

# **RIGHT TO LEGAL REPRESENTATION DURING SUMMARY PROCEEDINGS UNDER THE MILITARY JUSTICE SYSTEM**

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## **ABSTRACT**

Military justice is essential for maintaining discipline and order in the military. The Federal Constitution of Malaysia safeguards the fundamental right of individuals to be represented by a legal practitioner of their preference through Article 5(3), and Section 255 of the Criminal Procedure Code (Act 593) also provides the right of the accused to be defended before any criminal court. Additionally, Article 8 guarantees everyone equal legal protection. Thus, everyone has the right to legal representation, which is essential. Nonetheless, no provision in the Armed Forces Act 1972, Armed Forces (Court-Martial) Rules of Procedure 1976, and Armed Forces (Summary Jurisdiction) Regulation 1976 guarantees legal representation during summary proceedings. The omission of this provision will be examined through pertinent cases and compared to the United States' position. This legal research is purely doctrinal, analysing the relevant legal provisions and court rulings. Despite the fact that the Federal Constitution ensures the right to legal representation and equality, this article argues that introducing legal representation during summary proceedings is at the discretion of the commanding officer, subordinate commander, and appropriate superior authority, taking into account the distinct characteristics of such proceedings. This article proposes a need for reform of the current law to allow army personnel to opt for court-martial and to establish an appeal mechanism for the accused.

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## **HAK UNTUK DIWAKILI PEGUAM SEMASA PROSIDING TERUS DI BAWAH SISTEM KEHAKIMAN TENTERA**

### **ABSTRAK**

Keadilan tentera adalah penting untuk mengekalkan disiplin dan ketenteraman dalam tentera. Perlembagaan Persekutuan Malaysia menjamin hak asasi individu untuk diwakili oleh seorang peguam pilihan mereka melalui Perkara 5(3) dan Seksyen 255 Kanun Prosedur Jenayah (Akta 593) memperuntukkan tertuduh berhak dibela oleh peguambela di hadapan sebarang Mahkamah Jenayah. Tambahan, Perkara 8 juga menjamin perlindungan undang-undang yang sama kepada semua. Oleh itu, setiap orang mempunyai hak untuk diwakili peguam merupakan perkara penting. Walaubagaimanapun, tiada peruntukan dalam Akta Angkatan Tentera 1972, Kaedah-Kaedah Angkatan Tentera (Mahkamah Tentera) 1976, dan Peraturan-Peraturan Angkatan Tentera (Bidangkuasa Terus) 1976 yang menjamin perwakilan peguam semasa prosiding terus. Ketiadaan peruntukan ini akan dikaji melalui kes-kes mahkamah yang berkaitan dan dibandingkan dengan kedudukan di Amerika Syarikat. Kajian undang-undang ini adalah secara doktrinal, menganalisis peruntukan undang-undang yang relevan dan keputusan mahkamah yang berkaitan. Walaupun Perlembagaan Persekutuan menjamin hak kepada representasi peguam dan kesamarataan, artikel ini berhujah bahawa memperkenalkan perwakilan peguam semasa prosiding terus adalah budibicara pegawai memerintah, pegawai yang lebih rendah, dan pihak berkuasa yang lebih tinggi yang sesuai mengambil kira ciri-ciri yang berbeza dalam prosiding tersebut. Artikel ini mencadangkan bahawa terdapat keperluan untuk pembaharuan undang-undang sedia ada bagi membenarkan anggota tentera memilih untuk perbicaraan mahkamah tentera, dan untuk menubuhkan mekanisma rayuan kepada tertuduh.

**Kata Kunci:** Kehakiman Tentera, Prosiding Terus, Penyelesaian Terus Tuduhan, Mahkamah Tentera, Hak untuk Diwakili Peguam.

## INTRODUCTION

The military justice system in Malaysia operates through two distinct channels: summary proceedings and court-martial trials. Eng and Mazlan correctly noted that both summary proceedings conducted by commanding officers and court-martial trials comprise the military judicial proceedings.<sup>1</sup> However, the purpose of this article is to delve into the specifics of summary proceedings only.

To commence, it is worth noting that under the Armed Forces Act 1972 (AFA72), the term “summary court-martial” is not used to refer to the commanding officer's authorities. Instead, the term “summary disposal of charges” is employed, and in reference to the Armed Forces (Summary Jurisdiction) Regulation 1976 (SJR 76), the word “summary trial” is used. This contrasts with the United States, where “summary courts-martial” is recognised as one of the three types of court-martial. Thus, while Malaysia does not formally have summary courts-martial, commanding officers do possess the power to deal with specific charges against specific categories of accused and award punishments accordingly. Nevertheless, it could be argued that the commanding officer's summary proceedings resemble the jurisdiction of summary court-martial practices in other nations based on the nature of their authority and how they are exercised. As such, to prevent confusion, the term used in the Malaysian context is “summary proceedings”, and when referring to the US jurisdiction, the term used is “summary court-martial”.

Generally, summary trials play a crucial role in the military justice system. A summary proceedings is a simple form of procedure that is designed to try relatively minor offences committed by certain categories of armed forces personnel, whereas a court-martial trial is a formal trial of armed forces personnel for offences of a more serious nature.<sup>2</sup> Section 105 of the AFA 72 provides that there are two types of court-martial, General Court Martial and District Court Martial. Depending on the rank of the accused, a court-martial composition differs under the AFA 72. Typically, a court-martial trying a serviceman, i.e., any member of the military other than a commissioned officer, consists of a legal minimum of three commissioned officers,

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<sup>1</sup>Teo Say Eng and Colonel Wan Nor Mazlan, *Military Legal Proceedings in Malaysia* (Kuala Lumpur: LexisNexis, 2009), 15.

<sup>2</sup>Eng and Mazlan, *Military Legal Proceedings in Malaysia*.

referred to as a District Court Martial. On the contrary, a trial of any commissioned officer requires a legal minimum of five commissioned officers, referred to as a General Court Martial.<sup>3</sup> The rationale behind the practice of summary proceedings is to deal with the case promptly without unnecessary delay. According to Tshivhase, summary trials are designed to provide “*speedy justice where the nature of the offence and the circumstances in which it was committed are best addressed quickly*”.<sup>4</sup>

## RESEARCH METHODOLOGY

The method used in this legal research is purely doctrinal legal research analysing the relevant legal provisions and court rulings. This type of method aims to make specific inquiries in order to identify specific pieces of information.<sup>5</sup> The primary sources cited are pertinent statutes or legal regulations as well as reported cases law. The Federal Constitution, the Armed Forces Act of 1972, the Armed Forces (Court Martial) Rules of Procedure 1976, the Armed Forces (Summary Jurisdiction) Regulation of 1976, and the Criminal Procedure Code (Act 593) are some of the statutes that have been mentioned. Books, journals, articles, conference papers, and project papers which are secondary sources for the study were also used as references. A comparison to the United States was also made to emphasise the differences in how the legislation is applied. The exploration of military laws through comparative analysis has attracted considerable interest since its inception. This comparative study is deemed necessary and urgent, enabling the drawing upon foreign military legal frameworks to enrich understanding and development in the field.<sup>6</sup>

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<sup>3</sup>Mej Jamal Rodzi bin Dahari, “Examination On Court Martial System In Malaysia” (Kertas Kerja, Maktab Turus Angkatan Tentera, Kuala Lumpur, 2004).

<sup>4</sup>Aifheli Tshivhase, “The Future of Military Summary Trials,” in *Military Justice in the Modern Age*, ed. Alison Duxbury and Matthew Groves (United Kingdom: Cambridge University Press, 2016), 347.

<sup>5</sup>Salim Ibrahim Ali et.al. “Legal Research of Doctrinal and Non-Doctrinal,” *International Journal of Trend in Research and Development*, 4, no. 1 (2017).

<sup>6</sup>Zhou, Jian., *Fundamentals of Military Law: A Chinese Perspective*. China, (Law Press China-Springer: China, 2019).

## MILITARY JUSTICE

Military justice is a distinct legal system that applies to members of the armed forces and, in some cases, to civilians closely associated with the armed forces.<sup>7</sup> The purpose of the military justice system is to maintain discipline, order, and effectiveness within the armed forces by enforcing laws and regulations governing military personnel. As prescribed by the Manual for Courts-Martial (MCM)<sup>8</sup> of the United States (US), the military justice system is composed of three subjects: “good order and discipline in the armed forces, efficiency and effectiveness in the military establishment, and justice”. It is no accident that the preamble to the Manual for Courts-Martial stresses the importance of military justice by stating that the purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.<sup>9</sup> According to Morales et al., the military justice system was designed “to maintain good order and discipline, strengthen national security, and achieve justice”.<sup>10</sup> Military law is a mechanism envisioned for the representative of the armed forces in general and the army in particular, which governs their conduct in a certain way in order not only to preserve discipline among the rank and file but also to attain the highest level of professional quality.<sup>11</sup> Further, Keong stated that the principal objective of military law is to promote discipline in the armed forces, for without discipline the ability of the armed forces to defend the sovereignty of the state and its territorial integrity will be impaired.<sup>12</sup> Thus, it can be said that the military justice system is essential for promoting discipline, good order, effectiveness

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<sup>7</sup>Vashakmadze Mindia, “*Understanding Military Justice: A Practice Note*”, The Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2018.

<sup>8</sup>Manual for Courts-Martial (MCM), United States (2019 Edition).

<sup>9</sup>Kenneth M. Theurer; James W. Russell II., “*Why Military Justice Matters*,” Reporter 37, no. 2 (Summer 2010): 7-10

<sup>10</sup>Eleanor T. and Brooker Morales, John W., “Restoring Faith in Military Justice,” *Connecticut Law Review* 55 (2022).

<sup>11</sup>Avinash Raj David, “Military Justice System in India,” *Journal of Emerging Technologies and Innovative Research* 6, no. 3 (2019).

<sup>12</sup>Chan Sek Keong, “Speech by the Attorney-General Held on Saturday, 21 Oct 2000 at 0900 hrs at Kranji, Choa Chu Kang Way” (Kranji, Choa Chu Kang Way, 2000).

within the armed forces and ensuring justice. According to Tzu, “soldiers must be treated in the first instance with humanity, but kept under control by means of iron discipline”.<sup>13</sup> In a broader context, a military justice system is a system of laws and regulations that govern the conduct of members of the armed forces, and this system provides for penal sanction when such laws are violated by military members. From this discussion, it can be inferred that traditionally the primary function of a military justice system has been to ensure discipline and good order in a State’s armed forces. Nonetheless, States have progressively acknowledged that the most effective approach to obtaining good order and discipline is through fair and just procedures for determining guilt and for apportioning punishment. Thus, the primary function of modern military justice systems is the achievement of justice, not simply the attainment of good order and discipline.<sup>14</sup>

On the other hand, legal representation is a fundamental right for all individuals. It enables individuals to understand and protect their rights and interests within legal proceedings. Having legal representation ensures that an individual’s rights and interests are properly advocated for and defended in court or proceedings. The right to legal representation is recognised in many national and international legal systems, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. In criminal proceedings, this right is often enshrined in constitutional law, allowing individuals to choose their own legal representation.

In Malaysia, Article 5(3) provides individuals with the right to choose their legal representative, while Article 8 ensures equal protection under the law for all. Ab.Wahab and Khairi emphasise that it is the right of persons to be legally represented in the court system,

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<sup>13</sup>Sun Tzu, *Sun Tzu on the Art of War The Oldest Military Treatise In The World*, trans. Lionel Giles (1910) (England: Allandale Online Publishing, 2000).

<sup>14</sup>Rachel E. VanLandingham, Dr. Grazyvydas Jasutis, and Kristina Cernejute, “*Military Justice*,” National Institute of Military Justice and DCAF, accessed April 2, 2024, <https://www.dcaf.ch/sites/default/files/publications/documents/MilitaryJusticeFundamentals.pdf>

and all are equal before the law.<sup>15</sup> The aforementioned provisions can be reproduced as follows;

***Liberty of the person***

5. (3) *Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.*

***Equality***

8. (1) *All persons are equal before the law and entitled to the equal protection of the law.*

Whereas, in the US, The Fifth Amendment to the United States Constitution declares that “*No person shall be ...deprived of life, liberty, or property, without due process of law...*” and the Sixth Amendment to the United States Constitution declares that “*in all criminal prosecutions, the accused shall enjoy the right . . . and to have the Assistance of Counsel for his defence.*”

## **ANALYSIS AND DISCUSSION**

### **Who is A Commanding Officer?**

Under Section 97 of the AFA 72 and Regulation 12 of the Armed Forces (Summary Jurisdiction) Regulation 1976 (SJR 76), a commanding officer can be best explained as an officer who has powers of command over a person charged with an offence and has the jurisdiction to deal summarily with certain offences and against certain categories of accused. It can be said that the commanding officer is of immediate command of the unit, ship, station, or establishment to which the person belongs or is attached. Apart from the commanding officer, there are also subordinate commanders and appropriate superior authorities who have been given the power to investigate and to deal summarily with certain offences against certain categories of accused. Based on Regulation 2 of the SJR 76, a subordinate commander is an officer commanding a squadron, battery, company,

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<sup>15</sup>Andika Ab.Wahab and Aizat Khairi, “Right to justice and legal aid barriers to the vulnerable non-citizens in Malaysia,”*Geografia Malaysian Journal of Society and Space* 16, no. 1 (2020).

or equivalent sub-unit or any officer, appointed to be a subordinate commander by the Armed Forces Council or by an officer in command not below the rank of a brigadier or corresponding rank. An appropriate superior authority, on the other hand, is an officer not below the rank of Colonel or its equivalent who in each case has the power to convene court-martial under the AFA 72. In the context of this article, the term commanding officer is intended to encompass subordinate commanders as well as appropriate superior authorities.

### **The Function of the Commanding Officer**

When someone is suspected of violating a law that pertains to military personnel, the process for addressing the accusation involves several steps as laid down in Section 95 of the AFA 72. The accused must be informed of the specific charge being levied against them, and this charge must be reported to their commanding officer. The report must be made in a formal manner, using a specific charge report as prescribed in the Third Schedule of the SJR 76 that has been designated for this purpose. Once the charge has been reported to the commanding officer, it is mandatory for them to investigate the matter as the words used in Section 95 of the AFA 72 state “*the commanding officer shall investigate the charge*”. A commanding officer has the power to investigate the charges by himself or by delegating the task to his officer. By conducting the investigation, the commanding officer must rely on the Armed Forces (Court Martial) Rules of Procedure 1976 (RP 76), and he is entitled to investigate any offences committed under the AFA 72 by a person who is subject to service law irrespective of the type of offence committed and the rank of the person committing the offence. The record of proceedings for a summary trial must follow the format outlined in the Third Schedule of the SJR 76, whether it is for "Proceedings Before A Subordinate Commander/Commanding Officer" or "Proceedings Before An Appropriate Authority."

## Summary Proceedings

In many military justice systems, the commander has the authority to initiate and conduct investigations into misconduct within the unit.<sup>16</sup> Likewise in Malaysia, the commanding officer is involved in the investigation process once the alleged offence is reported to him. Upon receiving information of the offence, the commanding officer must take further action to investigate the offence.<sup>17</sup> This can be done by the commanding officer requesting the provost marshal, provost officer or military police to investigate the offence or appointing in writing any member of the armed forces personnel to investigate. After the investigation is completed, the investigation officer will submit the investigation report to the commanding officer. The commanding officer's office will then prepare a charge report based on Schedule 3 Part A of the SJR 76. The commanding officer will then evaluate the information available and decide whether or not to proceed with the charge. If the commanding officer decides to proceed with the charge, he must then investigate the charge. To explain briefly, when investigating the charge, the commanding officer must first read out the charge and explain the charge to the accused so that the accused understand the charge framed against him. After explaining the charge, the commanding officer then hears the evidence himself in three available modes, which are:

- (i) Under Rule 34 of the RP 76, by hearing the evidence by inviting the prosecution to adduce evidence by calling the witnesses,
- (ii) Under Rule 35 of the RP 76, by causing the evidence to be reduced to writing in the form of a summary of evidence, or
- (iii) Under Rule 36 of the RP 76, by causing the evidence to be reduced to writing in the form of an abstract of evidence.

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<sup>16</sup>HansenVictor, "The Impact of Military Justice Reforms." in *Military Justice in the Modern Age*, ed. Alison Duxbury and Matthew Groves, (United Kingdom: Cambridge University Press, 2016), 120.

<sup>17</sup>Teo Say Eng and Colonel Wan Nor Mazlan, *Military Legal Proceedings in Malaysia*, 52.

After hearing the evidence, reading, and considering the evidence produced by the prosecution and defence in accordance with any three of these modes of taking evidence, the commanding officer is deemed to have investigated the charge. Subsequently, according to section 96 (5) of the AFA 72, the commanding officer is said to have dealt with the charge summarily (considered as summary proceedings) when he decides the followings;

- (i) whether the accused is guilty,
- (ii) dismissed the charge,
- (iii) records the finding of guilty accordingly, and awarded the punishment.

At this particular stage, a critical issue arises regarding when the accused should be granted the right to legal representation. Specifically, there is a question of whether it should be provided during the investigation phase or after the commanding officer has completed the investigation and chosen to handle the charge in a summary manner. The summary proceedings is unique in that it involves the calling of witnesses and tendering of exhibits during the investigation of the charges, which are more material compared to the stage when the commanding officer decides to handle the charge summarily, where the lawyer will only plead for mitigation after the accused has been found guilty. Therefore, it is argued that the right to legal representation should be accorded starting from the investigation stage in which more technicalities are involved, and legal representation plays a crucial role. This argument is also supported by the fact that the investigation of the offence by the investigation body has already taken place before the investigation of the charge by the commanding officer.

By looking at the function of the commanding officer in investigating, hearing, and considering the evidence, it can be said that the role played by the commanding officer is not only administrative, but also quasi-judicial function. According to the Merriam-Webster Dictionary, quasi-judicial is defined as “having a partly judicial character by possession of the right to hold hearings on and conduct investigations into disputed claims and alleged infractions of rules and regulations and to make decisions in the general manner of courts”. In the case of *Hotel Malaya Sdn Bhd & Anor v. National*

*Union of Hotel, Bar & Restaurant Workers & Anor*,<sup>18</sup> Federal Court had decided that in exercising quasi-judicial function, the court's function comprises of an investigation of the facts, an analysis of the facts, findings of fact, and, lastly, the application of the law to those findings. In other words, where the decision consists of facts finding and applying the law, the decision made can be regarded as a quasi-judicial decision. Therefore, it can be said that the function of the commanding officer during a summary proceedings is quasi-judicial since he has to investigate the offence alleged by fact finding, evaluating the evidence, and making the decision by applying the law.

Central to many of the complaints against military justice is the high degree of discretion given to military commanders in their administration.<sup>19</sup> The military commanders exercise discretion in deciding whether an offence should be charged and how the offenders should be punished. The disposition decision is one of the most important and difficult decisions facing a commander.<sup>20</sup> It is important to emphasise that military commanders have command functions in military law which resulted them having wide discretionary power. The commanding officer is granted prosecutorial discretion, which means that the commanding officer has the authority to decide whether a particular case should be tried by courts-martial, handled summarily by him, or even excused by him. He even has the authority to decide whether cases should be settled administratively. The commanding officer has the discretion to exercise this authority just like the power of an Attorney General.<sup>21</sup>

### **Right to Legal Representation During Summary Proceedings in Malaysia**

One of the most common criticisms of the summary courts-martial is that the accused is not entitled to receive legal representation. Right to legal representation is not provided under the AFA 72, RP 76, or SJR

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<sup>18</sup>[1982] CLJ Rep 124

<sup>19</sup>Robinson O. Everett, "Role of Discretion in Military Justice," *Law and Contemporary Problems* 37, no. 1 (1972):173-215.

<sup>20</sup>"Military Justice Overview," United States Department of Defence, accessed March 30, 2024, <https://vwac.defense.gov/military.aspx>.

<sup>21</sup>Lt Kol Syed Ismail bin Syed Omar, "Military Law: Jurisprudence and Jurisdiction". *Malayan Law Journal Articles* 2 (1997): 9-10.

76. No legal representation is allowed during the stage of investigation by the Commanding Officer.<sup>22</sup> In contrast, the right to counsel is guaranteed under Rule 10 of the RP 76 in courts-martial trials in Malaysia. Consequently, in summary proceedings, it is not permitted for a lawyer to defend the accused. The summary trial process places greater emphasis on the expeditious resolution of alleged misconduct than on rights and justice for individuals. It focuses on factual rather than legal guilt. It uses inquisitorial rather than adversarial procedures, uses preliminary investigative processes to screen out cases where the accused is clearly not guilty, and places the public interest ahead of individual interests and rights.<sup>23</sup> Perhaps, the denial of the rights to legal representation may stem from these factors. Since no action was instituted by the accused before the civil court to challenge the practice, there is no case law that has been decided or reported regarding the absence of this provision. In the area of procedural law relating to criminal matters, the right to legal representation is reinforced and reemphasised by section 255 of the Criminal Procedure Code (CPC) which reads as follows:

"Subject to any express provision of law to the contrary, every person accused before any criminal Court may of right be defended by an advocate".

Further, Rule 4 (1) of the RP 76 affirms the application of the Criminal Procedure Code in court-martial proceedings. Rule 4 is reproduced as follows;

“As matters of rules of procedure for which no special provision has been made by these Rules or by any other law for the time being in force, the law relating to the criminal procedure for the time being in force in Malaysia shall be applied so far as the same shall not conflict or be inconsistent with these Rules and can be made auxiliary thereto.”

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<sup>22</sup>Dahari, An Examination On Court Martial System In Malaysia From Universal Declaration Of Human Rights Perspective; Eng and Mazlan, *Military Legal Proceedings in Malaysia*.

<sup>23</sup>“Summary Report on Military Justice,” New Zealand Ministry of Defence, accessed March 29, 2024, <https://www.defence.govt.nz/assets/publication/file/c17cd46f5c/Summary-Report-on-Military-Justice.pdf>

Although the Criminal Procedure Code applies to military justice proceedings, and there is no provision regarding the right to legal representation during summary proceedings, we opine that the inclusion of the phrase “*before any criminal court*” in Section 255 of the Criminal Procedure Code renders it inapplicable to summary proceedings. Nevertheless, cases involving the identical issue in Malaysian tribunal proceedings that were decided by the civil court can be referred to.

In *Doresamy v Public Services Commission*,<sup>24</sup> Raja Azlan Shah J. decided that the need for legal representation in ordinary courts is equally applicable in disciplinary tribunals, particularly when an individual's reputation and livelihood are in jeopardy. In this case, Doresamy, an office boy, was dismissed by the Public Services Disciplinary Board for breaching the Public Services Regulations. Doresamy appealed his dismissal through his solicitors, but the Appeal Board rejected the appeal because it was not made personally by Doresamy in writing, as required by regulation 13(1) of the Public Services Disciplinary Board Regulations 1967. However, Doresamy's counsel argued that there was no provision in the regulation that precluded legal representation and that the common law right of any person to appoint an agent could only be limited by explicit words or necessary implications. The counsel suggested that if the regulation states, “*An appeal shall be made in writing by a person aforesaid and none other,*” then it could be interpreted as preventing legal representation. The counsel further argued that the common law right of any person who is *sui juris* to appoint an agent to act on their behalf can only be restricted by explicit words in the regulation or necessary implication.

During the hearing, the counsel relied heavily on the case of *Mundell v Mellor*.<sup>25</sup> In that case, Deane J. held that the common law right to appear through an agent cannot be restricted without an expressed provision taking away that right. Deane J. also referred to the case of *R v Assessment Committee of Saint Mary Abbots, Kensington*,<sup>26</sup> in which Charles J. had to determine whether a person could appear through an agent while exercising the statutory right of

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<sup>24</sup>(1971) 2 MLJ 127

<sup>25</sup>[1992] SSLR 152

<sup>26</sup>[1891] 1 QB 378

objecting. In this case, Charles J. quoted a passage from Stirling J. in *Jackson & Co v Napper*.<sup>27</sup>

*"I understand the law to be that, in order to make out that a right conferred by statute is to be exercised personally, and not by an agent, you must find something in the Act, either by way of express enactment or necessary implication, which limits the common law right of any person who is sui juris to appoint an agent to act on his behalf. Of course, the legislature may do so; but prima facie when there is nothing said about it, a person has the same right of appointing an agent for the purpose of exercising a statutory right as for any other purpose."* (Emphasis added).

In the case of Doresamy, Raja Azlan Shah pointed out that Regulation 13(1) of the Public Services Disciplinary Board Regulations 1967 explicitly grants an individual the right to appeal. The question remains whether an individual's solicitor may appeal on their behalf, despite the regulation's silence on the matter. Does this silence justify denying the individual the right to legal representation? Raja Azlan Shah responded that there is no such justification for denying this right. He cited the following quote to support his stance:

*"The considerations requiring assistance of counsel in the ordinary courts are just as persuasive in proceedings before disciplinary tribunals. This is especially so when a person's reputation and livelihood are in jeopardy. If the ideal of equality before the law is to be meaningful, every aggrieved person must be accorded the fullest opportunity to defend himself at the appellate review stage. Where he has a statutory right of appeal and the regulations are silent on the right to the assistance of counsel, he cannot be deprived of such right of assistance. I can find nothing from regulation 13(1) to limit his right".*

Interestingly, the Honourable Justice Raja Azlan Shah believed that the right to legal representation was necessary to uphold the principle of equality before the law and to give the aggrieved person the best chance to defend themselves. However, Chan Gary commented that it is unclear whether the judge was suggesting that the

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<sup>27</sup>[1886] 35 Ch D 162 172

right to legal representation should be constitutionally conferred under Article 8 of the Federal Constitution when referring to the concept of equality before the law.<sup>28</sup>

Based on the foregoing discussion, it is observed that the court would hold that the common law right to appear and be heard through an agent cannot be restricted in the absence of an express provision restricting or eliminating the representation of legal counsel. This was evident in the case of *Doresamy*, where the court affirmed the right of an aggrieved person to legal representation during the appeal process. Although *Doresamy's* case involved an appeal to the board, and a summary proceedings under the commanding officer's original jurisdiction, the principle established in *Doresamy's* case can be universally applied.

In 2003, the case of *Marathaei d/o Sangulullai (suing on behalf of the estate of Thangayah Aupulley) & Anor v. Syarikat JG Containers (M) Sdn Bhd & Anor*<sup>29</sup> reinforces the principle established in *Doresamy's* case that the common law right to appear and be heard through an agent, including legal counsel, cannot be restricted in the absence of an express provision restricting or eliminating such representation. In this case, the Court of Appeal held that the Industrial Relations Act 1967 is silent on the issue of representation, and that parliamentary silence on the point of such importance enables the court to read such a right into the Act. The court found that there was no intention on the part of Parliament to exclude the right of an individual workman to representation at the hearing of a non-compliance complaint, and that the decision of the Industrial Court denying the appellant the right to representation went against the fundamental principles of procedural fairness (akin to natural justice). The Court of Appeal Judges decided that the Industrial Relations Act 1967 cannot take away the right to legal representation, which is a common law right.

Based on the principles established in the *Doresamy* and *Marathaei* cases, it can be argued that in the absence of any express provision in the AFA 72, RP 76, and SJR 76 that prohibits legal representation during a summary proceedings, the commanding officer has the absolute discretion to allow legal representation. The court in

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<sup>28</sup>Chan Gary, "The Right of Access to Justice: Judicial Discourse," *Asian Journal of Comparative Law* 2, no. 1 (2007).

<sup>29</sup>[2003] 2 MLJ 337

both cases emphasised the importance of procedural fairness and the principle of equality before the law, suggesting that a party in a legal proceedings should be allowed to be heard through legal representation if necessary. It is likely that the commanding officer would be required to exercise their discretion in a fair and consistent manner and should be guided by the principles of natural justice and procedural fairness.

In the case of *Sithambaran v Attorney-General*,<sup>30</sup> the court ruled that although Regulation 7 of the Police Regulations 1959 did not explicitly address whether subordinate officers could have legal representation at an inquiry, the chairman presiding over the inquiry had the discretion to permit the plaintiff to be represented by a legal representative. Tan Ah Tah J. cited the English case of *Enderby Town Football Club Ltd v The Football Association Ltd*,<sup>31</sup> in which Lord Denning explained the rules governing legal representation before a domestic tribunal, as follows:

*"The case thus raises this important point: is a party who is charged before a domestic tribunal, entitled as of right to be legally represented? Much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter for the discretion of the tribunal. It is master of its own procedure; and, if it, in the proper exercise of its discretion, declines to allow legal representation, the courts will not interfere."*

Therefore, the discussion above suggests that the argument and practice of disallowing legal representation during summary proceedings on the grounds of an absence of a provision for such representation may not be entirely accurate. Under common law, commanding officers have the discretionary power to allow legal representation during summary proceedings, taking into account the principles of military justice in maintaining discipline, good order and ensuring justice. Although summary proceedings differ from court-martial trials or criminal courts, the commanding officer's discretion in determining an accused's right to legal representation should be exercised judiciously and not arbitrarily. The commanding officer should consider relevant factors such as the accused's background, the

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<sup>30</sup>[1972] 2 MLJ 175

<sup>31</sup>[1971] 1 ALL ER 215

nature of the case, the technicalities involved, the potential punishment, and any other elements that may best serve the interests of justice.

One can refer to the case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lembah Enterprise Sdn Bhd*,<sup>32</sup> wherein the Honourable CJ Raja Azlah Shah disagreed with the claim made by the Chairman of the Land Executive Committee that they had unfettered discretion to approve or reject any application under section 124 and impose any conditions or requirements they deemed appropriate. In this notable ruling, the Honourable CJ Raja Azlan Shah emphasised that:

*“Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably”.*

It was decided in *R v Secretary of State for the Home Department, ex parte Tarrant*,<sup>33</sup> that prisoners do not have an automatic right to legal representation in every case, but adjudicators must consider such requests and reject them lawfully and reasonably. Foster noted that the Court of Appeal in *Tarrant* established several factors that adjudicators should consider before granting legal representation, such as the seriousness of the charge and the potential penalty, the likelihood of complex legal issues, and the prisoner's ability to present his case. These factors must be balanced with the need for reasonable speed in deciding cases and ensuring fairness between prisoners and prison officers.<sup>34</sup> Although the court used the term 'duty' rather than discretion, the principles laid down by the *Tarrant* case can serve as guidance for a commanding officer's decision.

Undoubtedly, summary proceedings aims to deal with cases promptly without undue delay by the commanding officer. As such, the commanding officer can exercise discretion to allow legal representation, subject to avoiding unnecessary delays. Nonetheless, it is crucial to emphasise the accused's right, as noted by judges in the

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<sup>32</sup>[1979] 1 MLJ 135

<sup>33</sup>[1985] QB 251

<sup>34</sup>Steve Foster, “Prisoners Rights, Disciplinary Procedures and the Right to Legal Representation,” *Journal of Civil Liberties* 7, no. 3 (2002).

above case regarding the constitutional right to equality under Article 8(1) of the Federal Constitution. Additionally, the nature and background of the accused who appears before their superior must be considered. The accused usually lacks a legal background and may not be aware of their rights under the law. The case of *Pett v Greyhound Racing Association Ltd*,<sup>35</sup> as decided by Lord Denning, supports this point. Lord Denning stated that:

*“Once it is seen that a man has a right to appeal by an agent, then I see no reason why that agent should not be a lawyer. It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his favor or the weaknesses on the other side. He may be tongue-tied or confused, or wanting in intelligence. He cannot examine or cross examine witnesses. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task. I should have thought, therefore, that when a man’s reputation or livelihood is at stake, he not only has a right, to speak by his own mouth. He has a right to speak by counsel or solicitor”.*

In the latest case of *Goh Chang Hon v PP*,<sup>36</sup> the High Court Judge decided that:

*It is a matter of common sense and logic that a lay person, having no background in the science of law being an accused person would be incapable of advocating his case well before the court of law. He does not possess any skills and knowledge whatsoever on the intricacies of law and procedure. In such circumstances, how could he reasonably and possibly defend himself when ab initio he lacks any knowledge on what lies next in a criminal proceeding?*

The above discussion indicates that the highest court in Malaysia has not yet examined the right to legal representation during summary proceedings. It would be beneficial to consider the position of the US, where the Supreme Court has already addressed this right in summary court-martial trial.

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<sup>35</sup>[1968] 2 WLR 1471

<sup>36</sup>[2022] 1 LNS 147

## Position in the United States

Generally, most countries like the US, United Kingdom, India, and New Zealand do not provide the right to legal representation during summary trials. The US, however provides for this right in some special cases. According to Rule 1301(e) of the Rules for Courts-Martial (RCM), an accused may be allowed to be represented by a qualified civilian counsel, provided that such representation does not cause undue delay and military exigencies do not prevent it. This practice has evolved over time in the history of the United States summary court-martial trials and will be further elaborated upon. Notably, the US is of interest in this context because the Supreme Court has interpreted the right to legal representation as enshrined in the Constitution itself. Moreover, the Court of Military Appeals (COMA) is the court Congress established to define military law, and it has developed the most appropriate and compelling test for determining the applicability of constitutional standards to the military.<sup>37</sup> The military justice system of the US also has a similar legal tradition originating from common law.

The military justice system is the oldest system of federal jurisprudence in the US—older than the Constitution, older even than the nation.<sup>38</sup> The Uniform Code of Military Justice (UCMJ) is a federal law in the US that governs military law. Enacted in 1950, the UCMJ prescribed for the first time a single disciplinary statute for all of the United States Armed Forces.<sup>39</sup> It applies to all active duty personnel, National Guard and Reserve members who have been called to active duty, and students at military academies. Prior to the UCMJ, each service had its own set of laws that varied during peacetime and wartime. The UCMJ was established to create a standardised legal framework for all services, and it also applies to citizens who support the armed forces during a war. K.Elsea and M.Gaffney<sup>40</sup> explained that

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<sup>37</sup>Stanley G. Ellis, “Military Law Courts-Martial Recent Cases,” *BYU Law Review* 1975, no. 1 (1975).

<sup>38</sup>Scott W. Stucky, “Appellate Review of Courts-Martial,” *Catholic University Law Review*, 69 no. 4 (2020):797-805.

<sup>39</sup>Eugene R. Fidell et.al., “Equal Supreme Court Access,” *The Yale Law Journal* (2021).

<sup>40</sup>Jennifer K.Elsea and Jonathan M.Gaffney, *Military Courts-Martial Under the Military Justice Act of 2016* (2020), accessed November 11, 2023, <https://crsreports.congress.gov>.

Presidents had implemented the UCMJ through the Manual for Courts-Martial (MCM). The MCM consists of various elements, such as the Rules for Courts-Martial (R.C.M.), the Military Rules of Evidence (Mil. R. Evid.), and the punitive articles of the UCMJ, along with commentary. Almost all aspects of military law are covered by the MCM.

The US has three types of courts-martial: summary, special, and general. Special courts-martial are at the intermediate level and have a military judge, trial counsel (prosecutor), defence counsel, and at least three officers sitting as a panel of court members or jury. General courts-martial are the most severe level and include a military judge, trial counsel, defence counsel, and at least five court members as expressed under § 816. Art. 16.

Our focus is on the summary court-martial, and its composition is prescribed in R.C.M. 1301(a). A commissioned officer on active duty is involved in a summary court-martial. Usually, members of the same armed force in which the accused is in are included unless authorised otherwise by the Secretary. It follows the rules and regulations of the accused's military service. Under R.C.M, 1301(b), the function of summary court-martial is prescribed to quickly adjudicate minor offenses through a simple disciplinary proceedings while ensuring impartiality and safeguarding the interests of both the accused and the government to uphold justice. A summary court-martial may consult a legal officer for legal counsel, but it is not permitted to consult anybody for guidance on factual conclusions or sentence determination. These decisions must be made independently by the summary court-martial. As previously mentioned, it is important to note that under the UCMJ, there is also no provision that guarantees the right to counsel for the accused in a summary court-martial, similar to the position in Malaysia. Counsel is only guaranteed to assist the accused in general and special courts-martial, as outlined in Article 27 of the UCMJ, 10 U.S. Code § 827.

In the period of 1972 to 1976, the US military justice system was uncertain about whether the right to detailed counsel applied to summary court-martial proceedings, as noted by Piotrowski.<sup>41</sup> The uncertainties began in 1972 when the US Supreme Court issued its

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<sup>41</sup>Leonard R. Piotrowski, "The Right to Counsel at a Summary Court-Martial," *Army Lawyer* 3 (1977).

ruling in *Argersinger v. Hamlin*,<sup>42</sup> which held that the Sixth Amendment right to counsel is triggered by the possibility of loss of liberty or confinement, rather than the categorisation of a crime as a misdemeanor or a felony. *Argersinger* is a civilian defendant who had been denied counsel and sentenced to prison for a misdemeanour case. According to the Supreme Court, no one can be imprisoned unless they have legal representation or knowingly forgo their right to it.

Later in 1973, the Court of Military Appeals (COMA) held in *United States v. Alderman* 22<sup>43</sup> that an accused conviction was inadmissible for considering sentencing purposes at a subsequent special court-martial unless he had legal representation at the summary court-martial that led to his conviction and confinement. The COMA in *Alderman* heavily relied on two Supreme Court decisions to come to its conclusion. One is a decision in *Argersinger v. Hamlin* and the other in *United States v. Tucker*,<sup>44</sup> which established that convictions obtained in violation of constitutional rights could not be used to increase sentences for future convictions.<sup>45</sup> For the majority, Judge Quinn carefully drew the line at the admissibility of evidence of a previous conviction obtained at a trial when the accused's right to counsel was improperly denied. In response to the *Argersinger* and *Alderman* decisions, the Navy and the Army promulgated regulations requiring counsel at summary courts-martial before confinement could be imposed.<sup>46</sup> The effect of this case resulted in army policy and military law being changed to provide that a soldier could not be sentenced to confinement by a summary court-martial unless he was represented by a lawyer or made a knowing and intelligent waiver of his right to such representation.<sup>47</sup>

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<sup>42</sup>407 U.S. 25 (1972)

<sup>43</sup>C.M.A. 298, 46 C.M.R. 298 (1973)

<sup>44</sup>404 U.S. 443 (1972)

<sup>45</sup>Steven E. Asher, "Reforming The Summary Court-Martial," *Columbia Law Review* 79, no. 1 (1979).

<sup>46</sup>Patricia A. Daly, "The Right to Counsel at Summary Courts-Martial," *Indiana Law Journal* 52, no. 1 (1976).

<sup>47</sup>Leonard R. Piotrowski, "The Right to Counsel at a Summary Court-Martial,".

In 1976, the Supreme Court eventually decided whether the defence counsel is required to aid during a summary court-martial proceedings in the case of *Middendorf v. Henry*.<sup>48</sup> The case involved enlisted Marine Corps personnel who were accused of taking unauthorised absences and were found guilty and sentenced to hard labour in summary courts-martial without legal representation. They challenged the military's right to try them without legal representation by filing a class action for habeas corpus and other relief against the Secretary of the Navy and others in a Federal District Court in California, which awarded them a judgment. The Court of Appeals reversed the judgment and remanded the case for reconsideration in light of the Court of Appeals' opinion in *Daigle v. Warner*.<sup>49</sup> In that case, the court held that there is no right to counsel under the Sixth Amendment in summary courts-martial and no absolute Fifth Amendment due process right in every case where a military defendant might be imprisoned.

Following the award of certiorari, the US Supreme Court ultimately ruled that the Due Process Clause of the Fifth Amendment and the Sixth Amendment do not require the accused to have legal representation during a summary court-martial. The Court's ruling was mainly focused on summary courts-martial, and it found that they did not fall under the definition of "criminal prosecutions" according to the Sixth Amendment. Consequently, the right to counsel clause was considered irrelevant, and the question of whether an accused person in a summary court-martial had the right to legal representation under the due process clause of the Fifth Amendment was addressed instead. The court came to the negative conclusion that legislative intent and military necessity outweighed whatever potential due process right to counsel the accused may have had. The Court also considered the non-adversarial nature of the proceedings, the minor nature of the charges, and the nature of the punishments, which included maximum confinement of thirty days, minimum fines reductions, and forfeitures. The Court further emphasised that the accused had the full right of option to have a brief and informal hearing. Overall, the Court came to the conclusion that the arguments made in support of counsel during

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<sup>48</sup>425 U.S. 25 (1976)

<sup>49</sup>490 F.2d 358 (9<sup>th</sup> Cir.1974)

summary courts-martial did not outweigh the compromises made by Congress in its decisions on the matter.<sup>50</sup>

It is important to highlight that the US's interpretation of constitutional law is dynamic. Referring to the famous words of John Marshall CJ in the case of *McCulloch v Maryland 4 Wheat*. 316, 415 (1819) that a constitution is “*intended to endure for ages to come, and, consequently, to be adapted to the various crisis of human affairs*”. Kennedy enlightens on how the common law tradition is instructive in the dynamic interpretation process of written constitution of the US.<sup>51</sup> He also noted that over time, the Supreme Court, beginning with the Marshall Court, developed doctrines of constitutional interpretation that led to a deeper understanding of the constitution's dynamic nature among judges.

However, there are many reasons to criticise Middendorf's case. The dissenting opinion of Justice Marshall contends that summary courts-martial fall under the sixth amendment's definition of ‘criminal prosecutions’ and are thus subject to its guarantee of the right to counsel. According to Bell, there are strong arguments in favour of providing defendants at summary courts-martial the right to legal representation.<sup>52</sup> The Court noted in *Argersinger* that the expedited nature of proceedings for minor and misdemeanour offences calls for the presence of counsel. An interesting point and argument was raised by Grove, when he referred to the function of the presiding officer as the non-attorney ‘judge’. There is no requirement for the presiding officer in a summary court-martial to have a formal legal training, despite their roles as the judge, fact-finder, prosecutor, and defence attorney, except what is provided to all officers as part of their general military training.<sup>53</sup> As the accused does not have a right to legal representation and the presiding officer is not required to have formal legal training, no one present at a summary court-martial is qualified to interpret and implement military law. The summary court officer relies

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<sup>50</sup>Jefrey A. Bell, “Middendorf v. Henry The Right to Counsel,” *Arkansas Law Review* 31, no. 2 (1977).

<sup>51</sup>Justice Anthony Kennedy, “Written Constitutions and the Common Law Tradition,” in *The Sultan Azlan Shah Law Lectures II*, ed. Visu Sinnadurai (Kuala Lumpur: RNS Publications, 2006).

<sup>52</sup>Bell, “Middendorf v. Henry: The Right to Counsel.”

<sup>53</sup>Michael L. Grove, “The Summary Court-Martial in Constitutional Perspective,” *Houston Law Review* 14, no. 2 (1977).

mostly on good faith, common sense, basic understanding of military law, and a self-help trial brochure available in their unit library. According to Grove, this raises the possibility that the accused may be found guilty of a crime even without any prima facie evidence presented at the trial. Sternlicht believes that in reaching a contrary conclusion in the *Middendorf*, the Court over-estimated the needs of the military and underestimated the needs of the individual.<sup>54</sup> In addition, Ellis argues that the COMA approach not only applies *Argersinger* to summary courts-martial but also finds a fair balance between the accused's rights as a citizen and duties as a soldier.<sup>55</sup> According to him, the Supreme Court should uphold the COMA test in *Middendorf v. Henry*.

It is important to note that in the US, the accused has the option of choosing a summary trial. In other words, the accused has the opportunity to object a summary court-martial trial. This option is available due to the understanding that the accused's rights may not be as fully protected in a summary court-martial as they would be in higher-level court-martial proceedings. The commander must decide how to proceed in the event of such an objection. The commander had several options, including referring the case to a higher court-martial, non-judicial punishment, disposing of the case administratively, or complete dismissal. A commander's typical approach is to refer the case to a higher court-martial level.

In Malaysia, like the United States, the accused is also allowed to choose a court-martial trial. However, it is important to note that the accused may not be given this option, particularly in cases where the commanding officer uses provisions of sections 97(3) and 97(9) of the AFA 72. According to subsection (3), if the commanding officer finds that the charge against the accused can be dealt with summarily, then he shall proceed to do so. In such cases, if the commanding officer finds the accused is guilty, he may award one or more of the punishments listed in subsection (3), subject to subsections (4) and (9). Thus, the option for the accused to choose a court-martial trial may not be available in such circumstances.

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<sup>54</sup>Mark A. Sternlicht, "Military Law Right to Counsel," *North Carolina Law Review* 55 (1976).

<sup>55</sup>Ellis, "Military Law Courts-Martial Recent Cases".

Therefore, the position in the US is that at a summary court-martial, the accused is not entitled to legal representation. However, if the accused has legal representation qualified under R.C.M. 502(d)(2), that his counsel may be allowed to appear on the accused's behalf at the summary court-martial if doing so would not unreasonably stall the proceedings and if military exigencies do not prevent it as required by R.C.M. 1301. (e). At summary courts-martial, there is neither a statutory nor a constitutional right to counsel. Depriving an accused individual of the opportunity to be represented by counsel during a summary court-martial is thus not regarded as a mistake. Nonetheless, it is also not prohibited for counsel to appear. At the discretion of the detailing authority, a military attorney may be detailed or made available as a counsel for the accused.

By examining the practices observed in the US mentioned above, Malaysia could glean valuable lessons and potentially incorporate these practices to enhance the fairness and transparency of its summary proceedings within the military justice system. This could contribute to safeguarding the accused rights and ensuring that justice is served effectively.

## **FINDINGS**

After thorough deliberation, this article has arrived at several findings. First, within military justice systems, quasi-judicial power is vested in commanding officers, granting them unique authority. Second, this authority extends to the investigation of offences and charges, accompanied by prosecutorial discretion. Commanding officers have the prerogative to determine whether a case should proceed to courts-martial, be handled summarily by the commanding officer, or potentially be dismissed entirely, effectively assuming a judicial role with the capacity to award punishment. Third, in the absence of specific provisions, recourse to common law principles dictates that the right to legal representation is at the discretion of the commanding officer. Finally, considering the commanding officer's quasi-judicial power, akin to that of the court-martial trial, the denial of legal representation and not giving the accused an option to refuse summary proceedings might potentially *ultra vires* the Federal Constitution. However, in an abundance of caution and humility, it would be interesting to observe the future stances adopted by the apex court on this matter.

## RECOMMENDATION

Drawing from the preceding discussion, there is a pressing need to review and reform RP 76 and SJR 76, which govern summary proceedings and incorporate the commanding officer's discretionary powers therein. In accordance with Celidon's observation, any aspect of the military justice system that burdens commanders, harms service member's rights, or impedes the administration of good order and discipline should be reformed.<sup>56</sup> It is imperative to review existing legislation governing summary proceedings to integrate rules and regulations that are in compliance with fair trial guarantees, human rights and international law. Based on the report of the United Nations High Commissioner of Human Rights on the Summary of the discussions held during the expert consultation on the administration of justice through military tribunals and the role of the integral judicial system in combating human rights violations, the experts' presentations showed that, in some States, there were significant gaps in implementing the right to a fair trial. Questions were raised concerning the practice of summary proceedings for lesser offences, which in some States did not allow for the presence of legal counsel or the right of appeal. States were invited to take appropriate measures to ensure that the right to fair trial in military tribunals was in full conformity with the International Covenant on Civil and Political Rights (ICCPR).<sup>57</sup>

In response to this, a few expert groups analysed the international human rights aspects of military justice, specifically on how military justice proceedings in line with the ICCPR.<sup>58</sup> In 2006, Professor Emmanuel Decaux acted as the United Nations Special Rapporteur on the Administration of Justice Through Military Tribunals presented a report to the United Nations Human Rights Council in which his report was unanimously adopted. These principles commonly referred to as the 'Decaux Principles,' aimed to establish the legal framework for the proper administration of justice by military tribunals outlining twenty principles, serve as the definitive

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<sup>56</sup>Celidon H. Pitt, "The Case for Standing Courts-Martial," *Naval Law Review* 67 (2021):111-152

<sup>57</sup>United Nations A/HRC/28/32.

<sup>58</sup>Rosenblatt Franklin D., "Nonjudicial Punishment," *Villanova Law Review* 68, no. 5 (2024): 807-48

international standards regarding this issue.<sup>59</sup> Principle 15 suggests that summary proceedings should respect the human rights of the accused. Later, in 2019, a group of experts developed the 2019 Yale Draft Principles (Yale Draft Principles) for Military Summary Proceedings which consist of eighteen principles. These Yale Draft Principles seek to indicate the minimum standards under international law that should be observed by any system of military summary proceedings.<sup>60</sup> Principle 13 suggests possible reform that the accused shall have the right to consult a lawyer in respect of a charge that is to be dealt with summarily, whether or not national law permits legal representation in the hearing. Thus, the review and reform of our law can be achieved by developing a comprehensive plan, drawing upon insights from other jurisdictions, and incorporating relevant international instruments such as Decaux Principles and Yale Draft Principles with necessary modifications.

Additionally, the commanding officer should exercise wise discretion when deciding whether to permit legal representation during summary proceedings, considering the unique circumstances of each case. This approach is a marked improvement over the current practice, which disallows legal representation during such proceedings entirely. The commanding officer should therefore consider exercising their discretionary powers to permit legal representation, particularly where the accused is a layperson in need of legal assistance. Furthermore, the practice of denying the accused the option to refuse summary proceedings to go for a court-martial trial is unsound. The accused should be accorded the right to elect whether their case should be dealt summarily or tried by court-martial. As the concluding recommendation, it is essential to address the current deficiency in Malaysia's military justice system which lacks an appeal mechanism. At present, the SJR 76 does not permit appeals, and it is recommended that the accused be granted this right in this modern age. While the

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<sup>59</sup>Weill, Sharon and Robinson, Mitch, "The Decaux Principles on the Administration of Justice," *Reciprocite et Universalite: Sources et regimes du droit international des droits de l'homme Melanges en l'honneur du Professeur Emmanuel Decaux Collectif*, 553 (2017): accessed March 30, 2024, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3095408](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3095408)

<sup>60</sup>"2019 Yale Draft Principles for Military Summary Proceedings," accessed April 1, 2024, <https://puc.overheid.nl/PUC/Handlers/DownloadBijlage>

accused can currently request a review from the Armed Forces Council or superior officer,<sup>61</sup> establishing a formal appeals process would provide dissatisfied accused with a proper avenue to challenge the finding or sentence. Countries like the US and the United Kingdom amend their legislation to provide that a person found guilty at summary trial may file an appeal to allow a complete rehearing of any charge.<sup>62</sup> An appeal process ensures greater transparency and allows all parties to have a say during the proceedings. According to Tshivhase, despite the deficiencies in a summary trial, the right to elect trial by a summary court-martial and availability of an appeal mechanism against the finding and sentence of a summary trial as well as the automatic review is generally seen as a measure which legitimises and justifies the practice of summary trials in their present form.<sup>63</sup>

## CONCLUSION

The intentional exclusion of legal representation from summary trials enables the commanding officer to take swift disciplinary action without prolonging the proceedings that may result from legal representation involvement. Thus, the introduction of legal representation may impede the primary goal of the summary proceedings. Nevertheless, the summary proceedings requires reform to conform to contemporary legal developments, including allowing legal representation. The Malaysian Federal Constitution guarantees the right to legal representation and equal protection before the law. In the future, it will be intriguing to observe how the courts determine the applicability of the right to counsel and equality before the law to the summary proceedings of Malaysia's military justice system, as this has not been tested in the country's highest court to date. It is noteworthy that, like any other justice system, the military justice system in Malaysia is subject to constant evaluation and improvement to ensure that it is impartial, transparent, and effective in fulfilling its role and obligations.

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<sup>61</sup>Section 130 of Armed Forces Act 1972 (Act 77).

<sup>62</sup>“Summary Report on Military Justice,” New Zealand Ministry of Defence, accessed March 29, 2024, <https://www.defence.govt.nz/assets/publication/file/c17cd46f5c/Summary-Report-on-Military-Justice.pdf>

<sup>63</sup>Tshivhase, “The future of military summary trials in the modern age,” 356.

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