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بِوَسِيلَتِنَا مِنْكُمْ لَتَرْحَبُنَا لِنَكُنَّ مَلِكًا

MITIGATING AND AGGRAVATING FACTORS IN  
ISLAMIC CRIMINAL JUSTICE AND MALAYSIAN  
CRIMINAL JUSTICE

BY

MOHAMAD KHAIRUDIN BIN KALLIL

INTERNATIONAL ISLAMIC UNIVERSITY  
MALAYSIA

2005

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(

*When you judge between men,*

*you judge with justice*

(Sūrah al-Nisā' : 58)

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CRIMINAL JUSTICE

BY

MOHAMAD KHAIRUDIN BIN KALLIL

A DISSERTATION SUBMITTED IN PARTIAL  
FULFILLMENT OF THE REQUIREMENT FOR  
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## **ABSTRACT**

Sentencing is aimed to punish the convict in order to deter him not to commit the offence again. In sentencing the court may consider some factors that forwarded by the parties that much influence the degree of punishment whether lighter sentence or severe sentence in order to uphold the criminal justice. The factors that covered under Islamic law are depending to the kinds of punishment and the judge has to hear these factors and even there are no mitigating and aggravating factors forwarded by the parties, he himself has to consider these factors. While, under Malaysian law, the consideration is vastly upon the judge to consider the factors that raised by the parties. Therefore, this dissertation deeply endeavours comparing the mitigating and aggravating factors in Islamic Criminal Justice and Malaysian Criminal Justice.



## 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 dissertation for the degree of Master of Comparative Law.

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# DECLARATION

I hereby declare that this dissertation 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.

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Date: December 2005

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JUSTICE AND MALAYSIAN CRIMINAL JUSTICE**

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As an appreciation for all supports and sacrifices during the completion of my study, this work is primarily dedicated to

**MY BELOVED FAMILY  
ESPECIALLY MY PARENT,**

***BONDA KAMISIAH BTE ABD GHANI  
AND  
AYAHANDA KALLIL BIN ABD RAHIM***

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## LIST OF ABBREVIATIONS

C.A.	:	Child Act
C.J.	:	Chief Justice
C.L.J.	:	Current Law Journal
C.P.C.	:	Criminal Procedure Code
ESCAR	:	Essential (Security Cases) Regulations
e.g.	:	for example
F.J.	:	Federal Judge
M.L.J.	:	Malayan Law Journal
PP	:	Public Prosecutor
r.a.	:	<i>radiaAllāh ‘anhu</i>
s.a.w	:	<i>sallallahu ‘alaihi wasallam</i>



## **LIST OF STATUTES**

Child Act 2001  
Criminal Procedure Code 1976  
Dangerous Drugs Act 1984  
Essential Security Cases Regulation 1975  
Evidence Act 1950  
Federal Constitution  
Penal Code

## TRANSLITERATION

ط	.	ظ	t
ظ	b	ظ	z
ع	t	ع	'
غ	<u>th</u>	غ	<u>gh</u>
ف	j	ف	f
ق	h	ق	q
ك	<u>kh</u>	ك	k
ل	d	ل	l
م	<u>dh</u>	م	m
ن	r	ن	n
و	z	و	w
ه	s	ه	h
لا	<u>sh</u>	لا	l
ا	s	ا	a
ي	d	ي	y
<b>Short Vowels</b>			
	-		A
	-		I
	-		U
<b>Long Vowels</b>			
أ	-		ā
إي	-		ī
أو	-		ū

## INTRODUCTION

One of the crucial parts in the administration of criminal justice process is sentencing which it is a final order disposing of a case in court. Before the court passes, a few steps are usually taken. The court may convict the accused immediately after recording a finding of guilty or it may postpone conviction until a little later. The court may then listen to submissions from both prosecution and defence pertinent to sentence. The prosecution invariably submits on aggravating factors, whilst the defence invariably forwards mitigating factors.

The plea of mitigating factors forwarded by the prosecution to the court is aimed to influence the court to pass a possible sentence that more lighter. While, the opportunity in submitting the aggravating factors by the defence to the court is hoped not to impose a light sentence, thus imposing a severe punishment. In fact, the administration of the criminal justice process on sentencing in the submission of the mitigating and aggravating factors are varied among the procedure in Malaysia as well as the *Sharī'ah* perspective.

This includes the power of the judge in his discretion to consider the plea and the scopes and concepts of the mitigating and aggravating factors from each laws perspective. For instance in Islamic law perspective, the judge has full discretion in determining the submission according to the kind of crimes committed. Under Malaysian law, this opportunity is not considered as the entitlement of the

**offender. Thus, the court may not regard the plea if it thinks that the deterrent objective of punishment should be given priority.**

**This dissertation aims to make a comparative study on the criminal justice on sentencing in the mitigating and aggravating factors both under Malaysian Law and Islamic Law.**

**Initially, this dissertation consists of five chapters. The first chapter will deal with the theory of the criminal justice, its definition and scopes, the criminal justice in sentencing under Sharī'ah law and Malaysian law.**

**The second chapter will discuss on the aims of sentencing under both laws as the objectives of the punishment and sentencing are much closely related to each other in pronouncing any sentences.**

**The third chapter will examine the sentences available under both laws and their relevancy. The subsequent chapters i.e. four and five will directly compare the mitigating and aggravating factors under Sharī'ah and Malaysian laws.**

**At the conclusion, there are some concluding remarks on the topic as regard to the criminal justice on sentencing in mitigating and aggravating factors under these laws.**

## CHAPTER ONE

### CRIMINAL JUSTICE IN SENTENCING

#### 1.1 Definition of Criminal Justice

**Criminal justice is about society's formal response to crime and it is defined more specifically in terms of series of decisions and actions taken by a number of agencies in response to a specific crime or criminal or crime in general. Following the recognition of a crime-like incident, or in seeking to prevent lawless behaviour, criminal justice agencies become involved. There are four key sub-system of criminal justice:<sup>1</sup>**

- 1. Law enforcement: involving the police and prosecution agencies.**
- 2. Courts: making decisions about pre-trial detention, adjudication on the of the defendant, deciding on the sentence for those convicted and guilt that the rights of the defendant are respected. ensuring**
- 3. Penal System: involves probation and the prisons.**
- 4. Crime prevention: involves the above agencies who deal with individual offenders along with a wider group of agencies. For example, private and governmental agencies, who plan crime-free environments or seek to the conditions that lead to criminal behaviour. change**

---

<sup>1</sup> Davies, Croall and Tyrer, *Criminal Justice: An Introduction to the Criminal Justice System In England and Wales*, 2nd ed., Longman, London and New York, 1998, p.2

**Based on this definition, we can see that the criminal justice is applied wider from the very beginning of the criminal action until the end of the result of the action taken by the court. However, the important part in the criminal justice system is the sentencing decision whereby under this stage, it is the climax of the justice decision to impose any sentences that appropriated to the offence committed. Therefore, the question of mitigating and aggravating of the punishment are much debated in the court by both parties, i.e. the prosecutor and the accused to influence the decision of the court in sentencing. While, the court under his discretionary power has to decide according to the criminal justice and ensuring the aims of sentencing are achieved in pronouncing the sentences.**

#### **1.2 The aims of the Criminal Justice System**

**It is important to distinguish the aims of the criminal justice system from the aims of sentencing, which merely relate to one element. This is because criminal justice not only covers the sentencing part but it covers from the early step of the criminal procedure until the end of the stage namely the enforcement and the execution of the sentences. The system encompasses a whole series of stages and decisions, from the initial investigation of crime, through the various pre-trial processes, the provisions of the criminal law, the trial, the forms of punishment, then the post-sentence decisions concerned with supervision, release from custody, recall procedures etc.**

**It would hardly be possible to formulate a single meaningful ‘aim of the criminal justice’ which applied to every stage. It is true that one might gather together a cluster of aims: for example, the prevention of crime, the fair treatment of suspects and defendants, due respect for the victims of crime, the fair labelling of offences according to their relative gravity etc. But to combine these into some overarching aim such as the maintenance of a peaceful society through fair and just laws and procedures is determined surely to descend into vacuity, since it gives no hint of the conflicts that arise and the priorities that need to. As quoted in the Andrew Ashworth’s book, the aim of criminal justice is:<sup>2</sup>**

**To build a safe, just and tolerant society, in which the rights and responsibilities individuals, families and communities are balanced, and the protection and of the public are maintained security of**

**Meanwhile, the aims of criminal justice as quoted in the Andrew Ashworth’s book do have a set of more focused aims, of which three are:**

- 1. Reduction in crime, particularly youth crime, and in the fear of crime; maintenance of public safety and good order. and**
- 2. Delivery of justice through effective and efficient investigation, trial and sentencing, through support for victims. prosecution,**
- 3. Effective execution of the sentences of the courts so as to reduce re-offending and protect the public.**

---

<sup>2</sup> Andrew Ashworth, *Sentencing & Criminal Justice*, 3rd ed., Butterworths: London, Dublin, Edinburgh, 2000, pp. 59-60

**Therefore, we can differentiate that the aims of criminal justice covers all steps of criminal procedure while aims of sentencing are just covering the objective of the sentencing. But, both aim to maintain the peaceful society under the just laws.**

### 1.3 Theory of Criminal Justice on Sentencing

**The theory of criminal justice on sentencing is looked at the moral standing of the justification of the punishment. One way to justify punishment is by establishing that we are morally bound to punish those who commit crimes.**

**Another reason for justification of criminal punishment is that the punishment is a way to control and prevent from committing the evils or crimes in the society as the crimes themselves are morally prohibited from being committed.<sup>3</sup>**

**A moral obligation to punish which rests on a commitment to protect against harm has better credentials. The state is morally bound to provide the needed protection through rules of conduct whose effectiveness requires that violations be punished. Limited in this way, the moral obligation to punish exists only so long as punishment is needed as part of a scheme of social protection.<sup>4</sup>**

### 1.4 Sentencing and Criminal Justice

**One of the parts of the criminal justice process is sentencing. It involves the role of judge to decide the appropriate punishment under his discretion according to the laws and the precedents. Actually the criminal justice system is to prevent the crime, i.e. through the punishment imposed by the court it would deter the convict and prevent him from committing the crime again. The criminal justice**

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<sup>3</sup> Hyman Gross, *A Theory of Criminal Justice*, Oxford University Press, New York, 1979, pp.18 &19.

<sup>4</sup> *Ibid.*, pp. 20 &21