

## **GENERAL EXCEPTIONS RELATING TO THE ACT DONE BY A PERSON BOUND BY LAW**

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### **Abstract**

Anyone at any country must obey the relevant country's criminal law. If his every act or omission contrary to the provisions of criminal law, he shall be liable to punish under this law. The English criminal law that a crime is not committed if the mind of the person doing the act in question is innocent. General exceptions relating to the act done by a person bound by law may be categorized into two forms: they are exceptions of executive acts and judicial acts. Exceptions of executive and judicial acts are described in Sections 76 to 79 of the Myanmar, Indian, Malaysia and Singapore Penal Codes. Mention should also be made of judicial acts are provided in Sections 77 and 78 which are specific exceptions to the general rule that mistake of law is not a defence. Some kinds of public servants such as the police and military personnel have an important role to play in maintaining law and order or pursuing justice in a civil society. Generally speaking, the special protection afforded to public servants against criminal liability was the result of the law and order. The facts of exceptions are relevant with not only Criminal Law but also Special or Local Law. Relating with exempted acts provided in Myanmar Penal Code are different from those provisions stipulated in Criminal Laws of other countries.

**Keywords:** General Exceptions, Criminal Law Executive Act, Judicial Act, Mistake of Law, Mistake of Fact

### **Introduction**

Criminal Law makes universal in its application to all parts of countries. Every person shall be liable to be punished under criminal law and not otherwise for every act or omission contrary to the provisions of criminal law of which he shall be guilty within and without of the said territories. Myanmar Penal Code, the provisions in dealing with the general exceptions are laid down in Sections 76 to 106, wherein acts which otherwise would constitute offence, cease to be so under certain circumstances set out in this chapter. Sections 76 to 79 recognises that public servants and judges are fallible and affords them protection from criminal liability arising from the discharge of their functions.

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## **Materials & Methods**

Analytical study on the executive acts and judicial acts in dealing with the general exceptions. Literature survey and study on exceptions of executive and judicial acts of the Myanmar, Indian, Malaysia, Singapore, Swedish and Australia Criminal Laws.

## **Discussion**

The criminal law has been variously defined as prohibiting conduct which is of inherently evil or heinous nature, immoral, or harmful. However, none of these attempts to explain what it is that renders certain conduct criminal is universally applicable or entirely satisfactory.<sup>1</sup>

Evolution of the criminal law in the common law jurisdictions has taken place over several centuries. It is the branch of law which has often been said to represent society's strongest form of condemnation and to that extent it should be concerned only with serious harms. However, clearly this is not always the case, the criminal law is often used against minor harm-for example, licensing procedures, road traffic regulations, commercial and financial regulations, etc. For discussion of the fact that the criminal label is determined not only by the seriousness of the offence but also by a range of social, economic, political and historical factors.<sup>2</sup>

The conventional explanation of the elements of criminal liability is that a crime consists of two main parts, both of which must be proven before a person can be convicted of having committed the offence. It is usually said that it is a 'general principle' of the criminal law that a person cannot be convicted of a crime unless the person: (1) engages in conduct that is forbidden by the criminal law, and (2) does so with a guilty state of mind.<sup>3</sup>

The criminal law was drafted upon the assumption that all exceptional circumstances are absent. Instead of adding the limitations or exceptions to every offence, the makers of the criminal law made a separate chapter which is applicable to the entire criminal law. Therefore, to identify the exceptional circumstances by which a person can escape criminal liability.

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<sup>1</sup> Murugason, Mc Namara, *Outline of Criminal Law*, 8<sup>th</sup> edition, 1997, P.1.

<sup>2</sup> *Ibid*, P.4.

<sup>3</sup> *Ibid*, P.18.

Myanmar Penal Code, the provisions in dealing with the general exceptions are laid down in Sections 76 to 106, wherein acts which otherwise would constitute offence, cease to be so under certain circumstances set out in this chapter. Although the accused caused guilt any offence, if any matter has been permitted by law, he is exempted from the punishment. The facts of exceptions are relevant with not only Criminal Law but also Special or Local Law.

In addition, every time a crime is created, the Penal Code automatically extends the coverage of that criminalized behaviour to attempt and abetment of that crime. Part and parcel of the definition of every offence are the general exceptions, and for murder, the special exceptions. These are conditions under which responsibility is either extinguished or mitigated because of, for example, intoxication or provocation.

General exceptions relating to the act done by a person bound by law may be grouped together as follows;

(1) Executive Acts

- (a) Act of a person bound or who believes himself to be bound by law to do a certain thing (Section. 76).
- (b) Act of person justified by law (Section. 79).

(2) Judicial Acts

- (a) Act of a Judge acting judicially (Section. 77).
- (b) Act done in pursuance to an order or judgment of a Court of Law (Section. 78).

Exceptions of Executive Act are found in Chapter IV of the Myanmar, Indian, Malaysia and Singapore Penal Codes, Sections 76 and 79 they apply to offences within and without the Code unless excluded by statute. For this area of the law, it is vital to fully appreciate the particular way by which Sections 76 and 79 exculpates an accused of criminal responsibility.

Section 76 of the Penal Codes mention as follows; 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.<sup>1</sup>

Illustrations are as follow:

- (a) A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence.
- (b) A, an officer of Court of Justice, being ordered by that Court to arrest Y, and, after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.

Some kinds of public servants such as the police and military personnel have an important role to play in maintaining law and order or pursuing justice in a civil society. The law imposes certain duties on these public servants which, along with the powers which go with them, are not normally accorded to ordinary civilians. There will invariably be occasions when, in the discharge of these duties, the public servant causes harm which will constitute an offence. There will also be circumstances when public servants will be met with physical resistance when performing their duties. Mindful that both these types of occasions involve public servants discharging their duties, the Penal Code has devised provisions to protect them. Generally speaking, the special protection afforded to public servants against criminal liability was the result of the law and order.

There are two forms of mistake considered by the criminal law—mistake of fact and mistake of law. The primary Myanmar Penal Code provisions on mistake are Sections 76 and 79. These sections are virtually identical except that section 76 concerns a situation where a person under a mistake of fact believes he or she was bound by law to do an act, whilst section 79 concerns a person who, under a mistake of fact believes he or she was justified by law to do it. The term "bound by law" under section 76 involves the actor in some legal duty to undertake conduct, whilst the term "justified by law" under section 79 only requires the actor's conduct to have been lawful.<sup>2</sup>

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<sup>1</sup> Section 76 of the Myanmar, Indian, Malaysia and Singapore Penal Codes, 1861, 1860, 1870, 1870.

<sup>2</sup> Chan Wing Cheong & Michael Hor & Mark McBride & Neil Morgan and Stanley Yeo, *Criminal Law in Myanmar*, 1<sup>st</sup> Edition, 2016, P.99.

Mistake of Law means mistake or ignorance as to existence or otherwise of any law regarding a particular subject or the 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.<sup>1</sup>

Section 79 of the Penal Codes provide as follows; 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.<sup>2</sup>

As for example; A sees Z commit what appears to A to be murder. A in the exercise, to the best of his judgment, exerted in good faith of the power which the law gives to all persons of apprehending murderers in the act, seizes Z in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self-defence.

The provisions say that 'nothing is an offence which is done by a person who by reason of a mistake of fact in good faith believes himself to be bound or justified by law in doing the act. The basis for exculpation is that the accused reasonably, albeit mistakenly, believed that he and she was bound or justified in doing the act complained of: it is not simply that the accused took reasonable care when mistakenly performing the act. Neither is it that the accused lacked the fault for the particular offence.'<sup>3</sup>

If a party bonafide believes that he is acting in pursuance of a statute, he is entitled to the special protection which the legislature intended for him although he has done an illegal act. To entitle a person to claim the benefit of Section 76, it is necessary to show the existence of a state of facts which would justify the belief in good faith, interpreting the latter expression with reference to Section 52, that the person to whom the order was given, was bound by law to obey it.<sup>4</sup>

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<sup>1</sup> Ratanlal and Dhirajlal, Law of Crimes, Vol. 1. 24<sup>nd</sup> Edition, 1997, P.250.

<sup>2</sup> Section 79 of the Myanmar, Indian, Malaysia and Singapore Penal Codes, 1861, 1860, 1870, 1870.

<sup>3</sup> Chan Wing Cheong & Michael Hor & Mark McBride & Neil Morgan and Stanley Yeo, Criminal Law in Myanmar, 1<sup>st</sup> Edition, 2016, P.101.

<sup>4</sup> Ratanlal and Dhirajlal, Law of Crimes, Vol. 1. 24<sup>nd</sup> Edition, 1997, P.239,240.

The Singapore case of *Tan Khee Wan Iris V. Public Prosecutor*.<sup>1</sup> The appellant was convicted by the trial court of the offence of providing public entertainment without a licence in the early hours of 1 January 1994. The appellant had in fact applied for a licence for the full duration of the performance up to 6 am on 1 January 1994, but owing to an oversight by the licensing officer, one part of the licence stated that it was only valid till 31 December 1993. The Singapore High Court held that the Prosecution had to prove that the appellant had provided public entertainment, but the appellant could rely on the defence of mistake under Section 79 of the Penal Code. In other words, she needed to show, on the balance of probabilities, that she had acted under a mistake of fact made in good faith that she had a valid licence for the relevant period. However, the court held that even though it was clear that the appellant had made a mistake, and even though it was an 'easy' mistake and 'a natural one -- which reasonable persons often make', the appellant could not show that she had exercised due care and attention as required. The conviction was therefore upheld.

It is observed that Sections 76 and 79 provide for two types of defences, namely, superior orders and mistake, and they can be further divided into four specific defences-being bound by law, being justified by law, mistakenly believing to be bound by law, and mistakenly believing to be justified by law. This chapter is concerned only with the defences involving mistake.<sup>2</sup>

In the case of *U San Win V. U Hla*,<sup>3</sup> a notice to effect some repairs in a tenanted building was served on the owner of the property under Section 120 of the Burma Municipal Act under which such notice could be served either on the owner or the occupier. Failure to carry out the requirement of the notice was punishable under Section 206 (b) of the Burma Municipal Act. It was contented that in view of the provisions of Sections 76 and 79 of the Penal Code the accused were not guilty. HELD: That Section 76 applies to an act committed by reason of mistake of fact and not a mistake of law by a person, who in good faith believes that he is bound by law to do it. Section 79 applies

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<sup>1</sup> 1995, 1 S.L.R @ 723.

<sup>2</sup> Chan Wing Cheong & Michael Hor & Mark McBride & Neil Morgan and Stanley Yeo, Criminal Law in Myanmar, 1<sup>st</sup> Edition, 2016, P.100.

<sup>3</sup> AIR (1931) Ran. 83.

to an act done by a person who, by reason of a mistake of fact (not by mistake of law) in good faith believes himself justified by law in doing it. The distinction between Sections 76 and 79 is that in the former the person bona fide believes himself to be bound to do it and in the latter justified by law in doing it. The distinction is between the real or supposed legal obligation and real or supposed justification in doing a particular act.

In the Bombay High Court case of *Emperor v Gopalia Kallaiya*,<sup>1</sup> the accused was a police officer who had a warrant to arrest a particular person. He arrested the complainant whom he mistakenly believed, despite making reasonable inquiries, to be the person mentioned in the warrant. The charge against him of wrongful confinement was dismissed on the basis of Section 76.

The defence of mistake of fact under Sections 76 and 79 requires the accused to prove on a balance of probabilities the following elements:

- (1) the or she had been induced by a mistake to commit the criminal act in questions;
- (2) the mistake was one of fact and not of law;
- (3) the accused mistakenly believed that he or she was bound or justified by law in doing the criminal act; and
- (4) the mistake was believed by him or her in good faith.<sup>2</sup>

Furthermore, it has been held that a mistake of law will not reduce a charge of murder to culpable homicide not amounting to murder. However, mistake of law can be recognised as a mitigating factor in sentencing.<sup>3</sup>

The express command of a Magistrate or officer will exonerate an inferior officer or soldier, unless the command be to do something plainly illegal, or beyond his know duty. If through gross ignorance, or neglect, or design, a Judge or Magistrate pronounces an unlawful sentence. If the order or warrant was plainly illegal, as, for example, to strangle a prisoner in jail, or to poison him, or the like, certainly the mere possession of such a warrant will

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<sup>1</sup> (1923) 26 Bom LR 138.

<sup>2</sup> Chan Wing Cheong & Michael Hor & Mark McBride & Neil Morgan and Stanley Yeo, *Criminal Law in Myanmar*, 1<sup>st</sup> Edition, 2016, P.103,104.

<sup>3</sup> Ibid, P.113.

not prevent the officer who wickedly yields it obedience from being held art and part in the legal murder, and suffering for its commission.<sup>1</sup>

Section 132 of the Myanmar Criminal Procedure Code protects Magistrate, Soldier, police officer and inferior officer against prosecution for any act done in obedience to any order they are bound to obey. Every person is bound to assist a Magistrate or police office under Section 42 of the Myanmar Criminal Procedure Code. A police officer having a warrant to arrest a person, after reasonable inquires arrested the complainant believing in good faith that he was the person to be arrested. It was held that the police officer was protected by this section and was guilty of no offence.<sup>2</sup>

The powers and duties of police officers are prescribed in Sections 16 to 22 in Chapter III of the Police Act, 1945. Section 16 states that police – officer enrolled under this Act shall not exercise any authority except the authority provided for a police-officer under this Act and any other law for the time being in force.<sup>3</sup> Moreover the special provisions for additional police and disturbed areas are described in Sections 23 to 30 in Chapter IV of this Act. Furthermore, maintenance of law and order are provided in sections 31 to 41 in Chapter V of this Act.

The Rangoon High Court case of *Maung Myat Tha V Queen Empress*,<sup>4</sup> A first class constable verbally ordered two police constables to arrest bad characters on a road and to fire if resisted. The accused challenged two men and then fired as one of them did not stop, and killed one man. Held, that the accused acted unlawfully and should not have been acquitted on a charge of culpable homicide not amounting to murder. A police-officer who commits a wrongful act under the orders of his superior officer is liable to punishment as his mistake of law in supposing himself authorized cannot be accepted as a good defence, though it may be a ground for mitigation of punishment.

"Bound or justified by law", for Section 76 to succeed, the accused must have mistakenly believed that he or she was bound by law to do the criminal act. Being 'bound by law' denotes having a legal duty or obligation to

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<sup>1</sup> Ratanlal and Dhirajlal, Law of Crimes, Vol. 1. 24<sup>th</sup> Edition, 1997, P.240.

<sup>2</sup> Section 42 and 132 of the Myanmar Criminal Procedure Code, 1898.

<sup>3</sup> Section 16 of the Police Act, 1945.

<sup>4</sup> Queen-Empress V. Maung Myat Tha and one, S.J.L.B. 164.



perform the conduct complained of. Section 43 of the Penal Code offers the following definition: 'a person is said to be "legally bound to do" whatever it is illegal in him to omit'.<sup>1</sup>

For Section 79 to succeed, the accused must have mistakenly believed that he or she was justified by law to do the criminal act. There being no Code definition of what 'justified by law' means in relation to Section 79, the courts have held that an act which is not prohibited by law is justified by law.<sup>2</sup>

These sections, there must be excuse a person who has done what by law is an offence, under a misconception of facts, leading him to believe in good faith that he was commanded by law to do it. It is based on the maxim "ignorance of law is no excuse.

On general grounds for exemption from criminal responsibility are prescribed in Chapter 24 of the Swedish Penal Code 1962. Section 2 describes that if a person who is an inmate of a prison, is remanded in custody or is under arrest or otherwise deprived of liberty, escapes, or by violence or threat of violence offers resistance, or offers resistance in some other way to someone who is in charge of him and is responsible for seeing that he behaves, such force as is justifiable in view of the circumstances may be used to prevent the escape or to maintain order. This also applies if, in cases referred to in this paragraph, resistance is offered by someone other than those previously mentioned. The right of a policeman and certain other personnel to use force is otherwise dealt with by provisions in the Police Act (1984:387).<sup>3</sup> (Law 1994:458)

Section 3 of the Swedish Penal Code states that with mutiny or during combat, and also on occasions when a crime against military discipline results in a special danger, a military superior may, vis-à-vis a subordinate who is insubordinate, use the force necessary to secure obedience.<sup>4</sup>(Law 1994:458)

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<sup>1</sup> Chan Wing Cheong & Michael Hor & Mark McBride & Neil Morgan and Stanley Yeo, *Criminal Law in Myanmar*, 1<sup>st</sup> Edition, 2016, P.106.

<sup>2</sup> Ibid, P.107.

<sup>3</sup> Section 2 of the Swedish Penal Code 1962.

<sup>4</sup> Section 3 of the Swedish Penal Code 1962

Circumstances in which there is no criminal responsibility are provided in Chapter 2, Part 2.3 of the Australia Criminal Code Act 1995. Mistake or ignorance of fact (fault elements other than negligence) is provided in Section 9.1 of the Australia Criminal Code Act mentions as follows;

- (1) A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if:
  - (a) at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and
  - (b) the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.
- (2) In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.<sup>1</sup>

Mistake of fact (strict liability) is prescribed in section 9.2 of the Australia Criminal Code Act mentions as follows:

- (1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:
  - (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and
  - (b) had those facts existed, the conduct would not have constituted an offence.
- (2) A person may be regarded as having considered whether or not facts existed if:
  - (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and

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<sup>1</sup> Section 9.1 of the Australia Criminal Code Act 1995.

- (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.<sup>1</sup>

According to Section 9.3 of the Australia Criminal Code Act 1995, mistake or ignorance of statute law are as follows;

- (1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.
- (2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if the Act is expressly to the contrary effect.<sup>2</sup>

Section 10.5 of the Australia Criminal Code Act lawful authority deals with "A person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law".<sup>3</sup>

A similar finding occurred in the Madras High Court case of *Queen Empress v Subba Naik*.<sup>4</sup> A police party escorting some prisoners had arrived at a village and demanded food and water. Thinking that the villagers had not given them proper attention, the Head Constable of the police party struck a villager. This resulted in several villagers assembling and an argument started between them and the police. The Head Constable commanded the accused, one of the constables, to shoot at the villagers. After repeated orders, the accused fired and wounded a villager. The court rejected the accused's plea of superior orders for the following reason: The command of the Head constable cannot of itself justify his subordinate in firing if the command was illegal, for he and the Head Constable had the same opportunity of observing what the danger was, and judging what action the necessities of the case required. We

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<sup>1</sup> Section 9.2 of the Australia Criminal Code Act 1995

<sup>2</sup> Section 9.3 of the Australia Criminal Code Act 1995.

<sup>3</sup> Ibid, Section 10.5.

<sup>4</sup> 1898, I.L.R. 21, Mad 249.

are of the opinion that the order the accused obeyed was manifestly illegal, and the accused must suffer the consequence of his illegal act.

These competing arguments by using two methods. The first is the entirely non-controversial one that police and military personnel are protected from criminal liability if they were obeying a *lawful* order. Hence, a soldier will not be criminally liable for obeying the order of his or her commanding officer who is legally authorised to make the order and has exercised that authority lawfully.

The second method relates to cases where the order was unlawful. The subordinate of such an officer a defence to a criminal charge if they had, by reason of a mistake of fact, in good faith believed themselves to be bound by law to obey the order. In effect, therefore, promotes the stance that subordinates must comply with the orders of their commanding officers but that they should desist from doing so if the factual circumstances were such that they knew, or ought to have known, that the order was unlawful.

Mention should also be made of judicial acts are provided in Sections 77 and 78 of the Myanmar, Indian, Malaysia and Singapore Penal Codes which are specific exceptions to the general rule that mistake of law is not a defence. Section 77 recognises that judges are fallible and affords them protection from criminal liability arising from the discharge of their functions. Acts done by judicial officers are provided in Sections 77 and 78 of the Penal Code. For this area of the law, it is vital to fully appreciate the particular way by which Sections 77 and 78 exculpates on accused of criminal responsibility.

Section 77 of the Penal Codes which provide that nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.<sup>1</sup>

The closing words of the section clearly envisage a judge making a mistake of law. Judges will be exculpated of any criminal liability for such mistakes if they reasonably believed they were acting legally. Conversely, the protection afforded by Section 77 is unavailable where the judge's belief was so irrational as to impute malice or corruption. Section 78 is a corollary of Section 77 and extends the protection against criminal liability to persons

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<sup>1</sup> Section 77 of the Myanmar, Indian, Malaysia and Singapore Penal Codes, 1861, 1860, 1870, 1870.

acting under a judgment or order of a court. Section 78 is wider than Section 77 in that, while the latter requires the judge to have acted within his or her jurisdiction, section 78 protected a persons carrying out an order of a court which may have had no jurisdiction at all to issue the order.<sup>1</sup>

Section 78 of the Penal Codes show that nothing which is done in pursuance of, or which is warranted by the judgment or order of, a Court of Justice, if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction.<sup>2</sup>

In the case of *U Tun Aye and two V. The Union of Myanmar*,<sup>3</sup> as a judge, he will get exception from Section 77 in the exercise of any power which is, or which in good faith he believes to be, given to him by Law. Knowing exactly, the action done without entitlement and which is unable to defend for truth cannot be protected by this section. As the court itself knowing being able to grant exemption to the disposal of tenancies committees but did not give it and take action in criminal case, this sort of action of township administrative officer cannot be exempted by this section.

Another possible instance of a judicial exception to the general exclusionary rule occurred in the Privy Council decision in *Lim Chin Aik v R*,<sup>4</sup> an appeal from Singapore. The accused was charged with an offence under the Immigration Ordinance 1952 of unlawfully remaining in Singapore. The relevant Minister had made a prohibition order in respect of the accused. The accused was unaware of the order as it had not been published. The Prosecution contended that the issue of knowledge was irrelevant because fault was not an element of the offence. Also, since the ministerial order was part of the law of Singapore, the accused's ignorance of that order could not provide a defence. On appeal to the Privy Council against his conviction, the Judicial Committee rejected both arguments of the Prosecution. First, it held

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<sup>1</sup> Chan Wing Cheong & Michael Hor & Mark McBride & Neil Morgan and Stanley Yeo, *Criminal Law in Myanmar*, 1<sup>st</sup> Edition, 2016, P.116.

<sup>2</sup> Section 78 of the Myanmar, Indian, Malaysia and Singapore Penal Codes, 1861, 1860, 1870, 1870.

<sup>3</sup> 1966, B.L.R (S.C.C.A.C) 27.

<sup>4</sup> 1963, AC, 160.

that the presumption of mens rea was not rebutted, with the result that the Prosecution had to prove that the accused knowingly violated the prohibition order. As for the second argument, Lord Evershed said:

The maxim of "ignorance of the law is no excuse" cannot apply to such a case as the present where it appears that there is in the State of Singapore no provision ... for the publication in any form of an order of the kind made in the present case or any other provision designed to enable a man by appropriate inquiry to find out what "the law" is.

According to the best of his judgment, upon a matter within his jurisdiction, has been firmly established and uniformly maintained. One who serves in a judicial capacity is required to exercise a judgment of his own and as his duty obliges him to decide all questions of law and fact which are submitted for his judgment, he is not punishable for error or mistake whether of fact or of law. This large exemption is conferred on him when acting judicially, not only in those cases in which he proceeds irregularly in exercise of a power which the law gives to him but also in cases where he, in good faith exceeds his jurisdiction and has no lawful powers.<sup>1</sup>

Section 77 protects Judges from criminal process just as the 'Judicial Officers Protection Act'<sup>2</sup> saves them from civil suits. Section 1 of that Act says: "No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of."<sup>3</sup>

There is also Exception C to Section 299(2) which reduces murder to culpable homicide not amounting to murder in the case of a public servant who exceeds the powers given to him or her by law and causes death by doing

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<sup>1</sup> Ratanlal and Dhirajlal, Law of Crimes, Vol. 1. 24<sup>nd</sup> Edition, 1997, P.243.

<sup>2</sup> Act XVIII of 1865, section 1.

<sup>3</sup> Ratanlal and Dhirajlal, Law of Crimes, Vol. 1. 24<sup>nd</sup> Edition, 1997, P.242.

an act which he or she, in good faith, believes to be lawful and necessary for the due discharge of his or her duty as a public servant.<sup>1</sup>

In the case of *Maung Pu and one v. King-Emperor*,<sup>2</sup> A was arrested under Section 478 of the Civil Procedure Code. On his being brought before the Court the Judge orally ordered the bailiff to keep him in custody. The bailiff in turn orally ordered a process-server to take charge of him, and this was done. The bailiff and process-server were subsequently prosecuted and convicted of wrongful confinement, under Section 344 of the Indian Penal Code. Held, that Section 78 of the Indian Penal Code does not extend to the oral orders of a Judge; that as Section 481 of the Civil Procedure Code only authorizes a Judge to commit persons to jail, the mistake of the bailiff and the process server, in believing that their oral orders justified their action, was purely a mistake of law and not of fact, and that therefore they rightly convicted.

The exceptions in Sections 77 and 78 are in favour of a Judge and officer of Court of Justice: whereas the Judicial Officers' Protection Act protects every "Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially." Mistake of Law can be pleaded as defence under Section 78.

### **Findings**

That the person to whom the order was given, was bound by law to obey it. Thus in the case of a soldier, the Penal Code does not recognize the mere duty of blind obedience to the commands of a superior as sufficient to protect him from the penal consequences of his act. Difficult as the position may appear to be, the law requires that the soldier should exercise his own judgment, and unless the actual circumstances are of such a character that he may have reasonably entertained the belief that the order was one which he was bound to obey, he will be responsible like any other sane person for his act, although he may have committed it under the erroneous supposition that his superior was by law authorized to issue the order.

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<sup>1</sup> Chan Wing Cheong & Michael Hor & Mark McBride & Neil Morgan and Stanley Yeo, Criminal Law in Myanmar, 1<sup>st</sup> Edition, 2016, P.113,114.

<sup>2</sup> 4 L.B.R – 253.

The defence of superior orders under Section 76 reflects two competing public policy considerations. The first is that the police and military depend on strict discipline and immediate obedience to orders for their efficient operation. The harms from which the police and military are duty bound to protect society will occur if subordinates are permitted to debate whether or not to comply with an order of their superiors. It follows that the law needs to promote obedience to superior orders by protecting from criminal liability those who have acted in compliance with those orders. As against this is the view that those who harm innocent people should not be allowed to hide behind a superior order. If a defence of superior orders were recognised, very perpetrator of wrongful conduct across the whole chain of command will be able to claim that they were merely acting under orders. To protect innocent lives against atrocities carried out under superior orders, the criminal law should send a clear signal to the police and military personnel that there is no defence of superior orders.

Section 77 excludes a judge from criminal liability when he exercises his power given to him by law in good faith. Section 78 supplements Section 77 and protects the ministerial staff of the "Courts of Justice" when they ensure that the judicial orders and directions given are carried out effectively. The aim of the section is to give immunity to the judges when they act in their judicial capacity to ensure independence of the judiciary and enable them to discharge their function without fear of consequences. Section 77 aims at protecting acts of judge.

### **Conclusion**

This paper will discuss three forms of protection accorded to public servants. The first is what is conventionally described as the defence of superior orders where the public servant seeks to be exculpated of a criminal charge on the ground that he or she was merely obeying a command of his or her superior officer. The second is the partial defence to murder which is available to a public servant who has killed while exceeding his or her public power. The third is the protection given to public servants who are confronted with force when performing their duties. Public servants are also given



additional protection in the sense that higher penalties apply to people who harm public servants when they are carrying out their role as public servants.

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