



الجامعة الإسلامية العالمية ماليزيا  
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA  
بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

LAW OF MURDER:  
A COMPARATIVE STUDY OF  
MALAYSIAN LAW, ENGLISH LAW AND ISLAMIC LAW

BY

SHAMRAHAYU BT. AB AZIZ  
(G 9210901)

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International Islamic University  
Jalan University,  
46350 Petaling Jaya,  
Selangor Darul Ehsan.

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## INTRODUCTION

Murder is the most serious offence against the person. It involves human soul and dignity and it is a kind of unlawful homicide.

(1)

A statistic from the Statistics Department shows that there

are a big number of murder cases being reported every year, however, since 1987 there is a slightly downward trend. The following table proves the fact:

REGION	YEAR	MURDER
MALAYSIA	1980	279
	1986	367
	1987	352
	1988	346
	1989	323
	1990	311

---

(1) Year book of Statistic, Department of Statistics, Malaysia, July 1990 & Statistics Handbook, Department of Statistics, April, 1991

Under Malaysian Law, the law of murder is governed by  
(2)  
section 300 of the Penal Code. By the wordings of the Section,  
murder is a species of homicide and therefore homicide is not  
always a murder. This is accepted by English and Islamic Laws.

It is the aim of this study to give a comparative analysis  
on the law of murder. Throughout the discussion emphasis is  
placed on elements, defences, penalties and some related offences  
such as infanticide, abortion and suicide for which these  
elements mark the distinction between these systems of law.

---

(2) Penal Code (F.M.S) cap 45 As at 15th July 1991

## CHAPTER ONE

### MURDER DEFINED

#### DEFINITION OF MURDER UNDER MALAYSIAN LAW

The definition of murder in Malaysia is clearly given by section 300 of the Penal Code. The section reads as follows:-

"Except in cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

Secondly, - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

Thirdly - 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

Fourthly - 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 death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid."

(For the purpose of understanding and interpretation of the section there are a number of illustrations).

To discuss on the definition of murder under section 300 it is important to note the definition of culpable homicide not amounting to murder under section 299, because generally a killing is a culpable homicide and murder is a kind of that homicide, that is why section 300 starts with "Except in cases hereinafter excepted, culpable homicide is murder". Meaning to say section 300 is a species and an exception to section 299.

According to some writers, this part (definition of murder) is the weakest part of the code because both sections are similar. For instance, Stephen in commenting the Indian Penal Code's provisions (which is in pari materia with Malaysian Penal Code) said,

"The definitions of culpable homicide and murder are I think the weakest part of the Code. They are obscure, and it is obvious to me that the subject had not been fully thought out when they were drawn."<sup>(4)</sup>

---

(3) However to note also cases where the absolute defences are available and the accused will be entitled to a total acquittal

(4) Stephen, A History of the Criminal Law of England, 299 Vol 3 (1883)

To be guilty of murder under section 300 one must be proved to have done the act which caused the death of another, with the intention to cause death or with the intention of causing bodily injury which is likely to cause death or with the intention of causing bodily injury which is in the ordinary course of nature will cause death or with the knowledge that the act done is so imminently dangerous and will cause death.

If at least one of these elements is found the accused may be guilty of murder. In short, the offence of murder consists of actus reus and mens rea.

For a further illustration on the definition of murder the author will discuss under the topic of Actus Reus and Mens Rea of murder. (5)

---

DEFINITION OF MURDER UNDER ENGLISH LAW

Under English Law murder is a crime at Common Law; and that the definition therefore a Common Law, and not a statutory definition.

---

(5) Infrg at Chapter Two

The classic definition of murder is that of Coke,  
"Murder is when a man of sound memory and of the age of  
discretion, unlawfully kills within any county of the realm  
any reasonable creature in rerum natural under the King's  
peace, with malice for thought, either expressed by the  
party, or implied by law, so as the party wounded, or hurt  
etc. die of the wound, or hurt etc. within a year and a day  
after the same."<sup>(6)</sup>

After reading the definition, one has to analyse, such as:

- (a) who can commit murder,
- (b) where murder can be committed
- (c) who can be the victim
- (d) death within a year and a day
- (e) malice aforethought

All elements mentioned above save the last one are regarded as  
the external aspects of murder known as Actus Reus. The last  
element (malice aforethought) concerns with the intention or the  
state of the accused's mind - known as mens rea.

If therefore can be said that the definition can be divided  
into two separate headings, namely the Actus Reus and Mens Rea of  
murder. (For further illustrations and explanation the  
discussions on Actus Reus and Mens Rea of Murder are therefore  
much relevant).

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(6) Edwards Coke, Milite JC, Cokes Institutes, Part 3 & 4 47  
(1935)

## DEFINITION OF MURDER UNDER ISLAMIC LAW

What is meant by the author with the word "murder" is "wilful murder" or "intentional killing". According to Shariah murder can be said as an act done by one human being which results the death of another human being without 'haq' or without due process of law. Niazi says that "it is the killing of human being by a human being".<sup>(7)</sup>

According to Dr. Ali Ahmad Mar'ee, it is a wilful conduct or an act of a mukallaf (a responsible person) intended to kill a living humanbeing whose blood is protected by Islam, through a method likely or usually to cause death.

(8) لو ان بعد المكلف قتل انسان حي معلوم  
الدم لا يقتل به غالباً

From the definition there are few elements to be discussed, namely,

- i. The act was a wilful act
- ii. The act was done by mukallaf (responsible person)
- iii. The victim must be a living humanbeing
- iv. The victim must be one protected under the law
- v. The method used must either be likely or usually cause death.

---

(7) Liqat Niazi Khan, Islamic Law of Torts, 130 (n.d)

(8) Dr Ali Ahmad Mar'ee - Al-Qisas wa al hudud fi al figh al-Islamic, 17 (1986)

From the definition also it is found that there are two main things to be considered, ie, intention ( *قصد* ) and the physical act - (Actus Reus)

The author will discuss on the matter in detail under the topic of Mens Rea and Actus Reus of murder.

### Conclusion and Comparison

Under the Malaysian Law the definition given is a statutory one. It is contained in a specific statute. Under English Law, since the law of homicide was a Common Law offence, the definition given is a Common Law definition. Definition of homicide is not given in the Holy Quran clearly under Islamic Law. It is however a matter of *اجتهاد* or *فتاوى* given by the ulama'. Therefore there are various definitions on the point. But what is stated above is the one generally accepted.

Under the three laws the definitions contain of two aspects, viz Mens Rea and Actus Reus. But what marks the difference is the concept and the applicability, for example, Malaysian Law has no direct mention that the victim must be under the protection of the state as the Islamic Law and English Law do. It is however impliedly understood.



The definition given by the English Law is more similar to Islamic Law than the Malaysian Law because both are answering the questions of - who can commit murder who can be the victim and intention. The Islamic Law however does not mention where the murder can be committed - (The Ulama' are of different opinion) and Islamic Law does not mention that the death must be within a year and a day.

The Malaysian Law does not mention of who can commit death because there are specified general exceptions under the Penal Code. Malaysian Law also does not answer the question of where murder can be committed because it is impliedly understood that it must be committed within the jurisdiction. Malaysian Law also, as Islamic Law does not specify the time within which an act would amount to murder.

Another important point is that, Islamic Law does not directly mention of the intention of causing bodily injury which will cause death or likely to cause death. This is found under the English and Malaysian Law.

To conclude, basically the definition of murder is similar under the three systems of law. But, as has been seen there are few distinctions between them.

## A) CATEGORIES OF HOMICIDE

### CATEGORIES OF HOMICIDE UNDER MALAYSIAN LAW

Homicide is the killing of human being by another human  
(9)  
being. It is either lawful or unlawful.

#### Lawful Homicide

Lawful homicide is sometimes termed as simple homicide.  
(10)  
This includes homicide offences falling under the Chapter of 1  
general exceptions the Penal Code - sections 76 to 106. Based on  
the general exceptions Ratanlal devided lawful homicide into  
justifiable and excusable homicide.

#### i. Justifiable Homicide

Justifiable homicide includes cases where the death is  
caused by, \_\_\_\_\_

- (a) a person under mistake of fact, believing that he  
is either bound or justified by law (sections 76  
and 79)
- (b) a judge acting on judicial power (section 77)
- (c) a person done an act in pursuant to the judgment  
or order of a court. (section 78)

---

(9) Ratanlal and Dhirajlal, Law of Crime, Vol 2, 1038 (1988)

(10) Ibid

- (d) a person doing an act likely to cause harm but without a criminal intent, and prevent other harm - ie a person acting in the state of necessity. (section '81)
- (e) a person acting in private defence. (sections 100 and 103)

ii. Excusable Homicide

Excusable homicide includes cases where the death is caused by,

- (a) accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act, in a lawful manner, by lawful means, and with proper care and caution. (section 80).
- (b) a child, or a person of unsound mind or an intoxicated person (section 82, 83, 84, 85, 86)
- (c) an unintentional act done in good faith for the benefit of the person killed when
  - (i) he consented to the act done either expressly or if minor or unsound mind person, consent was given by their guardians. (sections 87, 88) or

- (ii) It is impossible for the killed person to sign by his consent or incapable of giving consent and has no guardian (section 89).

### Unlawful Homicide

The Penal Code contains three types of homicide offences, viz, murder, culpable homicide not amounting to murder and causing death by rash or negligent conduct. The Actus Reus of these three types of homicide is common, that is "causing the death of human being"<sup>(11)</sup>. The different homicide offences are therefore distinguished primarily by their different Mens Rea terms.

### Murder

The definition of murder is found under section 300 of the Penal Code.<sup>(12)</sup> Basically it is an intentional or premeditated killing, of which if one is found guilty thereof he will be liable to death penalty.<sup>(13)</sup>

The punishment for murder is death, as provided for under section 302 of the Penal Code (2a).

---

(11) Infra at - (details on the Actus Reus)  
(12) Infra at - (murder Defined) 2(a) - Infra, at -  
Punishment for murder)  
(13) Infra at - (Punishment for murder)

## Culpable Homicide Not Amounting To Murder

The definition of this type of homicide is provided for under section 299 of the Penal Code. The section reads as follows,

"Whoever causes death by doing an act 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."

This section defines culpable homicide as the act of causing death with:-

- (i) the intention of
  - (a) causing death or
  - (b) causing such bodily injury as is likely to cause death
- (ii) the knowledge that by doing the act he is likely to cause death.

The wordings of this section are similar and closely related to the definition of murder as provided for under section 300. (14)

The offence of culpable homicide is also found under section 300 when the accused is able to establish one of the defences or exceptions to the section. The defences are provocation, exceeding private defence, sudden fight, exceeding public power and consent. (15)

---

(14) Infra at - (discussions on murder and culpable homicide)  
(15) Infra at - (Chapter Four)

The punishment for culpable homicide not amounting to murder is provided for under section 304 of the Penal Code. This section contains two limbs which provide two punishments for the offence. Under the first limb the punishment is imprisonment for a term which may extend to twenty years and shall also be liable to fine. This punishment is to be awarded to one who is found to commit the offence with the intention of causing death or of causing bodily injury as is likely to cause death.

Under the second limb, the punishment is imprisonment for a term which may extend to ten years or with fine or with both. The penalty is awarded when the act is done with the knowledge that it is likely to cause death, but without intention to cause death or to cause bodily injury as is likely to cause death.

#### Death Caused By Rash Or Negligent Conduct

An accused is said to have committed a death by rash or negligent conduct if he has acted with neither knowledge nor intention. The difficulty arises because the words rash or negligent is nowhere defined under the Penal Code. The accused in this case is not guilty for culpable homicide - but punishable under section 304A. The section says,

"Whoever causes the death of any person, by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment for a term which may extend to two years, or with fine or with both".

The punishment is very much lower than from any other form of homicide.

Section 304A of the Penal Code is frequently invoked in cases in cases involving section 41 of the Road Transport Act 1987 the section reads,

"(1) Any person who, by the driving of a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances ..... is dangerous to the public, causes the death of any person shall be guilty of an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or both".

This section also gives rise to charges under road traffic legislation of causing death by reckless or dangerous driving. The Road Transport Act 1987 and the Penal Code therefore are using four different terms for mens rea-viz-rashness, negligence, (16) recklessness and dangerousness.

The punishment for this offence as provided for under section 304A is imprisonment, for a term which may extend to two years or with fine or with both.

If one is found guilty under section 41 of the Road transport Act 1987 he will be liable to a fine, not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or both. This is so provided under the same section - section 41 of the Road Transport Act 1987.

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(16) For the purpose of this essay the author will not discuss on the point in detail. See, Koh Morgan Clarkson - Chapter 21

## CATEGORIES OF MURDER UNDER ENGLISH LAW

As far as the categories of homicide is concerned the position under English Law is similar to the one under Malaysian Law. Homicide is "simply the killing by one human being of another human being".<sup>(17)</sup>

For legal purposes homicides are categorised into two categories, namely, those which are lawful and those which are unlawful.<sup>(18)</sup>

### Lawful Homicide

Lawful homicides include the killing of enemy soldier in a battle, formal execution by sentence of a court, killing in self defence, and causing death by misadventure.<sup>(19)</sup>

### Unlawful Homicide

According to the author of An Introduction To Criminal Law,<sup>(20)</sup> there are four types of unlawful homicide, namely murder, manslaughter, child destruction, infanticide and statutory offence, such as causing death by reckless driving. This is called statutory offence because the act is made an offence by statute or statutory provision, whereas other types of offences are originated from Common Law.<sup>1</sup>

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(17) Gary Scanland And Christopher Ryan, An Introduction To Criminal Law, 215 (1985)

(18) Ibid

(19) Ibid

(20) Ibid