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EFFECTS OF CONSENT IN CRIMINAL LIABILITY

Faridah binti Yusoff  
(Matric No. P010221)

Perpustakaan  
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### AUTHOR DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the work in this academic project is my own except for quotations and summaries which have been duly acknowledged.

Date: 28<sup>th</sup> March 2004

Signature:



Name: Faridah Binti Yusoff

Matric No: P010221

Address: P/S 31 Kampung Telipot  
16800 Pasir Puteh  
Kelantan.

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I wish may Allah bless their self forever and all that memories are always keep in my mind. I will remember you all. Good Luck.

## ABSTRAK

Kajian ilmiah ini membincangkan mengenai kerelaan didalam melakukan kes- kes jenayah serta kesannya terhadap pembuat jenayah tersebut. Penulis membuat kajian ini bertujuan untuk mengenal pasti jenis-jenis jenayah yang sering dilakukan oleh penjenayah serta hukumannya mengikut undang-undang yang terdapat di Malaysia serta hukuman yang dikenakan oleh Islam. Sebahagian besar maklumat adalah daripada kajian perpustakaan yang banyak tertumpu kepada buku-buku yang berkaitan dengan kesalahan-kesalahan jenayah. Caranya adalah dengan membuat penelitian terhadap buku-buku yang pernah dihasilkan oleh penulis terdahulu dan mengeluarkan isi -isi yang bersesuaian dengan tajuk penulis. Maklumat ini didapati daripada kajian perpustakaan yang lebih tertumpu kepada Perpustakaan Negara, Perpustakaan Universiti Islam Antarabangsa Malaysia dan Perpustakaan Akedemi Pengajian Islam Universiti Malaya. Hasil kajian telah menunjukkan bahawa kes jenayah yang dilakukan oleh penjenayah banyak memberi keburukan kepada manusia sejagat.

## ABSTRACT

This academic project is a study about the consent in criminal cases and its effect to offender. The study is to identify the types of criminal which always done by offender and the punishment based on Malaysian Act and also the punishment ruled by Islam. Many of the information are from library research which more focusing to books related with the criminal offences. The methods are from surveying, researching to books already written by previous writer and take out the main point which related to the topic. Information was also gathered from library research which is more focusing to National Library, Library of International Islamic University of Malaysia and Academic of Islamic Studies Library in Malaya University. As a result for this research, the criminal cases have done by offender give many of bad effects to human in the world.

## ملخص البحث

هذا البحث العلمي يبحث عن مفهوم الرضى في الجنايا وآثاره على المجرم نفسه. وتهدف الباحثة من هذا البحث لمعرفة أنواع الجرائم التي ارتكبتها المجرم وعقوباتها حسب القوانين العاملة في ماليزيا، فضلا عن عقوباتها في الشريعة الإسلامية. وتجمع المعلومات لهذا البحث من المكتبة، وخاصة في الكتب تتعلق بالمخالفات الجنائية . ومنهجه هو مطالعة الدراسات السابقة، واستخراج الأفكار الرئيسة منها خاصة البحث. وجمعت الباحثة المعلومات من المكتبات عديدة خاصة المكتبة الوطنية، ومكتبة الجامعة الإسلامية العالمية بماليزيا ، ومكتبة الأكاديمية الإسلامية بجامعة ملايا. والنتيجة من هذا البحث هي أن الجنايا التي ارتكبتها المجرم تعطى السيئات الكثيرة على حياة الإنسان في الدنيا.

## CONTENTS

	Page
AUTHOR DECLARATION	i
ACKNOWLEDGEMENTS	ii
ABSTRAK	iii
ABSTRACT	iv
<i>MULAKHKHAS AL-BAHTH</i>	v
CONTENT PAGE	vi
LIST OF STATUTE	viii
GLOSSARY	ix
TRANSLITERATIONS	x
ABBREVIATIONS	xiii
PROPOSAL	xiv
CHAPTER 1 HISTORY OF CRIME	1
1.1 History of crime	1
1.2 The meaning of crimes	2
1.3 Searching for the causes of crime	3
1.4 The basic elements of a crime	4
CHAPTER 2 CONSENT	9
2.1 Definition of consent	9
2.2 Four elements to the defense of consent	11
2.3 Misconception of fact	13
CHAPTER 3 CONSENT IN CRIMINAL OFFENCES	15
3.1 Consent in prostitution	15
3.1.1 Organized crime and prostitution	15
3.2 Sexual conduct that constitutes prostitution	16
3.3 Consent in murder	16
3.3.1 Murder (al-Qatl Al-Amd)	17
3.4 Penal Code (Act 574)	19
3.4.1 Culpable homicide	19
3.4.2 Murder	19
3.4.3 Punishment for murder	20
3.4.4 Punishment for culpable homicide not amounting to murder	20
3.4.5 Attempt to murder	20
3.5 Punishment based on the Islamic Criminal Law	21
Execution of the punishment of qisas (retaliation) in hurt	21
3.6 Proof of crime of hurt	22
3.7 Crimes liable to hudud	23
3.8 Zina	23
3.9 The prohibition of approaching zina	25
3.10 Parties to zina must be <i>muhsan</i>	26

3.10.1 Offences against the state	27
3.10.2 Offences against the person	27
3.11 Punishment for crimes liable to ta'zir	28
3.11.1 Imprisonment	28
3.11.2 Banishment	29
3.12 Example of enactments in Malaysia	30
3.12.1 Offence relating to decency	30
CHAPTER 4 CONCLUSION	32
4. 1 Summary	32
BIBLIOGRAPHY	33

## LIST OF STATUTE

## Syariah Criminal Law Enactment (Selangor) No.9 of 1995(N.pb)

1	the Law of Islam (Enacted by Allah SWT as prophet Muhammad (s.a.w.)
2	Islamic law
3	Islamic scholars
4	The Medinan Chapter (Madinatun-Nabawiyyah) including laws of Islamic criminal
5	Islamic criminal
6	Capital offence causing death
7	Islamic law
8	the Law of prophet Muhammad (s.a.w.)
9	Offence and penalty prescribed in Al-Quran
10	Practical law of Islam
11	A word meaning 'literally submission' (to the will of Allah) Islam
12	is the name of one of the world's great religions
13	The laws of Islam as provided by, legislated and applied in
14	Malaysia
15	Crimes
16	judicial
17	Misdemeanor
18	Sexual intercourse of an adult and marriage contract and consummation
19	during a valid marriage
20	Believer of Islam
21	Law retaliation or retribution
22	Open deliberate homicide
23	Chapter of the Al-Quran on punishment, including the punishment of
24	death for murder
25	deaths for capital crimes
26	Disciplinary matters
27	Legal procedure
28	Al-Quran

## GLOSSARY

<i>Al-qatl</i>	kill a person
<i>Al-Qur'an</i>	The Holy book revealed by Allah SWT to prophet Muhamad (p.b.u.h)
<i>Amd</i>	Deliberated homicide
<i>As-Sunnah</i>	The tradition of prophet Muhamad (p.b.u.h) including deeds saying and approval
<i>Aurah</i>	Secret Organs
<i>Diyat</i>	Compensation paid causing death
<i>Hadd</i>	Boundary, limit
<i>Hadith</i>	The tradition of prophet Muhamad (p.b.u.h)
<i>Hudud</i>	Offence and penalty prescribed by Allah
<i>Hukum Syara'</i>	Practical laws of Islam
<i>Islam</i>	A word meaning 'literally submission' (to the will God). Islam is the name of one of the world's great monotheistic
<i>Islamic Law</i>	The laws of Islam as provided for, administered and applied in Malaysia
<i>Jinayah</i>	Crimes
<i>Kadhi</i>	Judge
<i>Khata'</i>	Mistake
<i>Muhsan</i>	Sexual intercourse of an adult and sane man an adult and sane during a valid marriage
<i>Muslim</i>	Believer of Islam
<i>Qazaf</i>	Law retaliation or retribution
<i>Shibhl Al-Amd</i>	Quasi deliberate homicide
<i>Surah</i>	Chapter of the Al-Qur'an . The number preceding colon denotes the chapter number while numbers after the colon denotes the verse number
<i>Ta'zir</i>	Discretion penalty determined by kadhi
<i>Wali</i>	Legal guardian
<i>Zina</i>	Adultery (prostitution)

# ARABIC WORDS TRANSLITERATION SYSTEM

## TRANLITERATION TABLE

### 1. ALPHABET

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ء	,	فأر	fa`r
ب	b	برد	burd
ت	t	تال	tall
ث	th	ثوب	thawb
ج	j	جدار	jidār
ح	h	حليب	halīb
خ	kh	خادم	khādīm
د	d	ديك	dīk
ذ	dh	ذهب	dhahab
ر	r	رفيق	rafīq
ز	z	زميل	zamīl
س	s	سلام	salām
ش	sh	شعب	sha`b
ص	s	صحرا	sakhr
ض	d	ضيق	dayq
ط	t	طالب	tālib
ظ	z	ظالم	zalim

ع	ʿ	عقل	ʿaql
غ	gh	غلام	ghulām
ف	f	فيل	fil
ق	q	قلب	qalb
ك	k	كلام	kalām
ل	l	لب	lubb
م	m	مال	māl
ن	n	نجم	najm
هـ	h	هول	hawl
و	w	ورق	waraq
ي	y	يم	yam

## 2. Short Vowel

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
_____	a	كَتَبَ	kataba
_____	i	عَلِمَ	ʿalima
_____	u	غَلِبَ	ghuliba

## 3. Long Vowel

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ي , ا	ā	عالم , في	ʿālīm, fatā
ي	ī	عليم , داعي	ʿalīm, dāʿī
و	ū	علوم , أدعو	ʿulūm, adʿū

#### 4. Diphthong

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
و	aw	نوم	nawm
ي	ay	ليل	layl
يَـ	iy	شافعي	shafi <sup>c</sup> iy (ending)
وِـ	uw	علو	<sup>c</sup> uluw (ending)

#### 5. Exemptions

- 5.1 Arabic letter ء (hamzah) found at the beginning of a word is transliterated to the letter “a” and not to’.

Example: أكبر transliterated to: akbar (not ‘akbar)

- 5.2 Arabic letter ة (ta’ marbutah) found in a word without ال (al) which is coupled with another word that contains ال (al) at the beginning of it is transliterated to the letter “t”.

Example: مكتبة الإمام transliterated to: maktabat al-imam

However if the Arabic letter ة (ta’ marbutah) found in a word with ال (al), in a single word or in the last word in a sentence, it is transliterated to the letter “h”.

Example: المكتبة الأهلية transliterated to: al-maktabah al-ahliyyah

قلعة  
دار وهبة  
qal<sup>c</sup>ah  
dar wahbah

## ABBREVIATION

Bhd.	berhad
Dr.	doctor of philosophy
HJ.	haji
Ibid	ibidem
N.d	no date
N.pb	no publisher
No.	number
P.	page
p.b.u.h	peace by upon him
Sdn.	sendirian
SWT	<i>subhanahu Wa Ta'la</i>

## **PROPOSAL**

### **BACKGROUND OF RESEARCH**

Crimes are becoming a serious of problem in every part of country in Malaysia. Islam provides a comprehensive guideline on matters pertaining to criminal laws to handle the act of Muslim.

These situations encourage the writer to do a research about this issue. The topic of this academic project proposal is “ the effect’s of consent in criminal liability”. Meaning the words of consent is the freedom of the individual to consent to physical harm caused and the interest of the criminal law to protect the individual against violations of his body require a fine balance between two competing interest individual freedom and the social unity of an activity.

Generally, this topic will be focused and discuss about the effect of consent in criminal liability and the punishments of maker or offender in criminal cases.

### **AIM OF RESEARCH**

The research process must have the aim in getting the last target and to know the benefits of research for the others.

The undertaken in my research is to known in detail and to explore the punishment of consent in criminal cases. References to the decided cases are made in order to set a better view on its application.

### **OBJECTIVE OF RESEARCH**

The research process must have the objective in doing the research project to known about the main objective.

The first objectives in doing this research are to study the punishment of offences. When the writer doing this research, she will know in detail about the punishment of offences followed at Malaysian Act.

Beside that the second objectives in doing this research is to identify the effect of consent in criminal liability. When the writer doing this research she will know more critically about the effect of consent in criminal cases.

The others objectives in doing this research is to identify the types of consent in criminal liability such as consent to killed, consent to raped, consent to kidnapped and the others consent in criminal cases.

The last objectives in doing this research are to know the criminal law that enforced among Muslims.

## **RESEARCH METHODOLOGY**

Many methods can be employed and it depends on the research. Generally, the research methodology can be divided into two types; there are primary and secondary sources.

In undertaking this study, the secondary data was obtained based on the library research. There are several libraries such as the National Library, libraries of KUIM, UM, IIUM and UKM. Besides collecting data from the Internet is being employed in this academic project.

## **LITERATURE REVIEW**

The book of Criminal Law in Singapore and Malaysia provides a penal code about the consent in criminal liability. Under the Penal Code, suicide itself is not a crime (though attempt and abetment of suicide are punishable under ss 306 and 309 respectively). Why should consent not be a complete defence to murder under s 300 but only a mitigating circumstance (s 300 exception 5)?

The libertarians like Mill (1859) in the same book would argue that when a bodily harm is consent to by a victim, the criminal law ought not to intervene even on a paternalistic ground. According to Mill, the ground for intervention is “harm to others”.

However, Devlin’s (1965) attitude to the criminal law’s response to the victim’s consent is simply that it is the law’s function to enforce a moral principle and nothing else moral principle being the upholding of the sanctity of life and the physical integrity of the person.

Hart (1959,1963) disagrees with Devlin and states that we must ask whether a practice that offends moral feeling is harmful, independently of its repercussion on the general moral code. Also, whether it is really true that failure to translate this item of general morality in criminal law would jeopardize the whole fabric of morality and so of society. While Hart recognizes that Mill’s criterion of “harm to others “ is an important factor in the law’s intervention, he points out that it is not a single criterion.

Kadish and Paulson (1969) pose the following question: to what extent can the distinctions which courts have made as to when to recognize consent as a defence ... be explained on the ground of paternalism rather than legal moralism? Is it physical injury to person, even those consenting, that the courts are protecting against, or physical harm in the course of immoral behavior? These questions may also be asked in regard to the defence of consent and its limits in the Penal Code.

Abdul kadir Audah also has said in the book of *Al-Tashri’I Al-Jina’I Al-Islami* about the criminal and the consent in criminal.

The problem of consent in criminal liability we can look at the cases of prostitution, sexual offences, stealing of property and other criminal cases. P.R Glazebrook was discussed in the book of statutes on Criminal Law provides the Sexual Offences Act 1956 and all of act related with criminal cases.

For example: **The Sexual offence Act 1956 provides:**

1. Rape of woman or man

(1) It is an offence for a man to rape a woman or another man

(2) A man commits rape if –

(a) He has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and

(b) At the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it.

(3) A man also commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband.

(4) Subsection (2) applies for the purpose of any enactment.

**The sexual offence (Amendment) Act 1976 provides:**

1. Meaning of ‘rape’, etc.

(2) It is hereby declared that, if at a trial for rape offence the jury has to consider whether a man believed that a woman or man was consenting to sexual intercourse, the presence or absence of reasonable grounds for such as is a matter to which the jury is to whether he so believed.

Ratanlal and Dhirajlal's were discussed in the book Law of Crimes related with the cases of criminal. It's provides:

**1. Section 323. Punishment for voluntarily causing hurt.**

-Whoever, except in the provided for by section 334 Voluntarily causing hurt on provocation, Voluntarily causes hurt shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

**2. Section 335. Voluntarily causing grievous hurt on provocation.**

-Whoever (voluntarily) causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause

grievous hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to four years, or with fine which may extend two thousand rupees, or with both.

## **SCOPE OF RESEARCH**

In this research, the writer makes a research related with the criminal cases and it's punishment to the offender. The research doing related with all of matter in criminal cases likes sexual offences, stealing of property, murder and others criminal cases.

The scope of research is all of offender who incriminates themselves in the criminal cases whether between woman and man.

In this research, the writer want to raise the issue and matter related with criminal cases and the effects of consent in criminal liability. The writer want to discuss are the punishment of consent in criminal cases same or not in the punishment without consent in criminal cases.

## **PROBLEM STATEMENT**

During making this research the writer have some problem to finish this project paper. The first problem in doing this research are the writer not enough time to find the sources at the others library like National Library, UIAM library, UKM library, UM library and the others library.

Beside that problem in doing this research is difficult to know the meaning of books related with this topic because all of sources in the Arabic language and the English language.

The last problem in doing this research are the writer have not enough money to spend to this research project because this research need more money to photocopy all of books related with this topic, beside that if the writer want to find the books out of KUIM's library it's need more money to spend.

## **SIGNIFICANCE OF RESEARCH**

The important to doing this research is the writer wants to know how many types of criminal, the effect of consent in criminal cases and the punishment among offender.

The others important are to get a new knowledge related to the criminal cases and the punishment for the offender in criminal cases. Such as know about the Acts related with criminal punishment.

The last one is to explore the effects of consent in criminal cases and give the information to society because many of society don't know about the punishment in the laws nowadays.

## CHAPTER 1 HISTORY OF CRIME

### 1.1 HISTORY OF CRIME

We can know about the history of criminal cases in the Quranic interpretation. Allah S.W.T had said in the Quran about the first crime in the world is murder. In the Quran, Allah had said that Qabiel is the first killer because he had killed his brother Habel. We can refer to Surah Al-Maidah verse 28-32.

Allah says:

لَئِن بَسَطْتَ إِلَيَّ يَدَكَ لِتَقْتُلَنِي مَا أَنَا بِبَاسِطٍ يَدِيَ إِلَيْكَ لَأَقْتُلَكَ إِنِّي أَخَافُ اللَّهَ رَبَّ الْعَالَمِينَ

*"If you do stretch your hand against me, to kill me, (then) it is not for me to stretch my hand against you to kill you: Because I do fear Allah, the cherisher of the worlds."*

إِنِّي أُرِيدُ أَنْ تَبُوءَ بِإِثْمِي وَإِثْمِكَ فَتَكُونَ مِنْ أَصْحَابِ النَّارِ وَذَلِكَ جَزَاءُ الظَّالِمِينَ

*"I intend to let you take upon yourself my sin as well as yours, for you will be among the companions of the fire, and that is the reward of those who do wrong."*

فَطَوَّعَتْ لَهُ نَفْسُهُ قَتْلَ أَخِيهِ فَقَتَلَهُ فَأَصْبَحَ مِنَ الخَاسِرِينَ

*"The (selfish) soul of the other (brother) led him to the murder of his brother: (for) he murdered him, and became (himself) one of the lost ones."*

فَبَعَثَ اللَّهُ غُرَابًا يَبْحَثُ فِي الْأَرْضِ لِيُرِيَهُ كَيْفَ يُوَارِي سَوْءَةَ أَخِيهِ قَالَ يَا وَيْلَتَا أَعَجَزْتُ أَنْ أَكُونَ مِثْلَ هَذَا الْغُرَابِ فَأُوَارِيَ سَوْءَةَ أَخِي فَأَصْبَحَ مِنَ النَّادِمِينَ

*“Then Allah sent a raven (a black crow), that scratched the ground, to show him how to hide the shame of his brother,” shame (and curse) on me!” said he: “was I not even able to be like this raven, and ( be able ) to hide the shame of my brother? Then he became full or sorrow (for his actions)”*

مَنْ أَجَلِ ذَلِكَ كَتَبْنَا عَلَى بَنِي إِسْرَائِيلَ أَنَّهُ مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا وَلَقَدْ جَاءَ تَهُمُ رُسُلُنَا بِالْبَيِّنَاتِ ثُمَّ إِنَّ كَثِيرًا مِّنْهُمْ بَعْدَ ذَلِكَ فِي الْأَرْضِ لَمُسْرِفُونَ

**On that basis:**

*“We ordained for the children of Israel that if any one killed a person unless it be for murder or for spreading mischief in the land, it would be as if he killed all the people: and if any one saved a life, it would be as if he saved the live of all the people. Then although there came to them our messenger with clear signs, yet even after that, may of them continued to commit excesses ( and do injustice) in the land.”<sup>1</sup>*

## 1.2 THE MEANING OF CRIMES

**What is crime?**

The meaning of crime is any act or omission resulting from human induct which is considered in itself or in its out come to be harmful and which the state wishes to prevent, which renders the person responsible liable to some kind of punishment as the result of

<sup>1</sup>Al-Quran..Al-Maidah 5: 28-32. (All Quranic translation in this writing is based on Professor (Dr.) Syed Vickar Ahamed.1999. *Interpretation of the meaning of the Glorious Quran*. Malaysia: TR Group of Companies.

proceeding which are usually initiated on behalf of the state and which, are designed to ascertain the nature, extent and legal consequence of that person's responsibility.<sup>2</sup>

In the others book, state that the 'crime' which identifies the quality of an act or omission which makes it an offence (crime and offence are synonymous). However, crimes are so many and varied and embrace such widely differing kinds of conduct that all attempt to illuminate the essential characteristics of a crime, whether based on moral criteria or otherwise, have proved fruitless. Writers have been forced to abandon the search for the 'nature' of a crime and to fall back on rather lame definitions based on the type of legal proceeding which may follow from the act. In other words, an act is a crime if it 'is capable of being followed by criminal proceeding, having one of the types of outcome (punishment, etc.) Known to follow these proceedings (Professor Glanville Williams, 8 CLP 107, p.123). Thus, although there are some crimes, such as murder and theft, which are instantly recognizable as Crime, if you wish to know definitively whether particular conduct is a crime, you must have recourse to statutes and case law to see whether criminal proceeding and punishment can follow such an act. As Dine and Gobert point out (cases and materials on criminal law, 3rd ed. P. 43) this definition 'put the cart before the horse'. Furthermore it is clear that the European Court of Human Right is free to reject a domestic law classification as non-criminal if the nature of the proceeding is characteristic of criminal offence proceeding (general enforcement by a public authority with punitive elements based on fault) with a significant penalty attached.<sup>3</sup>

### 1.3 SEARCHING FOR THE CAUSES OF CRIME

Of course, there is no simple answer to the question of what causes crime. Attempts to explain the causative factors associated with crime, the characteristics of criminals, and society's response to crime and delinquency comprise the field of criminology.

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<sup>2</sup> Sherman.1998. *Dictionary of Law*. Kuala Lumpur: Golden Books center.p.82.

<sup>3</sup> Russell Heaton. 2001. *Blackstone's study Pack Criminal Law*. United Kingdom: Blackstone press Limited.p.1-2.

Experts in criminology have studied the causes of crime from a number of different perspectives, law, psychology, psychiatry, anthropology, economics, biology and history. Traditionally, the study of crime causation focused on the fields of sociology, psychology, and psychiatry. In recent years, political scientists, political sociologists, and economists have become more active in this area. For instance, the so-called new or critical criminology focuses on a Marxist perspective of society in which laws and the instruments of the administration of justice (the police, court, correction,) are used by those in power for self-serving interests to maintain the status quo and protect their interests from the have-nots.

Although it is not possible for an introductory text to discuss all of the theories that have tried to explain crime, we can trace some of the major approaches and theories that have been identified as milestones in the development of approaches to crime and criminological thought.<sup>4</sup>

#### 1.4 THE BASIC ELEMENTS OF A CRIME

Certain basic elements are required in order for an act to be considered a crime. These elements form what is known as the 'body of the crime' or *corpus delicti*. Some people, for instance, wrongly believe that it refers to the body of the deceased in a homicide. The body of the crime is used to describe all of the elements which together constitute a crime, and includes the following:

- 1- The *actus reus*
- 2- The *mens rea*
- 3- The combination of *actus reus* and *mens rea*.

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<sup>4</sup> Robert D. Pursey. 1980. *Introduction to Criminal Justice*. London: Glencoe Publishing Co, Inc. p.33.

The terms *actus reus*, which literally translates as 'guilty act' refers to the forbidden act itself and is used in the criminal law to describe the physical crime and or the commission of the criminal act (or omission of the lawful act). In their *Treatise on Criminal Law*, Lafave and Scott state:

Bad thought alone cannot constitute a crime; there must be an act, or an omission to act where there is a legal duty to act. Thus, the criminal law crimes are defined in term of act or omission to act and statutory crimes are unconstitutional unless so defined. A bodily movement, to qualify as an act forming the basis of criminal liability, must be voluntary.<sup>5</sup>

The physical act in violation of the criminal statute is usually clearly defined within each offense. For example, in the crime of manslaughter, the unlawful killing of a human being is the act prohibited by statute, in burglary; it is the actual breaking and entering into a dwelling house for the purpose of theft. Regarding an omission to act, many jurisdictions hold a person accountable if a legal duty exist and the offender avoids it. For example the law recognizes that a parent has a legal duty to a child. Where a parent refuses to obtain medical attention for the child and the child dies the parent's actions constitute an omission to act and that omission may be considered unlawful.

The second element basic to the commission of any crime is the establishment of the *mens rea*, literally translated as 'guilty mind'. *Mens rea* is that element of the crime that deals with the defendant's intent to commit the act. A person ordinarily cannot be convicted of a crime unless it is proven that he or she intentionally, knowingly, or willingly committed the criminal act.<sup>6</sup>

The following case illustrates the absence of *mens rea*. A student at a university took home some book, believing them to be her own, and subsequently found that the books belonged to her classmate. When she realized that the books did not belong to her, she

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<sup>5</sup>Joseph J.Senna & Larry J.Siegel .1981.*Introduction to Criminal Justice*.United States of America: West Publishing co.p 92

<sup>6</sup> Ibid p.92

returned them to their proper owner. The student could not be prosecuted for theft since she did not intend to steal the books in the first place.

Another case that illustrates a lack of criminal intent, but one in which actual harm occurs, is that in which a pedestrian is accidentally killed in an automobile accident. At the time of the accident, the driver is operating the motor vehicle legally and with appropriate care, but the victim steps out in front of the car and is struck and killed. The driver cannot be found guilty of manslaughter unless evidence can be found that some intent or gross criminal negligence existed at the time of the accident. This situation would be legally considered in a completely different light if it could be proved that the driver actually intended to hit the pedestrian, or had been driving the car in a willful and reckless manner indicating criminal negligence.<sup>7</sup>

Thus, in order for an individual to be found guilty of committing most crimes, it must be proved that he committed the physical act itself and that he intended to do so with full awareness of the consequences of the act.

Other variations on the concept of criminal intent exist. Different degrees of intent are used to determine the mental state needed in order for an individual to commit a particular crime. Where a criminal homicide occurs, it may be necessary to prove that a mental of premeditation and malice existed in the accused before a judgment of first degree murder, it may be necessary to prove malice, for a judgment of second degree murder, it may be necessary to prove malice, and for a judgment of third degree murder, it may be necessary to prove guilty knowledge or criminal negligence.<sup>8</sup>

Mens rea conditions also differ among the types of crime when considering whether a general or specific intent to commit the crime exist. For most crimes general intent on the part of the accused to act purposefully or to accomplish a criminal result must be proved. A specific intent requires that the actor intended to accomplish a specific purpose as an

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<sup>7</sup> Ibid p.92

<sup>8</sup> Ibid p.93

element of the crime. Burglary, for example, involves more than the general intent of breaking and entering into a dwelling house, it usually also involves the specific intent of committing a felony, such as stealing money or jewels. Many other crimes such as a robbery, larceny, assault with intent to kill, false pretense, and even kidnapping may require a specific intent.<sup>9</sup>

The third element needed to prove the corpus delecti of a crime is the relationship of the act to the criminal intent or result. The law requires that the offender's conduct must be the approximate cause of any injury resulting from the criminal act. If, for example, a man chases a victim into the street intending to assault him, and victim is struck and killed by a car, the accused could be convicted of murder if the court felt that his actions made him responsible for the victim's death. On the other hand, if a victim dies from a completely unrelated illness after being assaulted, the court has to determine whether the death was a probable consequence of the defendant's illegal conduct or whether it may have resulted even if the assault had not occurred.<sup>10</sup>

In another case, if Ali intends to kill or harm Abu and then decides against such action, Ali cannot be found guilty of a crime if the Abu is accidentally harmed by Ali at a later date. Criminal liability, as previously explained, cannot be imposed for simply having had bad thought about the victim at a previous time. Thus, a concurrence of act and intent actus reus and mens rea must be present if a crime is to occur. However, cases do exist where Ali intends criminal action against Abu but harms a third party instead; for example, Ali intends to shoot Abu but misses and shoots Mamat. In this instance, the law transfers the original criminal intent to the innocent bystander. Under the legal doctrine of transferred intent, the accused would be considered criminally responsible for transferring wrongful intent to the other person.

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<sup>9</sup> Ibid p.93

<sup>10</sup> Ibid .93

It has been stated that both existence of a criminal intent and a wrongful act must be proved before an individual can be found guilty of committing a crime. However, certain statutory offenses exist in which mens rea is not essential. These offenses fall within a category known as public welfare, or strict liability crimes. A person can be held responsible for such a violation independent of the existence of intent to commit the offense. Strict liability criminal statutes generally include narcotics control laws, traffic laws, health and safety regulations, sanitation laws, and other regulatory statutes. The general purpose of such laws is to protect the public and provide the prosecution with an opportunity to convict offenders of crimes that would ordinarily be difficult to prove in court. Over the years, most legal commentators have been critical of strict liability offenses because it seems unfair to punish a person without referring to that person's state of mind when committing the crime. However, these statutes still remain part of legal codes in many jurisdictions.<sup>11</sup>

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<sup>11</sup> Ibid p. 94

## CHAPTER 2

### CONSENT

#### 2.1 DEFINITION OF CONSENT

The question of the freedom of the individual to consent to physical harm caused and the interest of the criminal law to protect the individual against violations of his body require a fine balance between two competing interest individual freedom and the social utility of an activity.

Libertarians like Mill (1859) would argue that when a bodily harm is consented to by a victim, the criminal law ought not to intervene even on a paternalistic ground. However, Devlin's (1965) attitude to the criminal law's response to the victim's consent is simply that it is the law's function to enforce a moral principle and nothing else the moral principle being the upholding of the sanctity of life and the physical integrity of the person.<sup>12</sup>

As a general rule, the consent of a victim to a crime does not justify or excuse the defendant who commits the action. The nature of the type of crime involved generally determines the validity of consent as an appropriate legal defense. Crimes such as common law rape and larceny require the lack of consent on the part of the victim. In other words, a rape does not occur if consent to sexual relations exists. In the same way, a larceny cannot occur if the owner voluntarily consents to the taking of the property. Consequently, in such crimes, consent is an essential element of the crime, and it is a valid defense where it can be proven or shown that it existed at the time the crime was committed. In statutory rape, on the other hand, consent is not an element of the crime,

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<sup>12</sup> KL Koh et al. 1989. *Criminal Law in Singapore and Malaysia* .Kuala Lumpur: Butterworth Legal Publisher. p.137.

and is considered irrelevant, because the state presumes that young people are not capable of providing consent.

Consent is also not an appropriate defense in cases involving assaults and batteries, mayhems, homicide, or in any injury involving a person oriented crime where serious harm can come to a person. In addition, regardless of whether both parties give consent to a fight, if there is a likelihood of serious bodily injury, mutual consent is not a valid defense.

There is certain situation in which a crime does not exist even when the victim consents to the action. For instance, players who participate in sport, such as football or hockey engage in hitting each other and no cause's serious harm during a game, or after a sport activity, the party may be guilty of a serious crime. Sport players often give implied consent to physical actions against them, which are a normal activity of the physical sport.

In addition, if the legal defense of consent is to be effective it cannot be caused by duress on the victim. Treats of bodily harm that produce fear cannot be used to force person to give consent to a given action. The validity of any defense in the criminal law must is based on voluntaries.<sup>13</sup>

The victim of a crime, in most cases can consent to the crime being committed, and the defendant will often be able to use this consent as a defense. This is true specifying where a crime, such as larceny, is directed against an individual. On the other hand if the act is type of offense that affect the public at large, as in the case of fighting in public or disturbing the peace, consent of the individuals involved will not be a defense, for they are all wrongdoers to a certain extent.<sup>14</sup>

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<sup>13</sup> Joseph J. Senna & Larry J. Siegel .1981 .*Introduction to Criminal Justice* .United States of America: West Publishing Co. p. 98-99.

<sup>14</sup> Neil C.Chamelin .2002.*Criminal for Police Officers*. United States of America: Prentice-Hall, Inc.p.88

When lack of consent is a necessary element of the crime, as in cases of forcible rape, property, larceny, burglary, and so forth, lack of consent can usually be presumed. If however, the accused raises consent as a defense; the state must then prove the defendant acted without the victim's consent.<sup>15</sup>

Penal Code s 300, Exception 5

Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

This exception was highly innovative. The common law has always maintained that a person cannot consent to his own death. Under English law, if the accused has intentionally killed his terminally sick mother, this will be murder even if she voluntarily and genuinely consented, unless he can bring himself under another defence such as diminished responsibility.<sup>16</sup>

## 2.2 FOUR ELEMENTS TO THE DEFENCE OF CONSENT

There are four elements to the defence of consent. The first is the person giving consent must be capable of giving it. Consent would not be available, as a defense to statutory rape because the class of person protected by that statute is incapable, by law, of giving consent. Consent by insane people or infants will not be recognized.

The second element is the offence must be of the type for which consent may be given, breaches of the peace, including affrays and disorderly conduct, are the offenses for which consent cannot be given, and therefore the defense is unavailable. Similarly, murder and mayhem are non-consentable crimes. This would also be true in many *mala prohibite* offenses such as the sale of mislabeled goods.

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<sup>15</sup> Ibid p.88

<sup>16</sup> KL Koh et al. 1989. *Criminal Law in Singapore and Malaysia*. Kuala Lumpur: Butterworth Legal Publisher. p. 462

The third element is that the consent not be obtained by fraud as to the nature of the act to be committed. Fraud can take one of two forms that must be distinguished, because one applies to the defense of consent, whereas the other does not. Fraud in the execution refers to the victim agreeing to an act, although unaware of its nature. For example: Aminah goes to doctor Kamal because of illness. Kamal advises Aminah that she needs an operation to which she agrees. While Aminah is under anesthesia, Kamal proceeds to have intercourse with her. This 'consent' was obtained by fraud as to the nature of the act and therefore, consent will not be a defense in Doctor Kamal's trial for rape. On the other hand, suppose that doctor Kamal has intercourse with Aminah after telling her that this will cure her ailment. Aminah later learns that this was just a ruse on the part of doctor Kamal to have intercourse with her. In this subsequent trial for rape, Kamal's defense of consent would be applicable. In this case Aminah did consent to the act, knowing full well by fraud. Here, fraud will not negate her consent because the law is not concerned with her reasons for consenting as long as she is aware of the nature of the act to be performed. This is called fraud in the inducement.

The fourth element is that the person giving consent must have the authority to consent to the commission of the crime. Faizal may consent to have his property stolen, but his consent is no good when he agrees to allow Farid to take property belonging to Shahrul.

All four of these elements must be satisfied before the accused can raise a defense of consent. If consent to perform a certain act is given, the accused may still be liable if the conduct goes beyond the bounds of the consent. If Azlina gives Diana permission to take a RM 100.00 from the dresser in Azlina's bedroom and Diana takes RM 150.00 instead, Diana has exceeded the bounds of the consent and will be liable for the theft of the extra RM50.00.

Consent given under threat or fear of reprisal will not be a good defense if the threat or reasonable fear was so strong that agreeing was a better alternative than allowing the threat to be carried out. The reasonableness of the fear will vary according to the type

and seriousness of the act. If Nina says to Didah, 'if you don't give me all of your money, I will never speak to you again', this is not sufficient threat or fear to negate Didah's consent when she agrees to hand the money. If on the other hand, saiful forces Lili to consent to intercourse under threat of death, Lili's agreement will not constitute consent for the purpose of his defense.<sup>17</sup>

### 2.3 MISCONCEPTION OF FACT

A misconception of fact may arise from fraudulent or innocent misrepresentation. Obvious examples where a misconception of fact will vitiate consent is where there is fraud as to the nature of the act, or as to the identity of the person who does an act (e.g. a man has sexual intercourse with a woman in the dark representing to her that he is her husband when he is not. Another example where consent is vitiated by a misconception of fact is seen in *Poonai Fattema* (1869) 12 WR (Cr)7, where the accused persons, who were snake charmers, induced the deceased persons to allow themselves to be bitten by a poisonous snake, inducing them to believe that they had the power to protect them from harm. The accused knew that consent was given in consequence of the misconception that they had such power. It was held that the consent was vitiated by the misconception and the accused persons were liable for the death of the deceased.<sup>18</sup>

However not all misconceptions of fact will vitiate consent. Suppose a man who is suffering from venereal disease or AIDS conceals this fact from his sexual partner, would her consent to the sexual intercourse be vitiated? Let it be supposed that she would not have consented had she known about it. In English case of *Clarence* (1882) it was held, obiter, that consent was not vitiated by the fraud of a husband who had connection with his wife, he concealing the fact from her that he was suffering from gonorrhoea. On the

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<sup>17</sup> Neil C. Chamelin .2002. *Criminal for Police Officers*. United States of America: Prentice-Hall, Inc.p p.89.

<sup>18</sup> KL Koh et al. 1989. *Criminal Law in Singapore and Malaysia*. Kuala Lumpur: Butterworth Legal Publisher  
.p.149

question of the extent to which fraud vitiates consent in the context of criminal law, Stephen J said:

“It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the words, and without qualification. It is too short to be true, as a mathematical formula is true. If we apply it in that sense to the present case, it is difficult to say that the prisoner with a woman without her consent, and if fraud vitiates consent, every case in which a man infects a woman or commits bigamy, the second wife being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes, and so might acts of prostitution procured by fraud, as for instance by promise not intent to be fulfilled. These illustrations appear to show clearly that the maxim that fraud vitiates consent is too general to be applied to these matters as if it were absolutely true...the only sort of fraud which so far destroy the effect of a woman’s consent as to convert a connection consented to in fact a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act.”<sup>19</sup>

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<sup>19</sup> Ibid.p.149

## CHAPTER 3

### CONSENT IN CRIMINAL OFFENCES

There are many offences related with the consent but here, the author had discussed just three offences. The first is:

#### 3.1 CONSENT IN PROSTITUTION

The offence of prostitution can be one of at least three non-metal *acts*:

1. Engaging in sexual relations with another person for a fee or something of value with consent
2. Offering with consent (or soliciting) to engage in sexual relations with another person for fee or something value
3. Requests (or agrees) to pay a fee or something of value to another person for sexual services and acts.<sup>20</sup>

The “fee” or “something of value” is most often money. Members of either sex may now be convicted of prostitution as distinguished from the past, when only women could be convicted. Most (if not all) state prostitution statutes forbid prostitution by males selling sexual services to other males. Males who offer to pay a woman to engage in sex acts may also be charged with the crime if the statutes of that jurisdiction apply to both sexes.<sup>21</sup>

##### 3.1.1 Organized crime and prostitution

The National Advisory Committee on Criminal Justice Standards and Goals makes the following observations in its report on organized crime:

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<sup>20</sup>Joseph J. Senna & Larry J. Siegel, 1981, *Introduction to Criminal Justice*, United States of America: West Publishing Co., p. 366

<sup>21</sup>*Ibid* p. 366

“Prostitution was one of organized crime’s early rackets, dating from the turn of the 20<sup>th</sup> Century. Unfortunately, not much has been written about how organized crime got into and ran the operations, or where illegal syndicates were most heavily involved.”

“One form of prostitution – streetwalking – probably becomes too conspicuous and hard to regulate for organized crime .it is the street prostitute whom the police arrest most frequently ,and she may have a bad reputation because of prostitution- related crimes (e.g. robbery of customer)also streetwalkers have pimps, who serve the practical functions of providing bail and client .it has been said that organized crime does not tot be involved with pimp ,believing that they are stupid ,unreliable and treacherous ...thus it seem that organized crime, when it is involved in prostitution ,has concentration call girls and the brothel trade, employing a variety of legal front such as massage parlors and “rap” and “encounter” joints.”

### 3.2 SEXUAL CONDUCT THAT CONSTITUTES PROSTITUTION

Modern prostitution statutes generally forbid not only vaginal intercourse, but also oral sex (cunnilingus and fellation), anal intercourse, masturbation, and, in many instances, sexual contact.

As most cases that go into a court involve police decoys, solicitation to commit any of these acts are almost always the basis of the criminal charge. Defendants in such cases are women who solicit male undercover officers, men who prostitution female officers, and male Prostitutes offering sex for a fee.<sup>22</sup>

### 3.3 CONSENT IN MURDER

The Arabic term homicide is “al-qatl” which means to kill a person .The jurists have divided this offence into several categories. *Amd* which is deliberate homicide (or murder), *shibhl al- amd* which quasi deliberate homicide and *khata’* which is killing by mistake.

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<sup>22</sup> Ibid p.366

### 3.3.1 Murder (al-qatl al- amd)

This is the act of intentionally killing a human being without a right to do so. This is mentioned in the Qu`ran to effect:

*“As regards the one who kills a believer willfully, his recompense is Hell, wherein he shall abide forever. He has incurred Allah’s wrath and his curse is on him, and Allah has prepared a woeful torment for him.”*<sup>23</sup>

Murder in Islamic jurisprudence is called *al-qatl al- amd*. The word *al- amd* etymologically is a derivative word from the root verb *amada* and means having the full criminal intention (means rea) to do the act which causes death. The following are definitions given by the schools of law:

Al- Kasani, a Hanafi jurist, expressed Imam Abu Hanifah’s view saying:

To strike someone intentionally with a weapon (like sword) or any other instrument which is a weapon such as sharp wood, spear, sharp reed, sharp stone or fire is *qatl amd*.<sup>24</sup>

The common law defined murder as felonies killing of any human being by another with malice aforethought. Murder was a general intent crime. Specific intent to kill any particular person was not required, although it would satisfy this requirement. The difficulties in proving a case of murder at common law basically involved the interpretation given the words malice and aforethought and the inter predation given both words together as a phrase.<sup>25</sup>

The word malice in legal usage connotes something different from what it does in the popular sense. Malice in the popular sense is often used as a synonym for hate, ill will, bad feelings, and the like. For purpose of the law of homicide, malice means the

<sup>23</sup> Sayed Iskandar Shah Haneef.2000.Homicide In Islam.Kuala Lumpur:Zafar Sdn.Bhd.p.14

<sup>24</sup> Ibid.p. 15

<sup>25</sup> Neil C. Chamelin.2002. Criminal Law for Police Officers.United States of America:Prentice Hall .p.133

intentional doing of a wrongful act in such a way and under such circumstances that the death of a human may result.

Malice may be either express or implied. To prove this element satisfactorily, it was necessary to show that the perpetrator either actually intended to kill ( express malice) or killed while committing a deliberate and cruel act likely to cause death( implied malice) . There are basically four situations in which the law would imply malice at common law. These instances involve, in effect, unintentional killings. The first was intentional infliction of great bodily harm on someone, unintentionally resulting in death. This would warrant a murder charge at common law.

The second situation in which the law would imply malice involved no actual intent to kill on the part of the perpetrator. Instead, it involved a deliberate act or omission, of such a nature that it tended to cause death or serious bodily harm. If Sam deliberately drove his automobile in excess of one hundred miles hour through a crowded city intersection to see how fast it would go, and killed somebody as a result, the law would infer malice. Third, the law would also imply malice when death resulted during the commission of a felony under the felony murder rule discussed in detail in the next section.

Finally, when death as caused by one resisting a lawful arrest, the common law would imply malice. The law requires a person to submit to a lawful arrest but permits the person to resist an unlawful arrest with necessary reasonable force. If the jury finds deadly force was reasonable necessary to resist an unlawful arrest, the defendant will be found to have committed excusable homicide.<sup>26</sup>

According to Abdul Kadir Audah a person can't give consent to another person to kill him self. If people kill someone, he must be punished under the Qisas punishment (mandatory), Diyat punishment or ta'zir punishment. If the guardian or heirs of the victim

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<sup>26</sup>Ibid 134

agree to pardon the offender and accept diyat or compensation, the punishment should be amended to enable the court to impose the ta'zir punishment of imprisonment.

### **3.4 PENAL CODE (ACT 574)**

#### **3.4.1 299. Culpable homicide**

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. It means whoever causes death by doing with the consent of causing death, its commits the offence of culpable homicide.

#### *Illustration*

(a) A lays stick and turf over pit, with intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.<sup>27</sup>

#### **3.4.2 300. Murder**

Except in the cases hereinafter excepted, culpable homicide is murder: -

- (a) if the act by which the death is caused is done with the intention of causing death;
- (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely cause the death of the person to whom the harm is caused;
- (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
- (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause

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<sup>27</sup> Penal Code. (Act 574) 2002.Kuala Lumpur .Petaling Jaya: Laser Press Sdn.Bhd (Act 574) p. 112

death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.<sup>28</sup>

*Illustrations*

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

**3.4.3 302. Punishment for murder.**

whoever commits murder shall be punished with death. Its means whoever caused death by doing with consent of causing death, it commit murder and shall be punished with death.

**3.4.4 304. Punishment for culpable homicide not amounting to murder.**

Whoever commits culpable homicide not amounting to murder shall be punished:

- (a) With imprisonment for a term which may extend to twenty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing bodily injury as is likely to cause death; or
- (b) With imprisonment for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.<sup>29</sup>

**3.4.5 307. ATTEMPT TO MURDER**

- (1) Whoever does any act with such intention or knowledge and under such circumstances, that if he by that act caused death he would be guilty of

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<sup>28</sup>Ibid p.113

<sup>29</sup>Ibid p.115

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murder, shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable to imprisonment for a term which may extend to twenty years.

- (2) When any person offending under this section is under sentence of imprisonment for life or for a term of twenty years, he may, if hurt is caused, be punished with death.<sup>30</sup>

Its means every person causes death by doing with the consent or intention or know causes death, he commits of murder and shall be punished as stated above.

### 3.5 PUNISHMENT BASED ON THE ISLAMIC CRIMINAL LAW

#### Execution of the punishment of *qisas* (retaliation) in hurt

Before the execution of the punishment of *qisas* (retaliation) in matter of hurt, an authorized medical officer may examine the convict and make it sure that the execution of *qisas* (retaliation) shall neither cause the death of the victim and if the medical officer is of the opinion that there is danger of the death of the convict in the execution of the punishment or a similar hurt cannot be caused to the convict as he has caused to the victim the punishment of *qisas* (retaliation) shall not be executed and the convict shall be liable for the compensation and may also be liable for *ta'zir* if required in the circumstances of the case. And if the convict is a pregnant woman, the execution of the punishment shall be postponed till the birth of the child or miscarriage and during this period she should be released on bail or kept in jail as in simple imprisonment. After the birth of the child or miscarriage, the woman may be subjected to the execution of punishment at a suitable time.<sup>31</sup>

Perpustakaan  
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<sup>30</sup> Ibid p.116

<sup>31</sup> Prof.Dr.Anwarullah.1997. *The Criminal Law of Islam*. Kuala Lumpur:A.S Noordeen.p. 110

### 3.6 PROOF OF CRIME OF HURT

The crime of hurt liable to *qisas* (retaliation) is proved either by the confession of the accused without any coercion or by the testimony of two adult, sane and credible witnesses. The crime of hurt liable for compensation whether prescribed (*ursh / arsh*) or unprescribed (*daman*) and the crime of hurt by mistake is proved by the confession of the accused or by the testimony of two witnesses or one witness or circumstantial evidence or any other evidence which proves the guilt.<sup>32</sup>

Crimes of *qisas* involve homicide, bodily injury or other forms of harm committed against the person. The punishment imposed is either a retributive penalty equivalent to the injury inflicted on the victim or takes the form of pecuniary compensation for the victim's injuries, which is imposed if the retribution is not executable or the victim waives his right to demand it. The Holy Quran and the Sunnah also prescribe the offences and their punishment.<sup>33</sup>

The Holy Quran states to the effect:

*"O you believe! The law of qisas is prescribed for you in cases of murder, the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude. This is a concession and a Mercy from your load. After this whoever exceeds the limits shall be in grievous penalty. In the law of qisas there is saving of live to you o you, men of understanding. That you may restrain yourselves."*

*" We ordained therein for them, " life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wound equal for equal". But if anyone remits the retaliation by way of charity, it is as act of atonement for himself. And if any fail to judge by the light of what Allah has revealed they are no better than wrong doers".<sup>34</sup>*

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<sup>32</sup>Ibid p.32

<sup>33</sup> Prof .Emiretus Tan Sri Ahmad Ibrahim.2002. The Administration of Islamic Law in Malaysia p.580(N.pb)

<sup>34</sup> Ibid p.581

### 3.7 CRIMES LIABLE TO HUDUD

"*Hadd* " literally means boundary ,limit, barrier, obstacle. In term of Islamic criminal law *hadd* means an unalterable punishment fixed by the Quran or the Sunnah of the prophet (s.a.w) as a right of Allah for a crime. *Hadd* cannot be increased, decreased, altered or remitted by anyone even the head of an Islamic State. Thus the punishment of *qisas* or *diyat* is not *hadd* because the Holy Quran has fixed it as right of individuals and it is for this reason that it can be remitted by the victim or his heirs. As a right of Allah means that it is meant for the betterment of society. *Hadd* in terms also means the crime for which unalterable punishment has been fixed by the Quran or the Sunnah of the prophet (s.a.w) as a right of Allah. The following are the crimes of *hudud* in Islamic criminal law:

1. zina or fornication)
2. Qazf (accusation of zina)
3. Theft
4. Harabah (robbery and dacoity)
5. Drinking intoxicating liquor)
6. Rebellion
7. Apostasy<sup>35</sup>

### 3.8 ZINA (ADULTERY OR FORNICATION)

" *zina* " means willful sexual intercourse between a man and a woman who are not, and do not suspected to be, validity married to each other. Modern jurists define it as sexual intercourse between a man and woman who are not, and do not suspected to be, in a state of legal matrimony. *Zina* has been prohibited in Islam. Quran says:

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<sup>35</sup> Prof.Dr.Anwarullah.1997. *The Criminal Law of Islam*.Kuala Lumpur: A.S Noordeen p. 112

وَلَا تَقْرُبُوا الزَّوْجِيَّ إِنَّهُ كَانَ فَاحِشَةً وَسَاءَ سَبِيلًا

*“And come not near to adultery: for it is a shameful (deed) and an evil, opening the road (to other evils)”.*<sup>36</sup>

Abdullah Yusuf Ali, while commenting on the above verse, “adultery is not only shameful in itself and inconsistent with any self respect or respect for others, but it opens the road to many evils. It may destroy the basis of the family, it may cause murders and feuds and loss of reputation and property, and also loosen permanently the bonds of society. Not only should it be avoided as a sin, but any approach or temptation to it should be avoided”.<sup>37</sup>

The Quran, while describing the qualities of the believers says,

وَالَّذِينَ لَا يَدْعُونَ مَعَ اللَّهِ إِلَهًا آخَرَ وَلَا يَقْتُلُونَ النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ وَلَا يَزْنُونَ وَمَنْ يَفْعَلْ ذَلِكَ يَلْقَ أَثَامًا

*“Those who invoke not with god any other god, nor slay such life as god has made sacred, except for just cause, nor commit fornication, and that does this meets punishment.”*<sup>38</sup>

يَا أَيُّهَا النَّبِيُّ إِذَا جَاءَكَ الْمُؤْمِنَاتُ يُبَايِعْنَكَ عَلَىٰ أَنْ لَا يُشْرِكْنَ بِاللَّهِ شَيْئًا وَلَا يَسْرِقْنَ وَلَا يَزْنِينَ وَلَا يَقْتُلْنَ أَوْلَادَهُنَّ وَلَا يَأْتِينَ بِبُهْتَانٍ يَفْتَرِينَهُ بَيْنَ أَيْدِيهِنَّ وَأَرْجُلِهِنَّ وَلَا يَعْصِيَنَّ فِي مَعْرُوفٍ فَبَايِعُهُنَّ وَاسْتَعْفِر لِهِنَّ اللَّهُ إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ

*“O prophet! When believing woman come to you to take the oath of fealty to you, that they will not associate in work ship any other thing whatever with God, that they will not steal, that they will not commit adultery (or fornication) that they will not kill their*

<sup>36</sup> Al-Qur'an, Al-Isra' 17:32

<sup>37</sup> Prof.Dr.Anwarullah.1997. *The Criminal Law of Islam*.Kuala Lumpur: A.S Noordeen p. 113

<sup>38</sup> Al-Qur'an, Al-Furqan 25:68

*children, that they will not utter slander, intentionally forging falsehood and that they will not disobey you in any just matter- then do you receiver their fealty".<sup>39</sup>*

Islam is very strict in prohibiting *zina* because it leads to confusion of lineage, child abuse, the breaking up of families, bitterness in relationships, the spread of venereal diseases and general laxity in morals.

### 3.9 THE PROHIBITION OF APPROACHING ZINA

Islam has not prohibited *zina* but it closes all avenues of approach to it and thus every step and every means leading to it. Accordingly, whatever excites passion, opens ways for illicit sexual relations between a man and a woman and promotes indecency and obscenity is prohibited and their violation is punishable with *ta'zir*.<sup>40</sup>

In order to close the avenue of approach to adultery, Islam has prohibited looking at a member of the opposite sex with desire, for the eye is the key to the feeling. The Holy Quran says:<sup>41</sup>

قُلْ لِلْمُؤْمِنِينَ يَغُضُّوا مِنْ أَبْصَارِهِمْ وَيَحْفَظُوا فُرُوجَهُمْ ذَلِكَ أَزْكَى لَهُمْ إِنَّ اللَّهَ خَبِيرٌ بِمَا يَصْنَعُونَ & وَقُلْ لِلْمُؤْمِنَاتِ يَغْضُضْنَ مِنْ أَبْصَارِهِنَّ وَيَحْفَظْنَ فُرُوجَهُنَّ وَلَا يُبْدِينَ زِينَتَهُنَّ

*"Tell the believing men that they should lower their gazes and guard their sexual organs: that is purer for them indeed. Allah is well acquainted with what they do. And tell the believing woman that they should lower their gazes and guard their sexual organs, and not display their adornment, except that which is apparent of it; and that they should draw their head coverings over their bosoms, and not display their adornment except to their husbands or their fathers or their husband's father or their son or their husband's son or their brothers or their brother's son or their sister's son or their woman or those whom their right hand possess, or male servant who lack sexual desire, or children who*

<sup>39</sup> Al-Qur'an. Al-Mumtahanah 60:12

<sup>40</sup> Prof. Dr. Anwarullah. 1997. *The Criminal Law of Islam*. Kuala Lumpur: A.S Noordeen p.114

<sup>41</sup> Ibid p.116