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BAIL AND THE *PRINCIPLE OF GENERALIBUS SPECIALIA DEROGANT* IN THE MALAYSIAN MILITARY JUSTICE SYSTEM

Mazura Md Saman[a,*], **Jamal Rodzi Dahari** [b]

[a] *Faculty of Defence Studies and Management, National Defence University Malaysia.*
[b] *Faculty of Defence Studies and Management, National Defence University Malaysia.*

*Corresponding author : *mazura.mdsaman@upnm.edu.my*

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ABSTRACT

This article analyses case law and literature to determine the position of bail in the military criminal justice system. The right to bail is a fundamental human right to liberty, and ensure unfairly imprisonment before trial. The criminal justice system in many countries provides for the right to bail, including Malaysia except for offences such as drug trafficking, kidnapping and crimes which carry the death penalty. However, as the Criminal Procedure Code only applies to civilian courts in Malaysia, military personnel may not enjoy the same treatment under the Armed Forces Act 1972. It is thus essential to investigate the need for the Armed Forces Act 1972 to be reformed to include the right to bail.. The finding suggests that the bail should be afforded to military offender charged under the Armed Forces Act 1972 and give the option to the military authorities the discretion to release the accused on a bail, in unanimity to the element of fundamental rights to liberty.

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Introduction

Releasing an accused person on bail is a common practice in the civil justice system. Bail denotes the temporary release of an accused person suspected or charged with an offence while awaiting the outcome of an investigation or trial for a crime. The idea of releasing a person on bail is mainly based on the belief that a person is innocent until proven guilty. Therefore, one should not be punished until they are convicted of a crime. In *Stack v Boyle* (342 U.S. 1, 72 S. Ct. 1 (1951)), the U.S. Supreme Court noted that it is important for a person to remain free during the pre-trial stage to assist in the preparation of his or her defence. The primary purpose of bail is to ensure that the accused appears at trial (Miller, 2012, p. 91). Where suspected or accused persons are refused bail, they are either held in police custody or held by courts in custody, depending on the stage of their case. Determination, whether suspects are to be bailed, are taken at various stages of the criminal justice process specifically at the pre-charge and a post-charge level either by the police or the court if accused are awaiting trial or sentencing or if the offender appeals to the sentences or convictions (Newburn & Neyroud, 2013, p. 11). Bail indeed is an essential legal mechanism in ensuring due process and fair treatment to both the accused person and the opponent before the finding of the case.

History of Bail

The issuance of bail can be traced back to English Law, with the first legal regulation of bail appearing in the 1200s. Law concerning bail in English Law has evolved in reaction to the misuse of bail rather than to changes in society with the first law to include bail was the Statute of Westminster in 1275 (Miller, 2012, p. 91). Before the enactment of the Statute, the local sheriffs who were the King's agents had a sole discretion of whether to release an accused prior to trial. They also have the discretion to set the amount of bail. Reacting to the frequent misuse of this power, the Statute of Westminster lists those offences that were and were not bail able, thus limiting the sheriff's discretion with regards to bail.

Historically, the primary function of bail was to get the defendant back to court for trial and not intended for preventing him from committing future offences. Indeed, the only intention of the English judges in setting out bail was to guarantee the presence of the defendant in court (Baughman, 2017, p. 19). Early English law followed the maxim that it was far worse to reject bail to an accused person later found to be innocent than to release someone who was actually guilty of a crime. For example, in the case of *United States v Barbe*r (140 U.S. 164 (1891), the court observed that in criminal cases "it is for the interest of public as well as the accused that the latter should not be detained in custody prior to his trial…presumptively they are innocent of the crime charged and entitled to their constitutional privilege of being admitted to bail". Some ancient English law went so far as to prohibit "pre-trial detention in all criminal cases" (Baughman, 2017, p. 20). However, subsequent reform to the law makes it more difficult to obtain release. By 1990s, the accepted objective of bail had expanded from ensuring the defendants' presence at trial to the more specific "public justification" of preventing danger to the community (Baughman, 2017, p. 27). Throughout history, many Statutes were enacted limiting the discretionary power of the court in allowing a bail. Securing national interest and public interest were the common reasons for the legislature to include such provision in the statutes.

General terms of Bail in Malaysia

The general law governing bail in Malaysia can be found in Section 387 to Section 394 of the Criminal Procedure Code (CPC). These provisions of CPC shall apply to the bail application for offences under the penal code or other statutes subject to any written law which provides specific provisions to the contrary. Under the CPC, a bail is a legal act allowing the release of a person from "custody or prison and delivery into the hands of sureties who undertake to produce him in court on an appointed date" (Hasbollah Mat Saad et al., 2011, p. 24). Under CPC bail is granted as of right only in respect of a bailable offence. With regards to a non-bailable offence, the grant of bail has to be performed with judicial care. Public protection from the criminal will have to be weighed against one's presumption of innocent until found guilty (Yusof bin Mohamad v P.P., [1995] 3 MLJ 66).

The CPC allows two kinds of bail, namely "a police bail" and/or "a court bail". Police bail is issued if an investigation cannot be concluded. The security bail was given to make sure the suspect would reappear for further questioning instead of detaining the suspect for a more extended period. Meanwhile, court bail means the release of an accused person from detention by the detaining authority on security provided, for appearance in court on an agreed date. The decision on court bail would depend on the nature of the offence. The consideration which the court took into account in deciding whether to grant bail or not includes the reasonable possibility of the presence of the accused at the trial, the character of the prosecution's evidence, the nature and seriousness of the offence, the reasonable apprehension of witnesses being tampered with, public protection from criminal and other consideration such as the propensity of the accused participating in further offences, and his likely attitude towards matters, persons or things around him (Yusof bin Mohamad v P.P., [1995] 3 MLJ 66). The types of bail that may be issued by the court are a personal bond with security, a personal bond without security, a bond with surety and security as well as a bond without security but with sureties. Nevertheless, despite the above general provision of law in relation to bail, there are statutes which specifically exclude the court's discretion in granting of bail. The provisions can be found for example the Dangerous Drug Act 1952 (DDA) (Section 41B), the Dangerous Drugs (Forfeiture of Property) Act 1988 (Section 57) and the Firearms (Increased Penalties) Act 1971. These provisions fall under the principle of *Generalibus Specialia Derogant*.

The Principle of *Generalibus Specialia Derogant*

The legal maxim *Generalibus Specialia Derogant* is a Latin word which literally means "special things take from the general" (Black, 1995, p. 538). It simply denotes that "where a written law has specifically provided for a matter, that will override the general provisions respecting it" (Public Prosecutor v Ajim Otoh @ Ajim Tutuh ([2016] MLJU 1799). Raja Azlan Iskandar C.J explained the application of the doctrine in the case of P.P. *v. Chew Siew Luan* [1982] 2 MLJ 2 MLJ 119. In this case, a woman was charged with trafficking dangerous drugs under DDA 1952, which carried a punishment of death penalty. The issue in this case, was whether or not Section 388 CPC overrides the provision of Section 41B of DDA 1952 in respect of bail. The Federal court held that the provisions regulating the granting of bail under the DDA "must be construed in the context of that Act and not the CPC and to that extend the general provisions of CPC must ex necessitate yield to the specific provisions of S41B of DDA in that regard". The federal court observed that the g*eneralibus specilia derogant* is a cardinal principle of interpretation which means that "where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law". In *Loy Chin Hei v Public Prosecutor* [1982] 1 MLJ 31 Wan Yahya J observed that the restriction on bail under section 41B of the Dangerous Drugs Act is absolute and neither the court below nor the High Court has the power to admit to bail any person charged thereunder with any offence punishable with death or more than five years' imprisonment or even for lesser terms when the Public Prosecutor certifies that "it is against the public interest to allow bail". The two cases illustrate that a specific clause prevents the application of the general rule when a particular provision is included in a particular statute. Thus in respect of bail, if a specific Statute prevents the granting of bail, the accused person would not be allowed to assert the right under the general application of the law.

The application of the principle *Generalibus Specialia Derogant* to the AFA 1972

Besides the general law, the Armed Forces personnel in Malaysia are governed mainly by The Armed Forces Act (AFA) 1972 and regulates disciplinary matters of the military officers and soldier. By virtue of Section 209 of AFA 1972, those persons who are being commissioned, enlisted or appointed under the Act are bound by the provisions the Act which is distinctively different from the civil jurisdiction. Under the provision of the 1972 Act or its subsidiary legislation, the provision regarding bail is nowhere to be found. This begs the question of the right to bail for an officer or a soldier accused or convicted with offences under the AFA.

The contentious issue of bail with regard to military personnel being charged under the AFA 1972 was deliberated in the case of *Kapten Rizal bin Dollah dan lain-lain v Pihak Berkuasa Bersidang dan lain-lain* [2009] 9 MLJ, 736. In this case, the applicants were officers and soldiers of the Malaysian Army. They were court-martialed for offences in relation to an explosion and were sentenced to imprisonment and were detained in civil prison. Upon conviction by the court-martial, the applicants thereon filed a notice of motion under the provision of Section 387 of the CPC. The motion was in respect of an application to be granted bail pending the decision of the revisionary application by the revisionary authority ('R.A.') under Section 135 of the AFA 1972. The applicants also seek to be granted bail awaiting the decision of the judicial review application filed by the applicants in the High Court against the decision and sentence of the court-martial. The main issue raised for the court's determination was whether the court had the jurisdiction to order that the applicants who were found guilty and convicted by the court-martial be acquitted with a security bond under the provision of the CPC pending the decision of the R.A.'s revisionary application under Section 135(3) of the AFA 1972.

The High Court dismissed the applicant's application. The court held that in the absence of an order for postponement of the sentence by the confirming officer, the gap to obtain a postponement of the execution of the sentence was on the R.A. under Section 135(3) of the Act. The applicants did not make such an application. The court also observed that if the court decided that it has the power to allow the said bail and had allowed it, it indirectly meant that the execution of the sentence was suspended. It would mean interference in the power of the R.A., who was authorised in deciding any suspension of the sentence. The court added that Section 387 of CPC was not a proper cause of action. Section 387 of CPC was in relation to bailable offences, and the AFA 1972 does not differentiate the offence under the Act for bailable, non-bailable and unbailable offences. The court further observed that Parliament deliberately omit to provide for provisions on bail under the Act due to the armed forces' service scheme and disciplinary maintenance thereunder which required a difference from the ordinary criminal procedures.

The court concluded that the applicants were charged and found guilty under the offence relating to discipline of armed forces and the civil court had no jurisdiction over the offences. Hence, by granting bail, it tantamount to intervention to the affairs of the offence which could not be heard in a civil court. The high court had no power to intervene in the court martials' proceedings and the powers of the R.A. by granting bail to the accused or the offender who was found guilty and sentenced by the court-martial. The Act and the Rules made thereunder only provide the power, rules, and procedures in granting a stay of the sentence for the offender sentenced by the court-martial.

Several conclusions can be derived from the court's decision in *Kapten Rizal bin Dollah's* Case. The first is that the AFA 1972 is an exclusive Act meant for the military and unique to serve the Armed Forces' service scheme and discipline. Secondly, the civil court does not have jurisdiction to interfere with the decision made by the court-martial. Thirdly, the AFA 1972 does not provide for bail, and that was the deliberate intention of the legislature. Finally, the accused person or the convicted person could not resort to the civil court to seek redress under the general law in respect to bail since the principle of *generalibus specialia derogant* applies.

While the AFA 1972 does not provide for bail, it allows for open arrest. Rules 13 of Armed Forces (Court Martial) Rules of Procedure 1976 allows a person not to be detained under arrest "where the offence he has committed or is reasonably suspected of having committed is not of serious in nature". A person is only to be placed under arrest only when necessary. In addition, Rules 16 allows the Convening Authority to direct that for the period of any adjournment of a court-martial, he shall be held under open arrest or be released from arrest. Nevertheless, the AFA 1972 and the Rules are silence on post-conviction processes of temporary release pending appeal, confirmation, or revision by respective authorities. The best avenue is to apply for suspension of sentence under Section 135.

Bail Provision in the Armed Forces Act of other Jurisdiction

In other jurisdiction, the Armed Forces have inserted the provision regarding bail. For example, the Singapore Armed Forces Act (Chapter 295), Section 130 allows bail pending appeal. Section 130 provides that a "subordinate military court may grant bail to any person who has lodged a notice of appeal against his conviction or sentence in accordance with Section 129". Section 182A – Section 182K was inserted in 1994, allowing bail in the Armed Forces, specifying the amount of bond and the provision of bail officer. In the U.K., the Court Martial Appeal Court (Bail) Order 2009 allows the grant of bail by the court-martial pending the determination of his appeal. That provision would give an avenue for military personnel charged under court-martial to apply for temporary release pending the determination of appeal of the sentence.

Conclusion

Considering the above discussion, it could be concluded that the current scheme of military laws, rules, and procedure does not provide for bail option for military offenders charged in the court-martial. The way forward is to amend the AFA 1972 to insert the provision of bail. This would allow an option to be given to the military offenders and the military commanders to exercise it in a trivial situation which bail is the most proper remedy to allow the temporary release of the accused persons from the custody.

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