In *Adorna Properties Sdn Bhd v Kobchai Sosothikul*,⁶⁴ it was held that the infringement of law brings grave injustice warranting a successive application under Rule 137.
- (5) Existence of incorrect and corrupted procedures: In *Re Uddin (a child) (serious injury: standard of proof)*,⁶⁵ the final determination of a previous judgment or an appeal shall only be re-open in certain exceptional circumstances such as the final determination of an appeal can only be reopened in most exceptional circumstances such as when the court process had been tainted with corruption or was being compromised.

Based on the above situations, it can be said that the power of the courts to review their judgments or decisions under Rule 137 can be said to be a way to resolve cases of miscarriage of justice but at the same time, Rule 137 acts as a double-edged sword. The role of Rule 137 is significant only to a certain extent as it can only be exercised sparingly and in exceptional circumstances.

⁶² [2002] 3 CLJ 577.

⁶³ [2002] 2 All ER 353.

⁶⁴ [2005] 1 CLJ 565.

⁶⁵ [2005] 3 All ER 550.

This unwittingly suggests that Rule 137 is ineffective towards accused who have been wrongfully convicted because miscarriage of justice can occur due to many factors, not just limited to the situations listed above. This indicates that there may be other circumstances that vindicate the Federal Court to review its own decision for each case varies.

High Court's power of revision

Apart from Rule 137 as a way of remedying cases of criminal miscarriage of justice, the Malaysian High Court also has its revisionary powers. According to Section 31 to Section 37 of the CJA, the High Court has special powers to review conducts and proceedings originating from the Subordinate Courts.

Section 35(1) of the CJA provides that the High Court plays the role of exercising its power to review all proceedings or procedures and the affairs of criminal matters in the lower courts in accordance with the relevant laws relating to criminal procedure.

The object of revisionary powers is seen in a few landmark cases. In *Hari Ram Seghal v Public Prosecutor*,⁶⁶ Wan Yahya, J explained that the purpose of the revision by the High Court is to correct or prevent any miscarriage of justice that may arise as a result of errors in judgment and procedure as well as negligence by any of the relevant parties:

“... the powers of revision by a High Court, as contained in Part VII of the Criminal Procedure Code and under section 31 of the Courts of Judicature Act must be given a wider interpretation. The object of these provisions is to correct any miscarriage of justice arising not only from error in judgment and procedure but from neglect or indolence on the part of those in authority and resulting in undeserved hardship on any individual affected by such judgment, neglect, or indolence...”

⁶⁶ [1981] 1 MLJ 165.

In *Tan Sri Eric Chia Eng Hock v PP*,⁶⁷ the power of the High Court for revision is not a right. Revision of proceedings is a procedural facility given to the accused as compared to appeal which is a statutory right given to the accused. Review of proceedings is not a continuation of a trial, appeal or suit but only as a measure to correct any irregularities if any, in the judgment and order of the subordinate court.

According to the case of *AFM Shafiqul Hafiz v Public Prosecutor*,⁶⁸ in every revision application, the main question to be determined is whether justice has really been achieved or will be achieved and whether the order made by the subordinate court should be interrupted in the interest of achieving justice. In the case of *Public Prosecutor v Kulasingam*,⁶⁹ the Court held that the purpose of revision is to give responsibility to the High Court to ensure that miscarriages of justice do not occur in any criminal proceedings.

Section 35 of the CJA empowered the High Courts to obtain or request any relevant record of a proceeding or case to be transferred to the High Court. The High Court may also direct the lower court to make such further proceedings as may be necessary for justice.

Besides the CJA the power of the High Court in revision is also subjected to the Criminal Procedure Code (CPC). Section 325 of the CPC clarified the power of judges on revision. The judge may call a trial of a case at any time or call it at his discretion subject to the CPC.

However, the judge does not have any power to change a sentence of acquittal on a conviction that has been decided. Nothing in an order under this section shall affect the accused unless the accused has been given an opportunity for trial.

⁶⁷ [2007] 1 CLJ 565.

⁶⁸ [2019] 10 MLJ 31.

⁶⁹ [1974] 2 MLJ 26.

The general procedure of revision is usually initiated by the notification of the subordinate court to the High Court of any doubt in a decision or any party may make an application to the High Court for review. The High Court judge will then use his discretionary power to call the case for review. In the case of *Public Prosecutor v Muhari bin Mohd Jani & Anor*,⁷⁰ it was decided that there are various ways to make an application to the High Court to review a decision decided by a subordinate court. Among the ways that can be done is through the press, a report on the case, a letter from any person, a request for review by a lower court, or a formal application.

From the CJA and Section 325 of the CPC, it can be generally concluded that the High Courts will only exercise their discretionary power in revision in certain circumstances. The revision made by the court will lead to a question of fact to administer justice. The court will accept the findings and outcome of the factual inquiries that have been recorded by the subordinate court unless such findings are expressly contradictory and clearly erroneous.

The intervening power of the High Court in such cases should be exercised with caution in situations where an error has been made by the court or a decision or sentence is express and unreasonable. The court's power of review may also be used if the trial court is aware of the evidence presented before it or where the trial court has acted and has made a finding based on inadmissible evidence.

Section 326 of the CPC serves to grant permission for the presence of the parties in revision. No party is entitled to be heard, whether personally or by his counsel, before a judge when exercising his powers of review. Provided that if the judge thinks fit, when exercising his power to hear any party, either in person or by counsel, and that nothing in this section shall be deemed to affect subsection 325 (2).

It can be indicated that in the revision of a case, it is safer if the High Court allows the accused and his counsels to appear before the court. This is based on the principle of *audi alteram partem* where a person should not be punished without being heard first. Therefore, this has provided an adequate and reasonable opportunity for the accused to state his case during the trial so that the concept of fundamental justice can be achieved.

⁷⁰ [1996] 3 MLJ 116.

The revision will end after the order on the review is given by the High Court. Section 327 of the CPC provides that when a case has been reviewed under Chapter 31 of the CPC, the judge after confirming his decision or order to the Court submitting the reviewed opinion or sentence is recorded or dropped by supplying the opinion and reasons for the change.

Thereafter, the Court that has received the decision will make an order commensurate with the confirmed decision and amend the record if appropriate. This means that the order on this review is final and it is not allowed for further appeal.

The power of the YDPA's royal pardon

If the accused has appealed his case to the Federal Court, he still has another avenue he could exhaust, i.e. by submitting a petition for pardon, also known as the royal prerogative of mercy. The royal prerogative of mercy conferred by the Yang Di-Pertuan Agong in Malaysia subscribed to what had been in *Michael De Freitas v George Ramoutar Benny & Ors*⁷¹ to the effect that;

“mercy is not the subject of legal rights but it rather begins where legal rights end.”

One of the main pillars that constructed Malaysia's federalism is that prerogative powers conferred in the Yang di-Pertuan Agong were derived from the Malay states under the 1957 Federation Agreement of Malaya, subsequently codified by numerous state legislations.⁷²

The executive power of the Yang Di-Pertuan Agong to grant royal pardons is enshrined in Article 42(1) of the Malaysian Federal Constitution:

⁷¹ [1976] AC 239.

⁷² Wan Ahmad Fauzi Wan Husain, “Watanic Jurisprudence: Articulating The Legitimate Elements Of The Basic Structure Of The Federal Constitution,” *IIUM Law Journal* 29, no. 1 (2021): 10, <https://doi.org/10.31436/iiumlj.v29i1.650>.

“The Yang di-Pertuan Agong has power to grant pardons, reprieves and respites in respect of all offences which have been tried by court-martial and all offences committed in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya; and the Ruler or Yang di- Pertua Negeri of a State has power to grant pardons, reprieves and respites in respect of all other offences committed in his State.”

In general, Article 42 (1) can be seen in two limbs, namely: i) The Yang Di-Pertuan Agong has the power to grant pardon for all offences committed in the Federal Territory of Kuala Lumpur, Labuan, and Putrajaya; ii) The Yang Di-Pertua Negeri has the power to grant pardon for all offences committed in his State.

Through the reading of Article 42 (1), the Yang Di-Pertuan Agong seems to have absolute power and discretion in pardoning offences but the Yang Di-Pertuan Agong in exercising his power in granting pardon should actually consider the advice of the Pardon Board. However, thereafter, the Yang Di-Pertuan Agong is not obliged to accept and act on the advice of the Pardon Board. This is because the Pardons Board is not the Yang Di-Pertuan Agong and since its function is only advisory the prerogative is not exercised by the Board as per the judgment in *Public Prosecutor v Param Cumaraswamy (No. 2)*.⁷³ The exercise of power by him cannot be reviewed and questioned by the court.

The role and function of the Pardon Board and its relation to the Yang Di-Pertuan Agong’s power of pardon can be seen in the case of *Sim Kie Chon v Superintendent of Prisons & Ors.*⁷⁴

In this case, Abdul Hamid, CJ ruled that the function of the Pardon Board is not to commute or reduce the death penalty as well as quash the conviction of the accused but its main function is to give advice to the Yang Di-Pertuan Agong only. Although the Pardon Board has given advice to the Yang Di-Pertuan Agong, the Yang Di-Pertuan Agong will exercise his powers in accordance with Article 42(1) of the Federal Constitution.

⁷³ [1986] 1 MLJ 518.

⁷⁴ [1985] 2 MLJ 385.

According to Yang Arif Abdul Hamid, the power to grant this pardon is an executive action that cannot be reviewed or questioned by the court. According to the case of *Public Prosecutor v Lim Heang Seoh*,⁷⁵ it was also decided that the Pardons Board and the process of running the pardon power is not confined by any rules of the court.

There are certain situations to be considered for an accused who has been convicted of a criminal offense to obtain the pardon of the Yang Di-Pertuan Agong. If the accused is sentenced to death by hanging, Section 281(c) of the CPC foists a duty on the Menteri Besar in which the offense was committed to submit a detailed trial report containing the conviction and sentencing information of the accused to the Yang Di-Pertuan Agong or Yang Di-Pertua Negeri concerned to be considered under Article 42 of the Federal Constitution.

For security offences or cases involving a court-martial to be considered under Article 42 of the Federal Constitution, Rule 54 of the Prisons Regulations 2000 requires the Commissioner General of Prisons to submit a report to the Menteri Besar where the offence was committed or to the Yang di-Pertuan Agong after the accused has completed four, eight, twelve, or sixteen years of imprisonment.

Article 113 (1) of the Prisons Regulations 2000 provides an opportunity for the accused to file a written petition for clemency⁷⁶. The first petition can be filed as soon as possible after the first time the accused has been convicted of the offence.

Thereafter, the accused may submit a second petition three years after the date of his conviction and a further petition every two years, unless there are special circumstances or situations that must be notified to the Yang di-Pertuan Agong or Yang di-Pertua Negeri. Article 113 (2) of the Prisons Regulations 2000 further provides that a person serving a prison sentence may submit his petition to the Yang di-Pertuan Agong or Yang di-Pertua Negeri at any time, provided that no petition is allowed if the previous petition on the same matter has yet to receive any reply or answer.

⁷⁵ [1979] 2 MLJ 170.

⁷⁶ Daniel Pascoe, *Last Chance for Life: Clemency in Southeast Asian Death Penalty Cases* (UK: Oxford University Press, 2019)

The Yang Di-Pertuan Agong's application or petition for pardon is likely to raise doubt to many as to whether the accused convicted of the offence is making a false confession just to escape the gallows. Nevertheless, there is no legislation that stipulates that a pardon petition can only be submitted on this justification. In the case of *Public Prosecutor v Soon Seng Sia Heng & Associated Appeals*,⁷⁷ the court ruled:

“...when considering whether to confirm, commute, remit or pardon, His Majesty does not sit as a court, is entitled to take into consideration matters which courts bound by the law of evidence cannot take into account and decides each case on grounds of public policy; such decisions are a matter solely for the executive. We cannot confirm or vary them; we have no jurisdiction to do so.”

From the excerpt of the case, it can be concluded that the Yang di-Pertuan Agong or Yang di-Pertua Negeri has the right to consider innocence or other reasons while deciding whether to pardon someone because the Yang di-Pertuan Agong or Yang di-Pertua Negeri is free to act to the interests of justice, the public interest and according to conscience.

Although this method of pardon may be used and applied for by the accused, there are some questions that remain unanswered about the pardon of the Yang di-Pertuan Agong.

One notable problem can be seen in the Pardons Board. The Pardons Board will not meet regularly. The former SUHAKAM Commissioner Datuk Muhammad Shafee Abdullah has revealed that there have been cases where pardon applicants have been imprisoned for 13–14 years without knowing whether they will be sentenced to death or the death sentence imposed on them will be revoked or not.⁷⁸

⁷⁷ [1979] 2 MLJ 170.

⁷⁸ Habib, S., “Pardons Board not sitting regularly”, *The Star*, 27 September 2009, <https://www.thestar.com.my/news/nation/2009/09/27/pardons-board-not-sitting-regularly>

To make things worse, this situation will make those who have made applications prior unable to submit further applications due to the existence of Article 113 (2) of the Prisons Rules 2000 which limits them to submit applications as long as the previous application has not been answered. This situation has put applicants having to wait a long time without knowing what the outcome of their fate will be.

Further issues can be seen whereby it was not discussed in the local laws whether the granting of pardon blot out the conviction or acts as a declaration of innocence. Article 42 of the Malaysian Federal Constitution does not give power to the Executive to reverse a guilty verdict made by the court. Though clemency or pardon has been given, it does not mean that the convicted person or the victims of a miscarriage of justice shall be deemed never to have committed that offence.

To seek clemency from the Yang Di-Pertuan Agong cuts both ways and it is undoubtedly a *pis aller*, making this a last resort for victims of miscarriage of justice to obtain their freedom but at the same time victims or accused who are truly innocent will have to bear a calumny and a glaring sin that they do not deserve for the rest of their lives.

RECOMMENDATIONS

As discussed above, criminal miscarriage of justice has been an enduring feature of all legal systems since the establishment of the criminal justice system and its close relationship with criminal justice agencies such as the judiciary, police, and the prison system.

We cannot know how many, or how often, innocent individuals are wrongfully convicted; yet, the idea that innocent individuals have spent years in prison for crimes they did not commit remains a strong narrative for the concept of miscarriage of justice.

Conviction of those who are not guilty creates a lasting impression that the nature of the criminal justice system will only be driven by the end result, with the ultimate goal of convicting and punishing only without caring about other aspects. Wrongful convictions will also add to many fears about allegations of corruption and abuse of power by the criminal justice system and its agencies that have violated civil liberty rights.

The problem of criminal miscarriage of justice is endemic to the justice system in the context of wrongful convictions. The analysis of this article also focuses on whether a case is considered ‘safe’ or not in law and the extent to which procedural offenses pose problems in achieving justice through the criminal justice system.

It is undeniable that an ‘unsafe’ conviction will usually involve an innocent defendant, but the existence of innocence is not a prerequisite for a case alleged to have been wrongful. The many causes of miscarriages of justice and how miscarriages of justice will continue to occur are important to develop solutions or improvements to these problems that arise.

There may not be a perfect criminal justice system in this world, yet, due to the problems that arise, it creates a silver lining for lawmakers to learn from the mistakes that occurred. At the same time, it also opens space to develop appropriate mechanisms or avenues to resolve or minimise the problem of miscarriage of justice and to provide appropriate remedies to victims of criminal miscarriage of justice.

Malaysia’s situation in overcoming the problems of miscarriage of justice is weak in terms of law and Malaysia does not have any mechanisms for the accused to review their case after appealing to the Federal Court, the apex court in the country.

There is a need for Malaysia to establish effective legal mechanisms or other alternatives to address this problem. The following are the proposed legal mechanism and recommendations for Malaysia to ensure that cases relating to miscarriage of justice can be reduced or prevented:

A Commission to Review Cases of Miscarriage of Justice

The *Lawyers For Liberty (LFL)*, a human rights lawyers organisation that was established in Malaysia, at some point urged the government to establish a Criminal Cases Review Commission (CCRC) to review alleged cases of miscarriage of justice⁷⁹ but to no avail.

⁷⁹ N. Surendran, “LFL: PH Govt must Urgently Set Up Commission to Review

Malaysia has yet to respond to the Press Statement by LFL. In this vein, Malaysia should set up its own version of the CCRC to review cases of miscarriage of justice. The establishment of this order should not be mistaken for a replacement for the existing appeal system in Malaysia. The CCRC must also be an independent body which is free from the government's control in order to make sure its transparency and any decisions made shall be free from the coercion or oppression of multiple layers of bureaucracy deciding on the same matter, especially what cases to be reviewed or not.

Besides that, it was explained earlier that the CCRC will only refer the case back if they find there is a 'real possibility' that the conviction or conviction imposed will not be overturned. This means that Malaysia has to take into account whether to apply the 'real possibility' test similar to the position in the United Kingdom when assessing cases or Malaysia shall adopt and create its own assessment.

Improving the Governance

The governance of the agencies working hand-in-hand with the criminal justice system should be improved. Wrongful convictions usually occur due to a variety of mistakes ranging from evidentiary errors by witnesses, false confessions, erroneous forensic reports, and other detrimental conduct⁸⁰. These mistakes made in the process of convicting are consequential, constructed one after another, and will only get worse as the investigation continues as it can affect the accused's case.

Nevertheless, with thorough and transparent police investigations, the lack or gap of evidence and more reliable information or alternative suspects at fault in a case can be detected and subsequently resolved quickly. In other words, integrity and governance in agencies that work with the criminal justice system can avoid the negative impacts that can exist due to errors inherent in the criminal procedure process.

All Suspected Cases of Miscarriage of Justice, in View of Anwar's Royal Pardon," Lawyers For Liberty (LFL), May 31, 2018, <https://www.lawyersforliberty.org/2018/05/31/7141-2/>.

⁸⁰ Michael Naughton & Gabe Tan, "Claims of Innocence" (UK: University of Bristol, 2010)

To enhance good governance among the agencies, training and evaluation on their competencies should be held from time to time. It is important to assess the standards of these agencies so that they are equipped with the latest procedures and laws governing criminal procedure so that these agencies do not act arbitrarily in performing their duties.

This can indirectly improve their accuracy and quality as an agency that defends the dignity of Malaysia's criminal justice system. In addition, governance among agencies working with the criminal justice system can be enhanced by strengthening law enforcement and discipline.

CONCLUSION

It is desirable to establish specific legal mechanisms to address the problem of miscarriage of criminal justice and the existing laws should be evaluated and amended accordingly. Nevertheless, it is impossible for a case of criminal miscarriage to be completely remedied because the criminal justice system cannot retribute victims of miscarriage of justice to a position prior to the occurrence of a wrongful conviction against them.

This is further compounded by the fact that Malaysia has weaknesses in the effectiveness of reviewing cases of miscarriage of justice because of its absence of a clear and comprehensive legal framework in reviewing cases of criminal miscarriage of justice.

Apart from the shortcomings of Rule 137 above, Malaysia also does not have an organisation such as the CCRC and is only subjected to provisions in several acts such as the CJA which provides that the accused who is in prison to send a notice of appeal and file a petition sent by a prison officer to the Registrar of Courts to their cases can be appealed and reviewed.

Therefore, issues that arise especially in Malaysia should be probed and studied attentively in depth so that a legal mechanism can be proposed to improve the effectiveness of the criminal justice system and thus reduce cases of miscarriage of criminal justice.