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يُؤْتِيهِنَّ مِنِّي إِسْلَامٌ أَنْبَأَا بِحَبِيبِنَا مُحَمَّدٍ صَلَّى

A COMPARATIVE ANALYSIS BETWEEN
MALAYSIAN AND ISLAMIC LAW

BY

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A THESIS SUBMITTED IN PARTIAL FULFILMENT
OF THE REQUIREMENT FOR THE DEGREE OF
MASTER OF COMPARATIVE LAWS

KULLIYYAH OF LAWS
INTERNATIONAL ISLAMIC UNIVERSITY
MALAYSIA

MAY 1998

*In the Name of Allah,
the Compassionate, the Merciful,
Praise be to Allah, Lord of the Universe,
and Peace and Prayers be upon
His Final Prophet and Messenger.*

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ABSTRACT OF THE THESIS

The title of this dissertation is "Disparity of Sentences: A Comparative Analysis Between Malaysian and Islamic Laws". The scope of this study is mainly confined to the Malaysian and Islamic sentencing systems, with little reference to the English law of sentencing. This is because, most of the aims and principles of sentencing under the English law are quite similar with what have been adopted by the Malaysian law.

The law of sentencing is part of a criminal law and it plays a very important role in governing the administration of criminal justice and sentencing policy of any legal system. Sentencing must be guided with certain rules and regulations, and not based on any whim and fancy. Thus, it is significant for every judge and magistrate to really appreciate and understand the correct law and principles of sentencing before they could arrive at a just and proper sentence.

Though sentencing is the exclusive power of the courts, yet it is always considered as the most difficult and crucial part in a criminal proceeding. The need to balance the public interest and the individual interest of the offender make it quite a formidable task. This is because, prior to sentencing, there are many factors to be taken into consideration by the courts, such as the facts of the case, the nature and gravity of the offence, the background of the offender, the aims of sentencing, the mitigating factors, the aggravating factors and et cetera.

Although the aims of sentencing under the Malaysian and Islamic laws are quite alike, such as retribution, deterrence and reformation; nevertheless there are some principles of sentencing under the Islamic law that are peculiar to the Malaysian law, for example, the *hudud*, *qisas* and *ta'zir* sentencing principles. Therefore, through this study, the writer would like to compare what are the similarities and differences of sentencing principles established under both laws, and how they could facilitate each other.

As different courts have different essence of priority in regard to sentencing, one of the vital area of the law of sentencing is disparity of sentences. Aptly, disparity of sentences refers to a situation where the decision of courts in passing sentence for the same nature or comparable offences are sometimes different from one court to another, and thus the offenders would receive very different sentences from one another, either differences in the range of fine or length of prison sentences.

Recently, the issue of disparity of sentences among the Malaysian courts has received wide public attention in Malaysia. There are evidence from few cases of similar nature that, sometimes the difference in the length of imprisonment and the range of fine are unwarranted and too great from one court to another. Some have blamed the court's wide discretionary power as the main factor that contributes to disparity of sentences. To certain extent the writer feels that, if we are going to allow this unwarrantable disparity to continue, then it might affect the public confidence on the judiciary.

Hence, the purpose of this study is to examine what are the various factors that inadvertently lead to disparity of sentences among the courts of law and also to examine what are the alternatives or solutions do we have in order to overcome this problem of disparity from happening unduly. The writer would also like to examine the role of judicial discretion under the Malaysian and Islamic judicial systems and to examine whether the courts under both systems have an absolute power in exercising their discretionary power in respect of sentencing.

As a comparison, the writer hopes that through this study, the writer can learn and share the experience of the Islamic judiciary in facing the problem of disparity of sentences and also to compare how much this problem occurs and affects the Islamic judicial system, if any. Apart from that, the writer would also like to examine whether it is possible for the courts to resolve the issue of disparity and to achieve a zero disparity in respect of sentencing.

Through this study, the writer would also like to analyse what are the proper basis and guidelines of sentencing to be followed and applied by the courts before arriving at any sentence; and to assess what are the appropriate tariff to be imposed by the courts on an accused person convicted for a particular offence. This is important in order to ensure that disparity of sentences among the courts is minimized and eluded.

The reference of this study will be much based on the Quran, the traditions of the Prophet, case laws, text books, articles and interviews with some prominent judges.

Finally, it is hoped that, by delving my knowledge in this important area of sentencing, the writer could contribute something to the Malaysian judiciary and the government as well, particularly in giving some valuable suggestions and proposals to the Malaysian judiciary on the development of this area of law of sentencing. The writer also hopes that, this study would be a beneficial guideline and assistance to those who are sitting on the bench in order to enable them to arrive at a just and right sentence. Last but not least, it is hoped that, this study will help the Malaysian judiciary to overcome the problem of unwarrantable disparity of sentences among the courts of law and ultimately to achieve consistency in sentencing.

ABSTRACT IN ARABIC

بسم الله الرحمن الرحيم

ملخص

وموضوع هذه الرسالة هو: "الاختلاف في الحكم: دراسة تحليلية مقارنة بين القانون الماليزي والشريعة الإسلامية". وبمجال البحث فيها هو نظام إصدار الحكم في ماليزيا والشريعة الإسلامية مع الإشارة الطفيفة إلى القانون الإنجليزي؛ وذلك لأن أهداف الحكم وأصوله في القانون الإنجليزي متقاربة مع القانون المطبق في ماليزيا.

وقانون إصدار الحكم هو جزء من قانون الجرائم حيث يلعب هذا القانون دورا هاما في إدارة محاكمة الجرائم وسياسة إصدار الحكم في أي نظام الحكم. وإصدار الحكم يجب أن يقيد ببعض القوانين والقيود كي لا يصدر على أساس الهوى والخيال. ومن ثم، على كل قضاة أن يفهموا قانون إصدار الحكم وأصوله جيدا ليضمن وصولهم إلى الحكم العادل.

ورغم أن إصدار الحكم هو السلطة العليا للمحاكم، فإنه دائما يعتبر أصعب عملية في إجراءات جنائية. والموازنة بين المصلحة العامة والمصلحة الشخصية دائما تجعل إصدار الحكم مهمة خطيرة، وذلك لأن هناك عوامل كثيرة يجب أن تؤخذ إلى الاعتبار قبل الحكم مثل سبب القضية، وطبيعة المدعى، وخلفيات المدعى عليه، وأهداف الحكم، وعوامل التخفيف والتشديد وغيرها.

ومن خلال الدراسة نجد أن أهداف الحكم في القانون الماليزي والشريعة الإسلامية لا تختلف كثيرا خصوصا أن أهدافهما هي العقاب، والمماثلة، والإصلاح، كما نجد أن كثيرا من أصول الحكم في القانون الماليزي متقاربة بالشريعة الإسلامية مثل أصول الحكم في الحدود والقصاص، والتعزير. ومن هنا، يحاول الباحث في هذا البحث ليقوم بالدراسة المقارنة بين القانون الماليزي والشريعة الإسلامية في أصول إصدار الحكم للوصول إلى معرفة الأمور المتشابهة والمختلف فيها بينهما.

وعندما تتعدد مراتب المحاكم بحسب اختلاف أولوياتها، فيعتبر الاختلاف في إصدار الحكم من أهم موضوع قانون إصدار الحكم. وسنجد أن قرار الحكم لقضية واحدة يختلف من محكمة إلى محكمة أخرى، والمدعى

عليه في قضية معينة سيحصل على عدة قرارات الحكم وتختلف من محكمة إلى محكمة أخرى؛ وهذا على حسب مستوى المحكمة وصلاحياتها.

واليوم نجد أن قضية الاختلاف في إصدار الحكم تلفت أنظار الناس في ماليزيا حيث اهتموا بها اهتماما بالغاً، وذلك لأن هناك دليل على أن الاختلاف الذي وقع كبير جدا عندما تنتقل محاكمة قضية معينة من محكمة إلى محكمة أخرى، وهذا الاختلاف وقع سواء في مبلغ الغرامة أم في مدة السجن. وهذا يؤدي إلى قيام بعض الناس بتوبيخ صلاحيات المحاكم المختلفة حيث تعتبر سببا رئيسيا لاختلاف قرار الحكم لقضية واحدة.

ومن ثم أن الهدف الرئيسي لهذا البحث هو تحليل أسباب الاختلاف في إصدار الحكم في المحاكم، ثم الوصول إلى الحلول لهذه المسألة. ويرجو الباحث - من خلال دراسته - أن يدرس تراث نظام القضاء في الإسلام خصوصا لمواجهة مسألة الاختلاف في إصدار الحكم، كما يحاول الباحث أن يعرف مدى إمكانية المحاكم لحل هذه المسألة ومنع حدوث الاختلاف في إصدار الحكم.

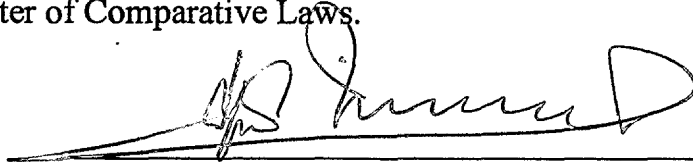
والباحث في هذا البحث قد قام بتحليل أصول إصدار الحكم ومعالمة التي يجب على كل قضاة أن يتبعوها ويطبّقوها في المحاكم، وهذه الأصول والمعالم لها أهمية كبرى بالنسبة للقضاة ليصلوا إلى الحكم الصائب ويقللوا نسبة الاختلاف في إصداره.

ومن أجل الوصول إلى النتيجة المرجوة في هذا البحث قام الباحث بالرجوع إلى القرآن الكريم والسنة النبوية الشريفة، والقضايا القانونية، والكتب التراثية، والمقالات، كما قام ببعض الحوارات مع بعض القضاة المعروفين في ماليزيا.

وأخيرا، يرجو الباحث أنه من خلال دراسته في هذا الموضوع المتعلق بإصدار الحكم، قد أسهم شيئا نافعاً لنظام القضاء في ماليزيا، والحكومة الماليزية، خصوصا في تقديم بعض مقترحات قيمة لتطوير نظام القضاء في ماليزيا، كما أنه يرجو أن هذه الدراسة ستكون مفيدة للعاملين والمتمرسين في مجال القضاء.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.



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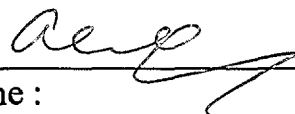
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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

Name : Arik Sanusi bin Yeop Johari

Signature : 

Date : 26 May 1998

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To My Beloved Parents and My Dear Wife

With High Esteem, Honour and Affection

ACKNOWLEDGMENT

First and foremost, praises to Allah, the Most Compassionate and Most Merciful for conferring upon me the ilm, taufik, hidayah, strength and health to complete this dissertation. Alhamdulillah, after going through all the stress, hurdles and pains, finally my dream to see this writing becomes a manuscript has become a reality.

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Finally, all mistakes are mine and may Allah bless we all.

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- Section 173 (m) (2)
- Section 173A
- Section 176 (ii) (r)
- Section 183 (ii)
- Section 281
- Section 282
- Section 283
- Section 289
- Section 294
- Section 295

Dangerous Drugs Act 1952

- Section 39B (1) (a)
- (2)

Dangerous Drugs Ordinance 1952

- Section 39B (1) (a)

Juvenile Courts Act 1947

- Section 12 (f)
- Section 28

Penal Code (F.M.S. Cap. 45)

- Section 302
- Section 304
- Section 376
- Section 379
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- Section 395
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- Section 408
- Section 457

Prevention of Corruption Act 1961

Section 3 (a) (ii)

Section 4 (c)

Road Transport Act 1987

Section 26 (1)

Section 43 (1)

Section 90 (1)

Subordinate Courts Act 1948

Section 63

Section 64

Section 85

Section 87

Section 88

Section 89

Section 95 (1)

Section 96

LIST OF ABBREVIATIONS

A.C.	Appeal Cases
Ag.	Acting
Anor.	Another
Cap.	Chapter
CBT	Criminal breach of trust
C.J.	Chief Justice
C.J. (Borneo)	Chief Justice of Borneo (with effect from 24.6.94 the term of Chief Justice of Borneo is substituted with Chief Judge of Sabah and Sarawak)
C.J. (Malaya)	Chief Justice of Malaya (with effect from 24.6.94 the term of Justice of Malaya is substituted with Chief Judge of Malaya)
Chief	
C.L.J.	Current Law Journal
Co.	Company
Cr.App.R.	Criminal Appeal Reports
Cr. L.R.	Criminal Law Review
D.Y.M.M.	Duli Yang Maha Mulia
e.g.	For example
F.C.J.	Federal Court Judge
F.M.S.	Federated Malay States
Ibid.	As cited above
Id.	As cited above at different page
i.e.	That is
Infra	As cited below
J.	Judge
J.C.A.	Judge Court of Appeal
L.J.	Lord Justice
Ltd.	Limited
L.P.	Lord President
M.L.J.	Malayan Law Journal
Ors.	Others
p.	Page
pp.	Pages
P.P.	Public Prosecutor
R.	Rex
Reg.	Regina
Supra	As cited earlier
v	Versus
Vol.	Volume
Y.A.	Yang Arif
Y.A.A.	Yang Amat Arif

CHAPTER I

DEFINITION, JURISDICTION AND TYPES OF SENTENCE

A BRIEF INTRODUCTION

Sentencing is the final stage in any criminal proceeding, i.e., in a case where conviction has been recorded against an accused person. In a summary trial¹, once an accused person has pleaded guilty to a particular charge, or found guilty of a particular offence by the trial court, after hearing and considering the mitigation, if any, then the court shall pass sentence according to the law. Section 173 (m) (2) of the Criminal Procedure Code (F.M.S. Cap. 6) provides that : -

"If the Court finds the accused guilty or if a plea of guilty has been recorded and accepted the Court shall pass sentence according to law."

Sentencing is always regarded by many as the most difficult and crucial part of a criminal trial because it involves a lot of technicalities and complexities. Based on the writer's personal experience and interviews with some experienced judges, indeed and hence in practice, it is quite a difficult task for a court to decide what is the best, most appropriate and most accurate sentence to be imposed on a particular offender. On this point, the

¹The procedure of summary trials in Malaysia is explained in section 173 of the Criminal Procedure Code (F.M.S. Cap. 6).

President's Commission on Law Enforcement and the Administration of Justice² has commented that : -

"There is no decision in the criminal process that is so complicated and so difficult to make, as that of the sentencing judge."

Thus, in law, it is a judicial requirement that, before arriving at any sentence that the court thinks just, proper and suitable with the degree and type of offences committed, a judge or a magistrate has a judicial duty to scrutinize meticulously every detail of the facts of the case and to consider carefully the social and economic background of the accused, the mitigating and aggravating factors of the case and other relevant considerations. The writer is of the view that, the court must strictly adhere to these procedures in order to ensure that justice is carried out in the course of sentencing.

The importance of sentencing has been stressed by Dr. Molly Cheang in her article of Disparity in Sentencing³ in which she says that : -

"Sentencing occupies a central position in the administration of criminal justice. Decisions made at this stage have not only important consequences for offenders, but they also affect the entire criminal justice system. Judges and magistrates are given enormous power over the lives of individuals. Nowhere else in our society

²*The Challenge of Crime in a Free Society* - A Report by the President's Commission on Law Enforcement and the Administration of Justice (Washington, 1967) at p.141, quoted from, *Disparity in Sentencing, infra* at p.xxxi

³(1977) 1 M.L.J. pp.xxxi-xxxii