

Comprehensive Legal Study on the Acts Done by Justification and Excuses Manners under the Penal Code of Myanmar

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Abstract

This research presents the defences of justification and excuses under the Penal Code of Myanmar. In criminal law, justification and excuse are the criteria to prescribe the acts done in general and pass the sentence or innocence in each case. Justification is recognized as an official duty to enforce the law and the rights of ordinary people to carry out public purposes. Excuses are regarded as acts done by exempted persons. This paper aims to understand the concept of justification and excuses better. It deals with the general defences of mistakes, necessity, self-defence, and accidents contained in sections 76 and 79, 80 and 81, and 96 to 100 of the Penal Code, respectively. These are presented with examples and reported cases in this research.

Keywords: justification, excuses, mistakes, necessity, self-defence.

Introduction

Crime is the act done by a person who has broken the law. Theft, murder, etc., can be given as examples of crime. The term “Crime” is not defined in the Penal Code, 1860. According to our ethics and society, murder is regarded as a crime. However, if the murder is done in self-defence or to save or protect another person or property, it cannot be punished. In such a situation murder is not a crime and it may be exempted from punishment. Therefore, whether an act is a crime or not depends on the circumstances of each case. That is the reason why crime is not defined in the Penal Code. However, the word offence is defined in section 40 of the Penal Code. According to this section, the word ‘offence’ denotes something punishable by this code. Criminal Law is the system of law focusing on punishing those who commit criminal acts. In most cases, statutes establish criminal acts and their punishment.

Materials and Methods

In drawing up this research, the provisions related to the justification and excuses are studied under the Penal Code of Myanmar. In order to consider how the person should know what kinds of manners are regarded as the justification or excuses so that the doers would be free from liabilities under the Penal Code, those manners are discussed in this research paper. Furthermore, it examines the nature of common law relating to the justification and excuses. Moreover, the reported cases from the Courts of Myanmar and the Court of Appeal in Myanmar are studied and analyzed. This paper is regarded as a qualitative research paper by referring to the scholars’ articles and judgments of the court.

Discussion

Principle of Legality

The Principle of legality is the legal model of criminal law. It is expressed in the Latin phrase *nulla poena sine lege*, which means that there is ‘no punishment without a law authorizing it.’ The fundamental rule of the Penal Code is that no one may be prosecuted under a criminal law that has not been previously passed for an act that has not been clearly forbidden in law. The principle of legality ensures that no defendant may be punished arbitrarily or retrospectively by the State. To ensure that principle, the Constitution of the Republic of the Union of Myanmar has laid down the Basic Principles of the Union and the Fundamental Rights of the Citizens. In section 373, it provides that “Any person, who commits a crime, shall be convicted only in accordance with the relevant law in operation. Moreover, he shall not be penalized to a greater

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extent than is applicable under that law.”³ With regard to the retroactive effect, it is provided in this Constitution that “No penal law shall be enacted to provide the retrospective effect.”⁴ Similar provisions have been provided in sections 4 and 5 of the Union Judiciary Act, 2010. In order to get justice, it is necessary to dispense justice in open court unless otherwise prohibited by law⁵ and an accused shall have the right of defence in accordance with the law⁶.

If the Court acquits the accused person without his being given any defence, the opponents (the injured persons) may presume that the Court’s decision is unjust. While deciding the case, it is necessary not only that the case be fair and just but also that such fairness and justice needs to be obvious to the parties to the case and the public.⁷ In the case of *Kyaw Sein v. The Union of Burma*⁸, it was held that it was desirable not only that justice should be done but it should be manifested to the entire world that justice had been done.

Therefore, the principle reflects essentially the core considerations of justice; it should always be present in the state’s legislation and practice.

Jurisdiction

According to Section 2 of the Penal Code, every person shall be liable to punishment for every act or omission contrary to the Code, which he is guilty of within Myanmar. Therefore, not only citizens of Myanmar but also foreigners shall be punished without discrimination.

A famous case was “*The Socialist Republic of The Union of Myanmar v. Zim Mo and Kang Min Chul*”.⁹ In this case, three North Korean agents named Zim Mo and Kang Min Chul and Kim Chi-o detonated a powerful bomb in Yangon, killing 21 people, 18 of whom were visiting South Korean officials, including Deputy Prime Ministers. The Court held that the Penal Code conferred jurisdiction on the Courts within the Union of Myanmar. According to Section 2 of the Penal Code, every person who commits any offence under the Penal Code shall be liable to punishment under the Code without discrimination of race, religion, or wealth.

Any person liable, by any law in force in the Union of Myanmar, to be tried for an offence committed beyond the limits of the Union of Myanmar shall be dealt with according to the provisions of the Penal Code for any act committed beyond the Union of Myanmar in the same manner as if such act had been committed within the Union of Myanmar.¹⁰

The provisions of the Penal Code apply also to any offence committed by any citizen of the Union wherever he may be.¹¹

The word ‘person’ includes any company or association or body of persons, whether incorporated or not.¹² Therefore, there are no issues related to a person who commits an offence under the Penal Code and it is clear that he will be convicted under the Penal Code. Since the company or association itself does not manage the business, a natural person, such as a director, manages the business on behalf of the company. Therefore, when an offence is committed by the company, there is the issue of “who is guilty and responsible for this offence.” With regard to the criminal responsibility of a company, it will become responsible when the criminal offence

³ Section 373 of the Constitution of the Republic of the Union of Myanmar, 2008.

⁴ Section 43, *Ibid.*

⁵ Section 19 (b), *Ibid.*

⁶ Section 375, *Ibid.*

⁷ *The Union of Myanmar v. Maung Shwe @ Maung Shay and Maung Tun Shin*, 1966 M.L.R. p. 616.

⁸ 1958 B.L.R. (H.C.) p. 639.

⁹ Criminal Regular case No. 10/1983 of the Yangon Division Court.

¹⁰ Section 3 of the Penal Code, 1860.

¹¹ Section 4, *Ibid.*

¹² Section 11, *Ibid.*

is committed in the name of the company or for the interest of the company, or under the instructions or the approval of the company. In such situations, the board of directors will have to take responsibility under the Myanmar Companies Law, 2017.

Justification and Excuses

The criminal law outlines different punishments for various crimes but a person may not always be punished for a crime that he or she has committed. The Penal Code, 1860, recognizes defences in Chapter four under the heading 'General Exceptions.' Sections 76 to 106 of the Penal Code cover these defences. The law offers certain defences that exculpate criminal liability. These defences are based on the premise that though the person committed the offence, he cannot be held liable. This is because, at the time of the commission of the offence, either the prevailing circumstances were such that the act of the person was justified or his condition was such that he could not form the requisite *mens rea* for the crime. The defences are generally classified under two heads - justifiable and excusable. Thus, for committing a wrong, a person must be responsible for doing a wrongful act without having any justification or excuse for it.

1. Definition and Types of Justification and Excuses

A justified act is one that otherwise, under normal conditions, would have been wrongful but the circumstances under which the act was committed to making it tolerable and acceptable. The person fulfills all the ingredients of the offence but his conduct is held to be right under the circumstances. An excusable act means that the actor is not punished as he lacks the necessary *mens rea* for the offence. There must be an inability to cause the condition that excuses the conduct. But, there is no such express classification of defences under justifiable and excusable given in the Code. Self-defence, executive act, judicial act, necessity, consent, and duress are the types of justification. Excusable acts are a mistake of fact, infancy, insanity, intoxication, and accident.

2. Self-defence, duress, and provocation

With regard to self-defence, sections 96 to 106 are provided. The right spell out that a person is justified to act in a certain manner to protect himself from threatened harm. This is based on the human instinct for self-preservation. A person is justified in causing proportional harm to his aggressor to protect himself from a looming threat of injury. In many cases where the accused killed the other person while trying to protect himself or another person, the court has allowed the plea of self-defence and acquitted the person. For example, when the deceased attacks the appellant, a one-legged person, first with bamboo and later with dah (sword), and the appellant strikes back with the dagger concealed in his crutch killing the deceased it was held that the appellant was entitled to defend himself effectively against such an attack even to the extent of causing the death of the deceased and was thus justified under section 100 of the Penal Code in exercising his right of private defence.¹³

Duress can be seen in sections 81, 91, and 94 of the Penal Code. Section 94 exempts a person from liability if he acted under any kind of compulsion provided he did not put himself in that situation. If a person faces the threat of instant death, his acts are justified under such circumstances. However, this defence does not extend to murder and offences against the State. The threat of instant death must continue throughout the offence.

The appellants are the police constables. During their duty, they went underground to become rebels and robbed people. When they were charged with these offences, the court held that there was a reasonable apprehension about instant death caused by the person who threatened them to be freed from criminal liability under section 94. In this case, such kinds of

¹³ Maung Mya Saw v. The Union of Burma, 1960 B.L.R. (H.C.) 46.

threats had not obviously appeared and they were policemen and bound to protect public property and interests. Therefore, they should have been strong and not afraid of the simple threat.¹⁴

Section 81 mentions necessity (provocation). The act is done without any criminal intention but not without knowledge. It is acceptable to do an act in good faith that prevents greater harm from taking place. An important issue while applying this defence is whether necessity can be used to justify murder. In an old case,¹⁵ a ship was cast away in a storm. The people on board had nothing to eat for many days. On the twentieth day, the accused decided to kill the cabin boy and eat his body. After being rescued, they were charged with murder. They pleaded necessity but the court held that self-preservation was not an absolute right and convicted them of murder.

3. Power and Obligation

These provisions (Sections 77 and 78) protect judges and judicial officers when acting judicially in the exercise of powers given to them by law or which they believe in good faith to be vested in them by the law. The acts are justified by law. The rationale behind these provisions is that judges and judicial officers should not be under any external influence so that they can act in a fearless and just manner.

4. Consent

Sections 87 to 91 mention the provisions of consent. In cases of consent, the accused is protected in causing harm, less than grievous hurt, if the other person consented to it. The person should not have the intention to cause any harm though he may have knowledge of the harm. The King Emperor v Maung Ba Thaug¹⁶ case states when a child is sent by its parent or guardian to a school, the parent or guardian must be held to have given implied consent to the infliction of such reasonable punishment as may be necessary for the purposes of school discipline and the purpose with which the parental authority is delegated to the schoolmaster, who is entrusted with the bringing up and disciplining of the child, must to some extent include authority over the child when it is outside the school walls. But if the school is closed for any length of time for a period of regular holidays, the child would have to be held to have returned to the charge of its parent or guardian and the authority of the schoolmaster would cease. Petitioner A, a schoolmaster, was convicted and fined under section 323 of the Penal Code for caning a schoolboy B under his charge. It appeared that while the school was temporarily closed for a period of two days C, a pupil of the school was assaulted in the night by some other pupils. It also appeared that the pupils were in the habit of attending night classes which ordinarily they would have attended on that night also. On the re-opening of the school, C's mother lodged a complaint with A in consequence of which A held an inquiry and came to the conclusion that B had taken part in the assault. A punished B by giving him eight or nine strokes with a cane. A was prosecuted under section 323 of the Penal Code. It was not suggested that A was actuated by improper motives or that he was not acting *bona fide* in the interests of school discipline or that the punishment was unduly excessive or conducted in other than a humane manner, but it was contended that A was mistaken in his finding that B had taken part in the assault. It was held that in the circumstances of the case A had acted within the implied authority delegated to him by the parents or guardian of B and that he must be held to have inflicted the punishment *bona fide* for the good of the boy and in the interest of school discipline and therefore he had committed no offence under the provisions of section 323 of the Penal Code.

¹⁴ Mya Tway @ Tin Aye and four others v. The Union of Myanmar, 1968 (S.C.C.A.C) 46.

¹⁵ U Thet Phay, Comments on Criminal Law, 2nd Edition, Nay Yi Yi Publishing House, Yangon, 1986, p. 95.

¹⁶ 3 Ran. 659.

5. Age of actor

The age of the actor (the acts of a child) is provided in sections 82 and 83. It is believed that a child lacks understanding of the nature and consequences of his actions and therefore cannot form a criminal intention. However, section 83 presumes that a child above seven but below twelve years of age is capable of understanding the nature and consequences of his conduct depending upon his level of maturity and understanding.

Moreover, there is a law relating to children's rights in Myanmar. This law is named the Child's Rights Law, 2019, and a provision concerning exemption from the child's criminal liability is provided in section 78 of this Law. According to this section, a child under ten years of age is exempted from any criminal liability.¹⁷ But, a child above ten years and under twelve years old can be exempted from criminal liability if the child has not attained sufficient maturity or understanding to judge the nature and consequences of his or her conduct on the occasion.¹⁸ It has been noted that relating to the exemption from criminal liability of a child, the age of the child contained in the provisions of the Penal Code and the Child's Rights Law are different from each other. In addition, the minimum age for criminal liability is still generally lower than the other members of the United Nations Convention on Child Rights, 1990.

The Union of Burma v. Rashin¹⁹ case is concerned with a child's act. The respondent, a child of 6 years of age was convicted under section 112, Railways Act. Section 82 of the Penal Code declares that nothing is an offence which is done by a child under 7 years of age and although section 130 of the Railways Act has no effect upon offences committed under section 112 of the said Act it was held that the immunity of children under 7 years of age from criminal liability extends to offences under any special and local law. The conviction was bad in law and set aside.

6. Insanity and intoxication

Section 84 deals with insanity. The person, at the time of the commission of the act, does not know if his act is wrong or contrary to the law. He is incapable of understanding the nature and consequences of the act. An apparently motiveless crime is not attributable to insanity or mental derangement of the perpetrator. The exemption from liability contemplated by section 84 of the Penal Code is the commission of an offence by a person who by reason of his unsoundness of mind at the time of the commission of the offence, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law.²⁰

Intoxication (sections 85 and 86) follows the same abovementioned logic and is thus excusatory in nature. However, the person must have been administered alcohol without his knowledge or against his will. In cases of voluntary intoxication, it has to be examined whether the accused had the specific intent or knowledge required for the offence. The intention of the person has to be gathered from the facts and circumstances of the case and the degree of intoxication. In the case of Nga Sein Gale v. King Emperor,²¹ evidence of drunkenness which rendered the accused incapable of forming the specific intent essential to constitute the crime ought to have been taken into consideration with the other facts proved in order to determine whether he had that intent. But evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not

¹⁷ Section 78 (a) of the Child's Rights Law, 2019.

¹⁸ Section 78 (b), *Ibid.*

¹⁹ 1955 B.L.R. (H.C.) 304.

²⁰ The Union of Burma v. Oo Hla Khine, 1958 B.L.R. (H.C.) 143.

²¹ 12 Ran. 445.

rebut the presumption that a man intends the natural consequences of his acts. The accused became very drunk but knew what he was doing. He went to his house, took hold of a da, and going along the road shouted his intention to kill a person with whom he had had a dispute. A person on the road gently tried to pacify him and thereupon the accused not only threatened to cut him but followed him and inflicted such wounds on him that the person died. On the facts of the case, it was held that the accused must be imputed with the same knowledge as he would have had been sober and his act amounted to murder for which there were no extenuating circumstances.

7. Other grounds for excluding criminal liability

Accidents and trifling matters are also free from criminal liability.

An accident (section 80) has been classified as excusable since the act lacks intention or knowledge and is done in a lawful manner by lawful means with due care and precautions. All these ingredients have to be satisfied to attract this defence. Lack of intention and knowledge is held to be the exculpatory factor. In this case, a man shot another person thinking it to be a hyena. The fact that it was raining allowed the person to successfully plead the defence of the accident. The court acquitted him since he lacked the knowledge that a man was present at that place.

Section 95 states that the law does not take into account trifling matters. This was incorporated to deal with such acts which fell under the letter of the law but not its spirit. The act will be governed by this section only if it amounts to an offence and a person with an ordinary temper would not complain of it.

8. Mistakes and misapprehensions

(a) Mistake of fact

The mistake is not defined in the Penal Code.

The mistake is not mere forgetfulness. It is a slip 'made, not by design but by mischance.' Mistake, as a term used in jurisprudence, is an erroneous mental condition, conception, or conviction induced by ignorance, misapprehension, or misunderstanding of the truth and resulting in some act or omission done or suffered erroneously by one or both of the parties to a transaction but without its erroneous character being intended or known at the time. It may concern either the law or the fact involved.²²

Section 76 applies to mistakes of fact and not to mistakes of law. This section and Section 79 are a paraphrase of the English Common Law maxim in its application to criminal law, *Ignorantia facit excusat : ignorantia juris non excusat*. (Ignorance of fact excuses, ignorance of the law does not excuse).

Sections 76 and 79 relate to the case of persons who justifiably believe that they are acting in conformity with the law. But cases of considerable difficulty occur where persons act under superior or even the highest authority and when the orders given to them are not in accordance with the usual working of the law. Such orders may be absolutely illegal or they may be legalized by an emergency which sets aside the ordinary procedures applicable to similar cases or they may be done by virtue of a power which stands above the law and is exempt from its jurisdiction.²³

A mistake of fact consists in an unconsciousness, ignorance, or forgetfulness of a fact, past or present, material to the transaction, or in the belief of the present existence of a thing

²² Ratanal & Dhirajlal's Law of Crimes, 25th Edition, Bharat Law House, New Delhi, India, 2002, p. 253.

²³ *Ibid*, p. 245.

material to the transaction, which does not exist or in the past existence of a thing which has not existed.²⁴

Nothing is an offence which is done by a person who is or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be bound by law to do it.²⁵

By studying the above provision, the accused person can be exempted from criminal liability only when he had done the act in good faith by a mistake of fact. In the *U Sein Mya v. the Socialist Republic of the Union of Myanmar*²⁶ case, he had done the act, not by mistake of fact. Therefore, he could not be freed from criminal liability and he could not plead that he had done something in good faith by mistake of law. The act of an accused giving the order to arrest the victim and interfering in the suit of the family's succession triable by the Court cannot enjoy the exemptions given by section 76 of the Penal Code.

Nothing is an offence which is done by any person who is justified by law or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by the law in doing it.²⁷

In the case of *U San Win v. U Hla*,²⁸ the Rangoon (Yangon) High Court provides an example of acts which are not justified by law. The accused, an advocate, had, on instructions from his client, sent a letter to a magistrate demanding the return of a sum of money given by the client as a bribe to the magistrate to hush up a legal matter. The court held that the accused could not rely on section 79 because, in writing the letter, he had made himself a party to an attempt to commit an offence. As such his conduct was not justified by law.

A mistake of fact can be accepted as a defence if the following conditions are fulfilled:

- (1) The state of things believed to exist would, if true, have justified the act done;
- (2) The mistake must be reasonable;
- (3) The mistake must relate to fact and not to law; and
- (4) The mistake must be made in good faith.

Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention.²⁹

(b) Mistake of law

A mistake of law ordinarily means a mistake as to the existence or otherwise of any law on a relevant subject as well as a mistake as to what the law is. A mistake of law happens when a party having full knowledge of the facts comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference arising from an imperfect or incorrect exercise of judgment upon facts as they really are. A mistake on a point of law is no defence in criminal cases. Mistake of law ordinarily means mistakes as to the existence or otherwise of any law on a relevant subject as well as mistakes as to what the law is.³⁰

Nothing is an offence which is done by a person who is or, who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law

²⁴ *Ibid*, p. 253.

²⁵ Section 76 of the Penal Code, 1860.

²⁶ *U Sein Mya v. The Socialist Republic of the Union of Myanmar*, 1974 M.L.R. 35.

²⁷ Section 79 of the Penal Code, 1860.

²⁸ A.I.R. 1931 Ran. 83.

²⁹ Section 52 of the Penal Code, 1860.

³⁰ Ratanal & Dhirajlal's Law of Crimes, 25th Edition, Bharat Law House, New Delhi, India, 2002, p. 257.

to do it.³¹ Nothing is an offence which is done by any person who is justified by law or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it.³²

The Penal Code does not exempt an act done under a mistake of law from the operation of the penal law.

Findings

Concerning the provisions of self-defence, duress and provocation, consent, intoxication, etc., it is not necessary to give suggestions in this research. However, relating to the age of actors, some suggestions are necessary. According to Section 82 of the Penal Code, it limits children's criminal liability by their age. Children under seven years old are not liable for criminal liability. And children above seven, but below twelve years of age may be liable depending on the understanding of their act's consequences and nature. Therefore, it may be presumed that a child starting from the age of above seven years to the age under 18 years cannot be exempted from criminal liability. Children between seven and fourteen years of age may be charged in court, or given probation and caution by the court. Children aged fourteen to eighteen years old may be charged in court, imprisoned, and sent to any training school by the court. On the other hand, under the Child's Rights Law, the age of a child who is not liable for criminal liability is under ten years old, and then the child above ten years and under twelve years old will not be liable for criminal responsibility depending on the understanding of his or her conduct or its consequences. Therefore, it may be pointed out that there is a difference between these Penal Code and the Child's Rights Law with regard to the exempted age of a child from criminal liability. Thus, the age of a child under the Penal Code should be amended to be the same as the age of a child provided in the Child's Rights Law. Moreover, it still causes the inconsistency between the provisions for a minimum age of criminal liability for children of the other members of the United Nations Convention on the Rights of the Child. Therefore, as Myanmar is a member of the UNCRC, Myanmar should take into account to raise the minimum age for criminal liability for children as nearly the same as the provisions of the other members of the UNCRC.

Conclusion

By studying and analyzing the above mentioned sections and some reported cases, it may be noted that a person's acts could not be regarded as an offence if his or her acts come within the concept of justification and excuses allowed by the Penal Code. Then, he or she will be free from criminal liability. However, to enjoy these justifications and excuses, his or her acts must be done in good faith or in performing the public duty or he or she did not know the consequences or nature of his or her acts at the time of committing the offence.

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