

CRIMES

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Introduction

- Statutory offences – offences stated in statutes.
- ‘Law’ refers to all regulations regulating the society while a ‘statute’ is much more specific...a written law approved by the legislative body to regulate specific circumstances.
- Also known as legislations.
- The penalties are prescribed in the statute.
- Criminal offences are usually put in statutes in order to promote public safety.

Criminal Offences

- Under the law of negligence - **intention, motive are all irrelevant.**
- However, under criminal law – the state of mind of a person is very important.
- To be guilty of a criminal offence (i) there must be commission or omission of the offence (**actus reus**);
- (ii) the person must have the intention ie state of mind (**mens rea**) towards the commission or omission of the offence.
- His guilt must be proven beyond reasonable doubt.

Criminal Offences - the Law in Malaysian Penal Code (Revised 1997)(Act 574)

- The Penal Code modeled after the Indian Penal Code provide certain provisions relevant for abortion, euthanasia and rape.

3. ISSUES UNDER THE PENAL CODE

1. Rape, Incest, Sodomy
2. Abortion
3. Euthanasia
4. Criminal Negligence
5. Assault
6. Causing Hurt

1. Rape

- A type of sexual offence.
- Section 375 of Penal Code:
- A man is said to commit rape when he has sexual intercourse with a woman under any one of the circumstances prescribed in section 375.

The circumstances:

- Against **her** will;
- Without **her** consent;
- With **her** consent but consent is obtained under fear or misconception of fact;
- With **her** consent but consent is obtained under mistake of identity;
- With **her** consent but consent is given when the victim is not able to understand the nature of the act;
- With **her** consent but the consent is obtained by using the man's position or authority over the woman;
- **With or without her consent when the girl is below the age of 16 (statutory rape)**

Requires 'penetration'

- Explanation in section 375 says sexual intercourse can be proven by penetration – sufficient when a man places his penis into the private part of a woman, even though it's just a slight penetration... **depth of penetration is irrelevant under the law.**
- Therefore, penetration per se is a requirement.
- **Hymen tear is not a requirement, still can be rape if hymen is intact.**
- **Ejaculation is not a requirement.**

Marital Rape not recognised

- The accused must be a man other than the woman's legally wedded husband.
- The victim must be a woman other than the accused's legally wedded wife. Marital rape is not recognized in Malaysia.
- However, section 375A – **Any man who during the subsistence of a valid marriage causes hurt to his wife...in order to have sexual intercourse...shall be punished with imprisonment for a term which may extend to 5 years.**

Incest

- **Section 376A** - A person is said to commit **incest** if he or she has sexual intercourse with another person **whose relationship to him or her is such that he or she is not permitted , under the law, religion , custom or usage** applicable to him or her, to marry that other person
- Punishment for incest - **section 376B** - Imprisonment for **a term of not less than 10 years and not more than 30 years** and shall also be **liable to whipping.**

Sodomy

- Section 377A covers this offence.
- – Any person who has sexual connection with another person by the **introduction of his penis into the anus** or mouth of the other person is said to **commit carnal intercourse against the order of nature**.
- Section 377B – Whoever voluntarily commits the above shall be punished with **imprisonment for a term which may extend to twenty years and shall also be liable to whipping**.

2. Abortion = Causing Miscarriage

- Sec. 312 – Whoever voluntarily **causes a woman with child to miscarry**, shall be punished for a term which may extend to three years, or with fine, or with both; and **if the woman be quick with child**, shall be punished with imprisonment for a term which may extend to seven years, and also be liable for a fine.

Meaning of “Quick with child”

- From the term “quickening” – sensations experienced by a woman in the fourth or fifth month of pregnancy – movements of foetus



Penal Code...*continue*

- Exception to section 312:
- This section does not extend to a medical practitioner registered under the Medical Act 1971 who terminates the pregnancy of a woman if such medical practitioner is of the opinion, formed in good faith, that the continuance of the pregnancy would involve **risk to the life of the pregnant woman or injury to the mental or physical health of the pregnant woman, greater than if the pregnancy is terminated.**

Penal Code...*continue*

- Section 313 – Whoever commits the offence defined in Section 312, **without the consent of the woman**, whether the woman is quick with child or not, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to ten years, and shall be liable to a fine.

Penal Code...continue

- Sec. 314 – Whoever with intent to cause the miscarriage of a woman with child **does any act which causes the death of such woman shall be punished** with imprisonment for a term which may extend to ten years, and shall also be liable to fine, and **if the act is done without the consent of the woman**, shall be punished either with imprisonment for a term which may extend to twenty years
- **Explanation – it is not essential that the offender should know that the act is likely to cause death.**

Penal Code...*continue*

- Sec. 315 – Whoever before the birth of any child does any act **with the intention and thereby preventing the child from being born alive, or causing it to die after its birth** shall if such act be not caused in good faith for the purpose of saving the life of the mother be punished with imprisonment which may extend to ten years or with fine or with both.

Penal code...*continue*

- Sec. 316 – Whoever does any act under such circumstances that **if he thereby caused death he would be guilty of culpable homicide and does by such act cause the death of quick unborn child** shall be punished with imprisonment for a term which may extend to ten years and shall be liable to fine.

Public Prosecutor v Dr Nadason Kanalingam [1985] 2 MLJ 122

- O & G Doc charged under section 312
- Woman did tubal ligation with doctor, later found to be 14 weeks pregnant
- Doctor did an abortion... claimed to save woman 's life as she had enlarged varicose veins, which might lead to pulmonary embolism.
- Held: Abortion was not done in good faith for the purpose of saving the mother's life as the defendant **“had not given reasonable thought and not taken enough steps to examine the woman further.”** The defendant's **“finding that the woman had enlarged or bad varicose veins is no other than the result of his mere clinical examination.”** The defendant was sentenced to a fine of RM3500, in default four months' imprisonment.

Rights of the foetus

- An unborn child or foetus is a biologically distinct organism from the mother, it is **not a legal person**, it has been accepted that in order to have a right of action, the foetus must be born and be a child. When an unborn child becomes a living person and suffers damages as a result of pre-natal injuries, the child is able to bring proceedings. **On birth, the child acquires legal status and thus, legal rights** – *Chin Yoke Teng & Anor v William Ui Ye Mein* [2005] 2 MLJ 480 (CA)

Rights to prevent abortion

- Do fathers have the right to prevent an abortion? Act is silent on this matter.
- Common Law - *Paton v Trustees of British Advisory Services* [1979] a husband does not have any legal right enforceable at law and equity to stop his wife from having an abortion or to stop doctors from carrying out a legal abortion.

3. Euthanasia

- The word “euthanasia” means *good death* as derived from two Greek words, *eu* which means well or good and *thanatos* which means death.
- “Euthanasia” refers to the means of inducing or bringing about a gentle and easy death (death without suffering).



END OF LIFE DECISIONS

....are *decisions* to hasten death by active or passive *means* (doing or refraining) taken by or on behalf of the subject.

- Conflict between **sanctity of life and quality of life**

Types of euthanasia



- **Active euthanasia** - positive steps taken which result in death such as injecting a lethal dose of medication into the patient. Assisted suicide is also described as a form of active euthanasia.
- **Passive euthanasia (term has been said to be misleading)** - occurs where available measures to prolong life are withheld from the patient such as withholding supply of fluids and nutritional feeding.

Types....

- **Voluntary euthanasia** - it is performed with the consent of the recipient
- **Non-voluntary euthanasia** - where the person concerned has been unable to express an opinion, usually because she lack the capacity to do so. Usually, her relatives will consider whether it is in her best interests to end her life at that time.

Types....

- **Involuntary euthanasia** – where the person has expressed wish to the contrary – euthanasia is performed without the consent or against the will of a competent patient



Penal Code

- No specific reference to euthanasia but provides certain provisions relevant for euthanasia. These provisions make **involuntary and active voluntary euthanasia unlawful**. **Involuntary euthanasia** may amount to murder under section 300 if the doctor has the required intention.

Section 300

- Culpable homicide would amount to 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 to 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 death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.”

Exception...

- Exception 5 of the provision stated that **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.** Cases of active voluntary euthanasia is not murder but can be culpable homicide. But cases of involuntary euthanasia are usually concern with competent patients who does not consent and are unwilling recipients of euthanasia. This situation usually fits the ambit of section 300.

Punishment...for Murder

- Provided in section 302 as Death.
- Attempt to murder is provided under section 307 in which a persons “who 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 murder shall be punished...

Section 299

- Active voluntary euthanasia, on the other hand, is covered by section 299 of the Penal Code.
- Section 299 provides that **“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.”** Explanation 1 given under the section stated that “a person who causes bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.”

Punishment...

- Punishment for culpable homicide not amounting to murder is provided under section 304 which stated that “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 such 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 to cause death, but without any intention** to cause death, or to cause such bodily injury as is likely to cause death.”

Section 81

- The **doctrine of double-effect** fit into the ambit of section 81. Section 81 provides for act likely to cause harm but done without a criminal intent, and **to prevent other harm**. Under this section, it is not an offence, “merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done **without any criminal intention** to cause harm, and in good faith for **the purpose of preventing or avoiding other harm to person or property.**”

Explanation...

- The Explanation under Section 81 further provide that “**it is a question of fact in such a case whether the harm to be prevented** or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.”

Section 88

- Act done not intended to cause death, done by consent in good faith for the benefit of a person
- Nothing, which is **not intended to cause death**, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose **benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or take the risk of that harm.**

Illustration

- A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death and intending in good faith, Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence.
- **He will not be liable if he does the act in good faith for the benefit of that person who has given his consent.**

Section 306

- Where a doctor assists a terminally ill patient to end his life, it can also be caught under section 306 relating to **abetment of suicide**. The section provides that “if any person commits suicide, **whoever abets the commission of such suicide** shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to fine.”

Section 308

- Section 308 will cover situation where doctors who intends and attempts, although unsuccessfully, to deliberately end his terminally ill patient's life. The section stated that "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 culpable homicide not amounting to murder, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both; and if hurt is caused to any person by such act, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both."

4. Causing Death by Negligence

- Section 304A
- 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.

5. Assault

- Section 351 - Whoever makes any gesture or any preparation, intending or knowing it to be likely that such **gesture or preparation will cause any person present to apprehend** that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Using criminal force to deter a public servant from discharge of his duty

- **Section 453** – Whoever assaults or uses criminal force to any person being a public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

6. Voluntarily causing Hurt

- **Section 321** – Whoever does any act with intention of causing hurt to any person or with knowledge that he is likely to cause hurt to any person and does thereby cause hurt to any person is said “voluntarily to cause hurt”.
- **Section 323** – Punishment for voluntarily causing hurt – **shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to two thousand ringgit, or with both.**

Thank you...

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