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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

In the name of Allah, Most Gracious, Most Merciful

CRIMINAL RESPONSIBILITY : MENTAL ELEMENT  
A COMPARATIVE STUDY OF ENGLISH COMMON LAW,  
MALAYSIAN LAW AND ISLAMIC CRIMINAL LAW

A DISSERTATION SUBMITTED TO:

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SUPERVISOR

SULAIMAN DORLOH

TAN SRI PROF. DATO'

MATRIC NO: G9410294

SYED AGIL BARAKBAH

INTERNATIONAL ISLAMIC UNIVERSITY  
JALAN UNIVERSITI, PETALING JAYA,  
46350 SELANGOR, MALAYSIA.

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## ABSTRACT

This work concerns the Criminal Responsibility: Mental Element (Mens rea) a comparative study of English Common Law, Malaysian and Islamic Criminal Law.

This work is divided into six chapters. The first chapter is divided into 2 parts. Part A deals with an introduction to the constituent elements of a crime. Part B deals comparatively with conceptual background of the Criminal Responsibility before the French and after the French Revolution. Shari'ah recognizes the principle of individual responsibility, the presumption of Innocence and Nullification of Penalty by doubt.

The second chapter deals comparatively with the nature and concept of crime in English Common Law and Shari'ah conception of a crime.

The third chapter deals with the nature of actus reus, namely: (a) omission (b) conduct must be voluntary. In Shari'ah, the ingredients of a crime, namely: (a) Legal element of crime (b) Material element of crime; and (c) Moral aspect of crime.



The fourth chapter deals comparatively with nature of Mental element (Mens rea). Under three Laws, namely: English Common Law, Malaysian Penal Code and Islamic Criminal Law. To elaborate the extent and the nature of Mental element, the writer uses legal Dictionaries.

The fifth chapter deals comparatively with the types of mental elements, namely: (a) intention; (b) motive; (c) recklessness; and (d) Negligence. In Shari'ah, there are (a) Common & specific intents; (b) Direct and indirect intents; and (d) Definite and indefinite intents.

The sixth chapter is divided into three parts. Part A deals comparatively with the nature and the definition of strict liability, namely: (a) English Common Law conception of strict liability; (b) Malaysian Penal Code conception of strict liability; and (c) Islamic Criminal Law approach towards the concept of strict liability. Part B deals comparatively with the Islamic criminal approach towards the offences of strict liability. Part C deals with conclusion.

This study relies on both Arabic, English and Malay materials. Arabic books are used together with English books.

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1959	The Prevention of Crime Ordinance (M'sia) Section 15(4)
1971	The Criminal Damage Act (UK) Sections 24-27
1972	The Licensing Act (UK) Section 13
1979	The Enforcement of Hadd Ordinance (Pakistan) Sections 3, 8(4), 14(1)
1981	The Contempt of Court Act (UK)
1988	The Road Traffic Act (UK) Section 3

## ABBREVIATIONS

A.C.	Appeal Cases
All E.R.	All England Reports
C.A.	Court of Appeal
Cr. App. R	Criminal Appeal Reports
Cr. L.R.	Criminal Law Review
Cr. L.J.	Criminal Law Journal
C.C.R.	Crown Cases Reserved
D.C.	Divisional Court
H.L.	House of Lord
K.B.	King's Bench
I.L.R.	Indian Law Reports
L.R.	Law Reports
M&W	Meeson and Welby
M.L.J.	Malayan Law Journal
P.C.	Privy Council
Q.B.	Queen's Bench
Q.B.D.	Queen's Bench Division
T.L.R.	The Time Law Reports
W.L.R.	Weekly Law Reports

## CHAPTER I

### A. INTRODUCTION

### B. THE CONCEPT OF CRIMINAL RESPONSIBILITY

- a. The Concept of Criminal Responsibility before the French Revolution
- b. The Concept of Criminal Responsibility after the French Revolution
- c. The Concept of Criminal Responsibility in Islamic Criminal Law
  - i. The Principle of Individual Responsibility
  - ii. The Presumption of Innocence
  - iii. The Nullification of Penalty by Doubt
- d. A Comparative Analysis

## CHAPTER I

### A. INTRODUCTION

One of the corner-stones of liberty in English law is the prevailing tradition that a person who is accused of having committed a criminal offence must be conclusively proved (i.e. beyond reasonable doubt) not only to have committed the "actus reus" of the offence but also to have had the requisite "mens rea" at the time. The actus reus (or external element of any crime) is the doing of a prohibited act or it can be failure to do what the criminal law requires or it can be sufficient for the accused to be responsible for a prohibited event or statement or being in possession or prohibited things or even being in a prohibited state or place. The "mens rea" or internal element of any crime is the blame worthy, guilty or criminal state of mind of the accused at the time that person caused the actus reus to occur.<sup>1</sup> These traditional principles are summed up in a stock latin maxim: actus non facit reum nisi mens sit rea : an act does not make a person guilty of a crime unless his mind also be a guilty.<sup>2</sup>

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<sup>1</sup> Christopher Ryan and Gary Scanlan, Criminal Law, 55 (1986).

<sup>2</sup> Ibid, See also Cross Jones & Card, Introduction to Criminal Law, (11th ed) 55, (1988) also, Anthony Kenny, Freewill and responsibility, 1 (1978).

Generally, both the external or factual elements of an offence and the internal or mental elements must be proved beyond reasonable doubt by the prosecution.<sup>3</sup> Thus, the requirement of mens rea is designed to give effect to the idea of just punishment.<sup>4</sup>

Many modern criminal codes contain general clauses stating that in the absence of an express provision to the contrary, mens rea is to be implied as an element of every offence. For example, Section 202<sup>5</sup> provides (subject to an exception that need not detain us here) that "a person is not guilty on an offence unless he acted purposely, knowingly, recklessly or negligently as the law may require, with respect to each material element of the offence."<sup>6</sup>

There is no such general provision in the penal codes of Singapore, Malaysia or India or any other legislative provision in those jurisdictions. Under the Penal Code of Malaysia and other local legislation a specific form of "mens rea" is sometimes required for an offence and this is stated

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<sup>3</sup> Christopher Ryan and Gary Scanlan, op.cit at 55.

<sup>4</sup> Cross Jones and Card, op.cit at 56.

<sup>5</sup> The Model Penal Code, the USA.

<sup>6</sup> KL Koh, (et.al), Criminal Law in Singapore and Malaysia : Text and Materials, 56 (1989).



at other times a statutory provision may be silent as to whether any "mens rea" is required and if so, what species of mens rea is required.<sup>7</sup>

Many sections of the Penal Code of Malaysia (and other statutes creating criminal liability) specifically spell out the need for "mens rea" and indicate exactly which species of "mens rea" must be proved. For instance, Section 142 of the Penal Code of Malaysia, makes it an offence if a person intentionally joins an unlawful assembly, section 275 makes it an offence if a person knowing any drug or medical preparation to have been adulterated... sells, etc., such drug. Section 304A makes it an offence if a person causes the death of any person by doing any rash or negligent act..." Section 378 defines theft as intending to take dishonestly any movable property.... Numerous other "mens rea" to be found in the Penal Code and in other statutes creating Criminal liability, eg. recklessness (S. 64 Road Traffic Act (Singapore Cap. 276), Voluntary: Penal Code S. 377, Fraudulently S. 415, Wantonly S. 153, Corruptly S. 220, Maliciously S. 219, Dangerously S. 64, Road Traffic Act (Singapore).<sup>8</sup>

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<sup>7</sup> Ibid.

<sup>8</sup> KL Koh (et al) op.cit at 56.

In Islamic law, an accused is to be considered a guilty of a particular prohibited act or omission if he or she did that act or omission with malice intention. Thus, the Shariah invariable links agent's act with his will or intention.

It was narrated by Umar Ibnu Khattab (R) he said, the Prophet (s.a.w) said "Every act's validity is depend on the intention of the doer".<sup>9</sup>

In another hadith the Prophet (s.a.w) said

"Acts are dependent on intentions and everyone will get his reward in consonance with his intention".<sup>10</sup>

However the seat of will is mind and it means intention and decision. For instance, the Arabs when "wishing some one will, say may Allah (s.w.t) protect you, thus if a person proposes to do an act does it, he is intentionally guilty thereof".<sup>11</sup>

It was narrated by Abu Hurairah (R) he said, the Prophet (s.a.w) said, Verily Allah (s.w.t) does not notice unto your

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<sup>9</sup> Reported by Bukhari and Muslim.

<sup>10</sup> As cited in Abdul Qadir Oudah, Criminal Law of Islam, (English) Vol. II, 105 (1987).

<sup>11</sup> Ibid.

appearance nor your wealth but He (s.w.t) notices unto your hearts and deeds.<sup>12</sup>

Based on the above-mentioned injunctions, it is very clear to say here that in declaring the accountability of the offender for the application of the principle that acts are linked with intention, the Shariah does not only take into account the offence of the accused but also offender's intention.<sup>13</sup>

Since the Shariah regards actions are dependent on intention, it draws a distinction between the offender's accountability owing to the offence committed willingly and his accountability due to the offence erroneously committed. Thus this distinction can be seen in the following injunctions.<sup>14</sup>

The Almighty Allah says:

"And there is no blame on you concerning that wherein you made a mistake but concerning that which your hearts do purposely".<sup>15</sup>

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<sup>12</sup> Reported by Muslim.

<sup>13</sup> Supra note 10.

<sup>14</sup> Abdul Qadir Oudah, Vol. II, op.cit at 106.

<sup>15</sup> The Holy Quran, Al-Ahzab, verse: 5. For further details, please look at Chapter IV of this dissertation, viz Islamic Criminal Law approach towards the concept of strict liability and how the Islamic Criminal Law approach towards the offences of strict liability.

The Prophet (s.a.w) also says

"My Ummah is not accountable for what it does by mistake and inadvertently".<sup>16</sup>

Therefore, I wish to conduct a legal analysis on the issue of Criminal responsibility; a special reference to Mental Element as a comparative study of English Common Law, Malaysian law and Islamic Criminal Law.

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<sup>16</sup> Reported by Ibn Majah, Ibn Habban, ad-Daruqutni, at-Tabari and al-Hakim from Ibn Abbas.

## B. THE CONCEPT OF CRIMINAL RESPONSIBILITY

### a. The Concept of Criminal responsibility before the French Revolution

Criminal accountability before the French Revolution rested on purely material basis. It called for the punishment of any one guilty of act whoever he was and whatever his circumstances were. Every individual was held criminally responsible irrespective of the fact whether he was adult or a child, a mature sensible person or one mentally deficient. An individual was held responsible not only for his own acts but also for the conduct of another individual even if he knew nothing about what the latter might have done and had no control over him.<sup>17</sup>

Islam holds that man is created innocent, and bears no sin, even after or until the age of maturity (baligh). No matter who his parents were, who his uncles and ancestor, his brothers and sisters and his neighbours or his society were, man is born innocent. This repudiates every notion of the original sin, of hereditary guilt, of vacarious responsibility, of tribal, national or international involvement of the person in past event before his birth.<sup>18</sup>

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<sup>17</sup> Abdul Qadir Oudah, Vol. II, op.cit at 80.

<sup>18</sup> Ismail Raji al-Faruqi, Al-Tawhid Its Implications for thought and life, 67 (1992).

The concept of vacarious responsibility is clearly explained in the Holy Quran. Almighty Allah says:

Namely, that no bearer of burden can bear the burden of another; that man can have nothing but what he strive for;<sup>19</sup>

The doctrine of personal responsibility is recognised under Islamic criminal law. Allah has expressed in the Holy Quran:

Every soul draws the meed of its acts on none but itself; no bearer of burdens can bear the burden of another.<sup>20</sup>

Allah has further said:

Allah does not charge a person with more than he can bear. Therefore, to everyone belongs the credit or discredit which he has personally earned.<sup>21</sup>

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<sup>19</sup> The Holy Quran, Surah Al-Najm, verses 38-39.

19.a The responsibility for his sin must be borne by himself and not by another. Abdullah Yusuf Ali, The Holy Quran 1382 (1992).

19.b No person is responsible for the guilt of another... To every person belongs the merit or demerit of what he has wrought. Ismail Raji al-Faruqi, Loc.cit.

<sup>20</sup> The Holy Quran, Surah Al An'am, verse 164.

20.a The doctrine of personal responsibility again. We are fully responsible for our acts ourselves, we cannot transfer the consequences to someone else. Nor can anyone vacariously atone for our sins. Abdullah Yusuf Ali, op.cit 343.

<sup>21</sup> The Holy Quran, surah Al-Baqarah, verse 286.

21.a It gets every good that it earns, and it suffers every ill that it

These injunctions state a basic principle in Islamic Criminal law, namely, the personal responsibility and punishment of the guilty, thus suppressing all vicarious responsibility.<sup>22</sup>

The concept of Criminal Accountability in man-made laws were based on the doctrine of material accountability. Under this doctrine again, the punishment of the offender extended to the member of his family and his friends.<sup>23</sup>

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cars... Abdullah Yusuf Ali,  
op.cit at 720.

<sup>22</sup> Said Ramadan, Islamic Law: Its Scope and equity, 65 (1992).

<sup>23</sup> Abdul Qadir Oudah, Vol. II, op.cit at 90.

23.a Materialism holds that matter is the primordial or fundamental constituent of the universe, which is not governed by intelligence, purpose or final causes. Every thing is to be explained in term of material entitles or processes. Human feelings and values began to be described of illusions for which the world of fact gave no warrant. (a logical consequence of the denial of God). M: Umer Chapra, Islam and the economic challenge. 22 (1992)

The Quran, however declares that no soul will bear any but its own burden.<sup>24</sup> To it belong that is has personally earned, whether merit or demerit.<sup>25</sup> None will receive judgement for the deed of another, and none may intercede on behalf of another.<sup>26</sup> Allah says:

Say: "Neither shall you be called to account for whatever we may have become guilty of, nor shall we be called to account for whatever you are doing".<sup>27</sup>

Again the Almighty Allah says.

On the Day of judgement, no person will be of any avail to another, neither for good nor for ill. Those who committed injustice will be assigned to the Fire which they denied.<sup>28</sup>

Islam defines man's responsibility exclusively in terms of his own deeds and defines a deed as the act in which man, the sane, adult person, enters into bodily, consciously, and voluntarily, and in which he produces some disturbance of the flow of space-time. That guilt and responsibility are ethical categories and are incurred only where a free and conscious deed is committed.<sup>29</sup>

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<sup>24</sup> Supra, note 2 at 68, cf The Holy Quran, Al-An'am verse 164.

<sup>25</sup> Ibid. cf The Holy Quran, surah Al-Najm, verses: 38-39.

<sup>26</sup> Ibid. cf The Holy Quran, Surah Saba', verse 24.

<sup>27</sup> Muhammad Assad, The Message of the Quran, 660 (1980).

<sup>28</sup> The Holy Quran, surah Saba', verse 42.

<sup>29</sup> Ismail Raji al-Faruqi, loc.cit.