The Concept of Crime and Criminal Law in Islam

Zulkifly Muda
THE CONCEPT OF CRIME AND CRIMINAL LAW IN ISLAM
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The Islamic law is also known as the Shariah Law. The Shariah Law rules and regulates all aspects of public and private behavior. It prescribes specific rules for prayers, fasting, giving to the poor, and many other religious matters. It also has regulations for personal matters including sexual conduct, and elements of child rearing; as well regulation in transactions and criminal matters. As deduced from the Arabic meaning of Sharia, it is essentially the "way".

The Islamic law does not conform to the notion of law as found, for example, in the common law. Rather than a uniform and unequivocal formulation of the law, it is a scholarly discourse consisting of the opinions of religious scholars, who argue on the basis of the text of the Holy Quran, the sacred hadith and the consensus of Muslim scholars.

Islam has, in fact, adopted two courses for the preservation of the five indispensables in human life: religion (Islam), life, intellect, offspring and property. The first is through cultivating religious consciousness (al wazi’ al dini) in the human soul and the awakening of human awareness through moral education. The second is by inflicting deterrent punishment (al qanun), which is the basis of the Islamic criminal system. The Islamic Criminal Law, which is part of the Shariah Law, provides a worldly punishment in addition to that in the hereafter.

In the classical textbooks of fiqh, criminal law is not regarded as a single, unified branch of the law. Provisions regarding offences mentioned in the Quran and Hadith constitute violations of the claims of God (the right of
Allah), with mandatory fixed punishments; these offences are: apostasy (riddah), highway robbery (hirabah), unlawful sexual intercourse (zina), theft (sariqah), the unfounded accusation of unlawful sexual intercourse (qazaf) and drinking alcohol (syurb khamr). Provisions for offences against another person, i.e. homicide and wounding, are subdivided into, (i) those regarding retaliation (qisas) and, (ii) those regarding financial compensation (diyat). And they are provisions concerning discretionary punishment of sinful or forbidden behaviour or of acts endangering public order or state security (ta'zir).

So here in this book, whenever I discuss the above points, I will pay attention to the various schools of jurisprudence (mazhab) and try to present the authoritative opinions of each school. This may seem somewhat confusing to the reader but it is necessary in order to convey how rich and variegated the legal discourse is.

May Allah bless us and I sincerely hope this book will be of benefit to us all.

CRIME

The word “crime” in Arabic is “habeel”. The word also means a prohibited act or an act of disobedience, a transgression or an act committed through negligence. In the religious sense, an act of committing wrong or not doing what has been prescribed.

In other words, a prohibited act or an act of disobedience for which punishment is prescribed are violations of the laws of Allah as laid down by law. An example of such an act is disobedience to the act of fighting (al-baghyu) for which the primary sources of the law prescribe lashes whipping for married persons. Another example of such an act is disobedience to the act of adultery (al-zina) for which the primary sources of the law prescribe flogging for married persons. Other such acts include negligence in performing prayers, fasting in the month of Ramadan and fighting or killed. Other such acts include negligence in performing the prayer, fasting in the month of Ramadan and fighting or killed. Other such acts include negligence in performing the prayer, fasting in the month of Ramadan and fighting or killed. Other such acts include negligence in performing the prayer, fasting in the month of Ramadan and fighting or killed.

1-Anwarullah, The Concept of Crime and Criminal Law in Islam
2-Lane Edward, Arabic
3-Abu Zahrah, al Jarima
The word “crime” in Arabic is referred to as *jarimah* or *jinayah*. Both of these terms convey the meaning “crime” or “offence”. The root word of *jarimah* literally means “to cut off”. This word also means a sin, a crime, a fault, an offence or an act of disobedience, a transgression whether done intentionally or committed through inadvertence.

In the religious context, the word *jarimah* means an act of committing what has been prohibited by the Syariah or not doing what has been ordered by the Syariah, of which, consequently the punishment of *Hudud* or *Ta’zir* has been prescribed.

In other words, *jarimah* means the commission of a prohibited act or omission of an obligatory act for which punishment is prescribed. The commission and omission are violations of the legal order and prohibitions imposed by law. An example of the commission of a prohibited act is adultery (*al-zina*) for which the punishment as prescribed in the primary sources of Islamic law punishment is one hundred lashes whipping for unmarried persons and stoning to death for married persons. An example of the omission of an obligatory act is disobedience to the khalifah or leader of the Islamic state (*al-baghyu*) for which the punishment, as determined by the al-Quran and al-Sunnah is that the person concerned could be fought or killed. Other examples of acts of omission include are negligence in performing religious tasks such as obligatory prayers, fasting in the month of Ramadhan, etc. Punishments

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1. Anwarullah, The Criminal Law of Islam, 1
2. Lane Edward, Arabic English Lexicon. 368
3. Abu Zahrah, al Jarimah, 23-24, Audah, al Tashri*, 1/ 66
are also provided for negligence in such matters.⁴

The word *jinayah* denotes a prohibited act, which is committed upon a person like murder, causing hurt etc. Some scholars said that it encompasses all kinds of prohibited acts that relate to injury whether in relation to the human body or property or other violations.⁵ According to other scholars, the word refers to or means offences liable to punishment under *Hudud* or *Qisas*.⁶

Generally, jurists do not differentiate between *jarimah* and *jinayah*, as both words have the same meaning or are synonymous to each other.⁷

Among other words that also associated with crime are disobedience (*ma’siyyah*) and sin (*ithm*). Actually, the word disobedience (*ma’siyyah*) is a general term, encompassing both punishable and non-punishable offences. The word *ma’siyyah* means disobedience to Allah or commission of certain acts, which are contradictory to the Syariah. Based on such definitions all kinds of crime are *ma’siyyah* (disobedience) but not all kinds of *ma’siyyah* can be considered as crime since the latter is confined only to specific punishable *ma’siyyah*.

The word *ithm* means sin for which retribution or punishment would be inflicted or imposed upon the offenders in the hereafter if they have not been pardoned or forgiven by the victims.

According to al Zuhaili, the word means *maksiyat*.

⁴ -Muslim scholars from the Shafie school of thought were of the opinion that punishment for negligence of obligatory prayers is the death penalty if the offender was refused to repent. Whereas Hanafi scholars said that the appropriate punishment is *ta’zir*. Some Hambali scholars were of the opinion that the appropriate punishment is the death penalty since the negligence of such obligatory prayers causes apostasy. Zaydan, al Mufassal, v. p.
⁵ -al Zailaie, al Bahr, 2/ 286
⁶ -Ibnu Farhun, al Tabsirah, 2/ 210
⁷ -Audah, al Tashri’, 1/ 67

or disobedience and omission of obligations to the state for which the proceedings being suppressed crime.

Thus, criminal law is concerned with obligations not to commit acts that are seen as against the state. It includes the proceedings being conducted by the Prosecutor.

⁸ Tafsiir al-Muniir, 8/193
or disobedience and comprises of major and minor sins. An omission of obligatory prayer is an instance of a major sin whereas watching non-mahram women with lust is an instance of a minor sin. It is significant to note that *ithm* or sin only refers to the commission of a prohibited act that does not inflict harm on others. However, if the prohibited act leads to harm, such an act should be classified as *al baghyu* (transgression).⁸

**THE CONCEPT OF CRIMINAL LAW IN MAN-MADE LAW**

The term “law” is used in many different context; we may speak of the laws of physics, mathematics, science, or the laws of football or war. When we speak of the law of a state, we use the term “law” in a special and restricted sense, and in that context, law may be defined as the rule of human conduct, imposed upon and enforced among the members of the community in a given state.

Basically, laws are divided into two categories, namely private law and public law. Criminal law is a part of public laws as described by Blackstone: “A crime is a violation of public rights and duties due to the whole community”.

Criminal law codifies various offences committed by individuals against the state. It aims to punish criminals and suppress crime.

Thus, criminal law imposes on individuals the obligations not to commit crimes. A crime is a wrong against the state for which punishment is inflicted by the state, the proceedings being brought to the courts by the Public Prosecutor.

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⁸ *Tafsiir al-Muniir*, 8/193
The essential elements of crime are the *actus reus* (wrongful act) and *mens rea* (guilty mind). For example, X strangles (actus reus) Y with the intention of killing him (mens rea). Mens rea is not a necessary element for certain statutory offences.

**ISLAMIC CRIMINAL LAW VERSUS MAN-MADE LAW**

Some comparisons may be made between Islamic Criminal Law and Man-made Law. It is pertinent to note that man-made law is comprised on provisions drafted and formulated by mankind, and not based on divine revelation at all. Actually, there is no meeting point between both laws since Islamic Criminal Law is deduced from a divine source (Creator) which is regarded as sacred, whereas man-made law is the product of human intellect (creatures).

Thus, there is a need for an depth study of these comparisons in order to prove that Islamic law is the most appropriate law for mankind that should be accepted, implemented and applied in this world since it is a divine law, originating directly from Allah The All-Knower of His creatures, especially mankind.

**Similarities between Islamic Criminal Law and Man-made Law**

There are some similarities between Islamic Criminal Law and Man-made Law:

**Definition**

Both Islamic and man-made law share the same definition on the commission of an obligated act for which prohibited by law or provided. In other words, in the Syariah is equal to Malaysian Law.\(^9\)

In both laws, punishment is not considered as predetermined.\(^10\)

**Objective**

Both laws aim at the maintenance of their public interest, of existence in the world, and of pleasure by implementing objective.

**Judicial Process**

Another point of fact that can be established through the judicial process is the presumption of a criminal act.

\(^{9}\) -Because according to Anwarullah, the Criminal Law is a code which prohibited by law or applied by the government, Anwarullah, the Criminal Law, 1/10

\(^{10}\) -Audah, al Tashri', 1/4
Definition

Both Islamic Criminal Law and Man-made Law mostly share the same definition of crime or offence, which focuses on the commission of a prohibited act or the omission of an obligated act for which the punishment has been determined or provided. In other words, the definition of crime or offence in the Syariah is equivalent to the definition of crime under Malaysian Law. 9

In both laws, the commission or omission of an act is not considered as crime until the punishment has been determined. 10

Objective

Both laws are in consensus in some aims of provision of punishment in that they are designed to safeguard people in their public interest, their system of life and in their persistence of existence in the world. At the same time, Muslims have their own ultimate objective, which is to obey Allah and to gain His pleasure by implementing the Islamic Criminal Law.

Judicial Process

Another point in common between both laws is the fact that can be established no crime, prior to undergoing through the judicial process. It means that the validity of the presumption of a criminal offence which has been committed

9 -Because according to contemporary laws, crime is defined as an act prohibited by law or an omission of an obligated act permitted by law. Anwarullah, the Criminal, 3
10 -Audah, al Tashri', 1/ 67
cannot be established until it has been brought before the court to be tried only after the accused has been found guilty and the crime is established, the wrongdoer can be punished. He is presumed innocent before and during the trial conducted in a court of law.

In Syariah law, this principle is based on the legal maxim “originally, one is innocent until he is proven otherwise”. This principle is parallel to a corresponding one applied in Malaysian Law.

**Standard of Proof**

Under Islamic Criminal Law, a person is not permitted to make an accusation without producing proof or evidence. Such an accusation will have no legal standing. The accuser is regarded as sinful and in certain cases he should be punished as well. The accused person is presumed innocent in the eyes of the law and the public until there is sufficient evidence to prove otherwise. This principle is also adopted provided under Malaysian Law.

Such similarities are not absolute, since the standard of proof in Islamic Law is fairer as it gives emphasis on the preservation of personal as well as public interests at the same time. In order to preserve public interest, the wrongdoer should be punished. To preserve personal interest, the accused person should be given a chance to defend himself while the accuser attempts to prove to the court that the accused is guilty of such an offence. In the meantime, the court has to be cautious before passing a verdict on the accused person by ensuring that the standard of proof is satisfied, so that the court can be certain that it would not punish the innocent.

**Differences Between Shari'ah and Made Law**

There are many differences of laws:

**Sources of Islamic Criminal Law**

Indeed, the Islamic Criminal Law is derived from the sources of Islamic Law which is introduced and revealed by Allah. Syariah is the Law given by Allah to His Messenger (PBUH) as the Law designated for the Muslims. Although there are differences in the application of these laws, some consistency is there such as offences liable to punishment under Islamic Law are also liable to punishment under made law in Malaysia. The only difference is that such laws relating to Ta'zir, all of them are applicable in Islamic Law.

Allah says:

And so judge what had been set before thee of desires, but be not desirous of desires, but be desirous of the good things which Allah had sent down to His servant (Muhammad). And judge thou with justice, that is better if ye believe in Allah and the Last Day.

**II**

Quran: al Maidah: 4

11 -Imran, Islamic Jurisprudence

12 -al Quran: al Maidah: 4
Differences Between Islamic Criminal Law and Man-made Law

There are many differences between these two forms of laws:

Sources of Islamic Criminal Law

Indeed, the original source of Islamic Law is Allah. Syariah is the main part of the religion of Islam that is introduced and revealed by Allah, who is actually the Lawgiver. Islamic Criminal Law is part of Islamic Law. Although there are differences on standards of punishments, such as offences liable to punishment under Hudud, offences liable to punishment under Qisas, and other offences liable to Ta’zir, all of them are subjected to the main source, that is punishment under Allah (by virtue of al-Quran).

Allah says:

وَأَنْ حَكِيمَ بَيْنَهُمَا مَا أَنزَلَ اللَّهُ وَلَا تَتَبَعُوهُمْ وَاحْذِرُونَهُمْ أَنْ يَفْتَنُوكُمْ عِنْدَ اللَّهِ عَنيْكُمْ

And so judge (you O Muhammad) among them by what had been revealed and follow not their vain desires, but beware of them lest they turn you (O Muhammad) far away from some of that which Allah had sent down to you.

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11 -Irman, Islamic Jurisprudence, 79
12 -al Quran: al Maidah: 49
Surely, We have sent down to you (O Muhammad) the book (al-Quran) of truth that you might judge between men by that which Allah had shown you, so be not a pleader for the treacherous.13

Perhaps, there might be to some extent, confusion pertaining to certain punishments or sentences, whether these were really derived from the Prophetic Traditions such as the punishment of stoning to death etc., and some other punishments, which may be decided by the judge in the form of Ta’zir punishments. Such provisions (as deduced from the Prophetic Traditions and also the decision of the judge under Ta’zir cases) indicate that the Prophet and the judges are also lawgivers besides Allah.

Responding to the first part of suspicion, it should be noted that the Prophetic Tradition (al-Sunnah al-Nabawiyyah) is also among the sources of Islamic Law that should be referred to in order to know the stand of Islam in whatever issues that arise in society. There are a number of Quranic verses that highlight the significance of obedience to the Prophet (pbuh) and warn about the consequences of disobedience to the teachings of the Prophet.14

Allah says:

O Believers obey the Apostle and the koula and the wisdom

He also says:

Whenever you recite the Quran, then reverence it.17

He also says:

He also says:

He also says:

Allah says:

13 - al Quran: al Nisa': 105
14 - Imran, Islamic Jurisprudence, 171-173
15 - al Quran: al Nisa': 59
16 - al Quran: al Nisa': 59
17 - al Quran: al Jumuah: 2
O Believers obey Allah and obey the Messenger.\textsuperscript{15}

He also says:

 وإن تنازعتم في شيء فردوه إلى الله والرسول إن كنتم تؤمنون بالله واليوم الآخر

Whenever you have disputes with each other in whatever matter, refer it to Allah and the Messenger if you really believe in Allah and the hereafter.\textsuperscript{16}

He also says:

 وما أتاكم الرسول فخذوه وما نهاكم عنه فاتهوا

Whatever is introduced by the Messenger accept it and whatever is forbidden by him do not approach it.

He also says:

 يتلوا عليهم آياته ويزكينهم ويعلمهم الكتاب والحاكمة

He recites for them the signs (Quranic verses) of Allah and bring them up and teach them al-Quran and the wisdom (the Prophetic Traditions).\textsuperscript{17}

\textsuperscript{15} - al Quran: al Nisa': 59
\textsuperscript{16} - al Quran: al Nisa': 59
\textsuperscript{17} - al Quran: al Jumuah: 2
He also says:

وَمَا يَنَطِقُ عَنَّ الْهُوَى إِنَّ هُوَ إِلَّا وَهْيُ يَوْحَى

And he does not talk something based on his own desire, but it is based on divine guidance.\(^{18}\)

Based on the above-mentioned verses, Muslims are bound to follow, emulate and consult the Prophetic Traditions absolutely.

The Prophetic Traditions embody everything that originated from the Prophet in the form of his sayings, acts, his tacit approvals and whatever was taught or narrated from him. Punishment, such as stoning to death, the whipping of forty lashes upon a drinker of intoxicants etc. are actually a part of Islamic Law although they are derived from the sayings or the acts of the Prophet himself.\(^{19}\)

With regard to the forms of ta’zir punishment, it is undeniable that under such kind of punishment, the judge has the discretionary power to impose the punishment as he thinks fit, based on the confines and restrictions under Islamic legal sources. The decision must be made in the light of general Islamic objectives (the preservation of religion, the soul, dignity, human intellect and wealth). The judge also has to refrain from making lawful things unlawful.\(^{20}\)

Islamic law is not subject to change and cannot be changed forever irrespective of changes in leadership styles, rulers, places, times, etc., whereas the man-made laws are subject to modifications and can be changed due to the whims and fancies of different leaders or rulers.

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\(^{18}\) al Quran: al Najm: 3-4
\(^{19}\) Kamali, Principle,
\(^{20}\) Audah, al Tashri’, 1/72

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Islamic Law is divine law, which is received by revelation of His creatures have a high regard for law and the Prophet in their lives. Allah Almighty to mankind that they are rulers or citizens. Moreover, the implementation of implementing Islamic Law thus will become closer.

Sources of Man-Made Law

As far as the religious laws are concerned, they are emanated from the human conscience and are not divine in nature, whereas the man-made laws are mostly based on the welfare of a particular society which is applicable under some situations but not in other situations.

Since a man-made law does not have the existence of God and a life or an offence or crime because Allah's knowledge and recognition of Allah’s knowledge and recognition of the law repeatedly in the hereafter.

---

\(^{21}\) A man, irrespective of his interest of the rulers.

Islamic Law is sacred and respected because it is a divine law, which is revealed and formulated by Allah. None of His creatures have any role in making the law, not even His angels or the Prophet himself. Since it is the revelation of Allah Almighty to mankind, Muslims accord great respect and have high regard for Islamic law, regardless of whether they are rulers or citizens. Muslims who understand the importance of implementing Islamic Law will feel fear and of God and thus will become closer to Allah.  

Sources of Man-Made Law

As far as the man-made legal system is concerned, it emanated from the human intellect, thus such man-made law is not divine in nature or is not regarded as sacred law. Such laws are mostly based on social norms which are suitable for a particular society, but not to other communities. It is applicable under some limited circumstances but not suitable in other situations.

Since a man-made law is formulated by human beings, it may be respected by certain groups of people but not others. It might be accepted by the rich, but not the poor, and might satisfy the rulers, but not their subjects or citizens.

Normally, a man-made law is formulated by a group of people who have power in society, in order to secure the interest of the rulers. For this purpose, they would modify the law repeatedly in order to achieve their objective (the

21 -A man, irrespective of his position in society, if he believe in the existence of God and a life on the day of resurrection, would not commit an offence or crime because he knows well that his action is always within Allah’s knowledge and recorded and will be presented in full to him on the day of judgment in the hereafter.
The Concept of Crime and Criminal Law in Islam

fulfillment of self-desire).  

With regards to the sources of law in Malaysia (including in criminal law), the written law is the most important source of law in Malaysia. It refers to that portion of Malaysian law which includes the Federal and State Constitutions, legislations enacted by Parliament and State Assemblies, and subsidiary legislation made by persons or bodies under the power conferred on them by Acts of Parliament or State Assemblies.

Another source of Malaysian law is the unwritten law that is not enacted by the Parliament or State Assemblies and which is not found in the written Federal or State Constitutions. Unwritten law is found in cases decided by the courts, local customs etc. The unwritten law comprises of principles of English law applicable to local circumstances, judicial decisions of superior courts and customs of the local inhabitants which have been accepted as law by the courts.

Muslim law or Islamic law has also become one of the sources of Malaysian law. In Malaysia, elements of Islamic law is increasingly being adopted in our local laws.

For instance, recently, there has been a move to incorporate some Islamic principles into our land law. Muslim law applies to every Muslim and of particular importance in laws relating to family matters and inheritance.

Moral Virtues

Another major characteristic in the religion of Islam is that it is based on the moral virtues.  In one of the Hadith of the Prophet, he is reported to have said:

Practically, the goal of the person is to nurture his first follower, that is, conduct or behavior. In order to fulfill the Syariah (preservation of the soul and wealth), Islam prays that such objectives be implemented with such objectives in mind.

In other words, akhlaq (morality) be is clearly contrary to the

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22 -Qattan, Tarikh, 19, Audah, al Tashri’, 1/ 72-73
23 -Audah, al Tashri’, 1/ 70
24 -Narrated by Imam Malik
25 - With regard to Man-made law as defined as man-made laws in the past and most of the Penal Code. Therefore, in man-made law, any act which disturb public interest

الأخلاق

I was sent to preach conduct or behavior.

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25 - With regard to Man-made law as defined as man-made laws in the past and most of the Penal Code. Therefore, in man-made law, any act which disturb public interest
Practically, the Prophet took more than ten years to nurture his first followers to become excellent in their conduct or behavior. In order to preserve the major objectives of the Syariah (preservation of religion, soul, dignity, human intellect and wealth), Islam provides certain laws and punishments that should be implemented. The commission of an act inconsistent with such objectives is considered detrimental to good behavior (akhlaq) and the culprit has to be punished.

In other words, Islamic Criminal Law is based on akhlaq (morality) because the crime itself is an act that contradicts the value of akhlaq due to its role in destroying the soul, wealth, dignity and others.

As far as the question of akhlaq is concerned, man-made law mostly neglects the significance of akhlaq in enacting laws and determining punishments. An act which is not consistent with morality or akhlaq can be exercised by people as long as the parties involved have consented to such an act and such an act does not inflict any harm on others or disturb public interest.25

24 - Narrated by Imam Malik
25 - With regard to Malaysian Law, the application of our laws are mostly based on the English common law as the British were our colonial masters in the past and most of our laws were written by them, for example the Penal Code. Therefore, it is implied that our Malaysian Law can be classified as man-made laws in various aspects. Thus, its ignorance of morality or akhlaq according to the Islamic perspective is evident. According to man-made law, any act which is immoral may not be considered as a crime unless it directly causes harm to the individual and the public at large. This is clearly contrary to the principles of Islamic law.
The crime of adultery, for example, is sinful and considered as a crime according to the Syariah and people found guilty of such an offence shall be punished after being proven guilty before the court. Among the reasons for the prohibition of such an act is that it is not consistent with society’s standard of behavior (akhlaq). On the other hand, such an act is not considered as a crime in the context of man-made laws even though it is incompatible with the standard of behavior in society except if it happens under coercion or rape. The adulterer is considered guilty of a crime only if the act of adultery results in chaos in the society.

Under Malaysian law, the offence of sexual intercourse between an unmarried couple is not considered a crime and therefore not liable for punishment if there is consent on the part of both parties. While these social ills are considered as serious crimes in Islamic law, sex between an unmarried couple is merely regarded as an immoral act and not considered as crime in modern secular societies. This act only will be considered as a crime if it creates chaos in society through the proliferation or spread of prostitution.

Another example is the act of gambling, that is clearly stated in the Quran as one of the prohibited acts as it violates human rights. A generally accepted conventional wisdom or axiom is that one cannot expect to become rich or improve one’s life through gambling.

However, the laws in Malaysia do not totally prohibit this act. Moreover, gambling businesses have become one of the sources of Malaysian income.

One case which can illustrate this is the one which involved Aspinall Curzon Ltd. v. Khoo Teng Hock [1991] 2 MLJ 484, whereby the plaintiff, an owner of a licensed gambling casino, applied in the High Court of Kuala Lumpur to have the judgment enforced in Malaysia. On appeal, the defendant argued that gambling is exchange for cash and considerations or that it is public policy. However, the court held that had the cor would have been so of section 24 of the Cor. The gaming chips for the provided that the game premise. This is the law in our country, Malaysia.

Therefore, by we can simply conclude that contrary to morality, in the context of man-made laws, contradict any provision.

Drinking into the Syariah but not according to the belief of Malaya, at least ruin the function of intellect and there is among the contradiction.

However, under the prohibition against drinking into the belief of Malay, more about freedom and will never be conviction permitted area. From the the liquor does not have to the mind and intellect. This is public policy. Despite
defendant argued that the cheques given to the plaintiff in exchange for cash and gaming chips, were given for illegal considerations or that the judgment was for a gambling debt and should not be enforced, being immoral or against the public policy. However, the judge dismissed the appeal and held that had the contract been entered into in Malaysia, it would have been so executed with lawful consideration and section 24 of the Contracts Act 1950 does not make it void. The gaming chips for the purpose of gambling are not unlawful provided that the gaming was done in a licensed gambling premise. This is the law in England and has been adopted in our country, Malaysia.

Therefore, by looking at the facts of the case above, we can simply conclude that, even though gambling is clearly contrary to morality, it would not be considered as a crime in the context of man-made law as long as the act does not contradict any provisions of existing civil or criminal laws.

Drinking intoxicants is regarded as a crime under the Syariah but not according to common law. It is regarded as a crime under the Syariah because it could destroy the mind or at least ruin the functions of the human intellect itself which serves as a medium of thinking, seeking knowledge, to arrange, administer etc. Under the Syariah, the preservation of human intellect is among the five major objectives of Islamic law.

However, under the Malaysian context, there is no prohibition against drinking liquor even though it is contrary to the belief of Malaysian muslims. Since the law is concerned more about freedom in life, Muslims who commit this crime will never be convicted so long as the act is done within the permitted area. From the Islamic perspective, the act of drinking liquor does not have any benefit at all. It only destroys human mind and intellect. Therefore, it is contrary to morality and public policy. Despite all these facts, we can still observe that
in Malaysia companies still continue to produce, manufacture and sell liquor.

In order to maintain the well-being of people, the Syariah (Islamic law) introduced the principle of *sadd al-zarai'*, which connotes the meaning of preventing something lawful from being exercised by people to prevent them from committing a crime or sin. In the case of drinking liquor or other intoxicants, the Syariah, from the outset, prevents or discourages people from consuming liquor even in small amounts or quantities intentionally, although consuming such amounts will not lead to intoxication, because the Syariah takes into account the moral and ethical aspects while being proactive in deterring people from consuming any amount of liquor or other intoxicants.

Laws which are the English based on Common Law, ignores morality aspects because it was not formulated based on religion but on actual or real life situations or customs. Drinking liquor might become unlawful in the context of common law only if it leads to chaos or disorder in society.\(^{26}\)

\(^{26}\) - Qattan, Tarikh, 21

**THE GENER**

There are several specific elements for a crime to be determined or ascertained committed before the commencement of the act or committing or omitting an omission.

a) Legal element: provision in the Syariah that constitute a crime and its punishment.

b) Substantive element: commission of the crime or omission of the omission.

c) Cultural element: wrongdoer must be all the attributes of the wrongdoer at the time of commencement of the commission of the crime. Maturity, responsibility, etc.

Apart from the specific elements for property in the crime, for example, in the case of rape, the male private organ (vagina) must be clear.

\(^{27}\) - Audah, al Tashri', 1/17
THE GENERAL ELEMENTS OF CRIME

There are several general elements of crime that must be determined or ascertained to establish that a crime has been committed before the punishment can be imposed or inflicted. A defect in those elements will provide grounds for the culprit to be released or the punishment to be altered into a lighter form. Those elements are:

a) Legal element (al-Rukn al-Shar'iy): an explicit provision in the Syariah that prohibits certain acts which constitute a crime and are subject to the imposition of a punishment.

b) Substantial element (al-Rukn al-Madiyy): the commission of the crime whether by committing a prohibited act or omitting an obligated act.

c) Cultural element (al-Rukn al-Adabiyy): the wrongdoer must be a mukallaf person, that is he possesses all the attributes of taklif (responsibility) at the time of commencement of the crime. In other words, the attributes of maturity, responsibility and accountability were all evident at the time of commission of the crime.

Apart from those general elements, there are also specific elements for each crime. For instance, stealing property in the crime of theft must be done secretly. An other example, in the case of adultery, is that the penetration of the male private organ (penis) into the female private organ (vagina) must be clearly seen or witnessed to be proven.\(^{27}\)

\(^{27}\)-Audah, al Tashri', 1/ 110-111