Chapter 3
CHAPTER - III
PUNISHMENT CONCEPTION IN ISLAMIC CRIMINAL LAW SYSTEM

1. HISTORICAL BACKGROUND OF ISLAMIC CRIMINAL LAW

Arab Social condition in pre islamic period at glance

To have knowledge of socio cultural tradition of Arab society in the Islamic period it is inessential to analyse emerging and developing of islamic history further wore. With not knowing situations and condition of Arab society in pre islamic period, is not easy to seek comparision before and after acceptance and fully comprehesion of Islam (Deen) of Arab society.

Infact, historical development of Arab society is in separable from history of islamic development. The Arab is a nation guided and brought up by islam, in contrary the Arab supported and spreaded the teaching of islam as divine religion. Historically, it is tangible that resurgence and developing of Arab become a big, powerful, an integrated nation for it reliance and loyalty to islam.

Massive civilization developed and spreaded in the middle east of costal area and it's surrounding, in Egypt, Syria, Greece thousand years ago, it's developing sources always have been coming from religion. Although the
religion or faith system varied. The sources of all civilizations have strong impact in creating world history route. In such social environment where the civilization backed up by religion sources, God has sent down messengers who have brought religion as what we know now."

It is peculiar for a nation which have no subjective conditions to bear the task of a great history be able to do it. Because however, subjective conditions remain necessary, despite objective conditions at that time gave advantage to the presence of Islam as a logical rational modest religion.

It is plausible that every nation having positive and negative aspects. Environment and nature condition where the nation lives, obviously have big influence towards character building, tradition, socio-economic characteristic etc.

Concerning with the problem as stated above, positive aspect, which present in Arab society, have certain contribution in Islamic development as well as development of integrity, power and grandeur that still present in the nation and carried on to its grandeur time, constitute unsightly factor for its role in weakening and destroying the glorious achievements that have been reached, it is one of several causes, why a small and powerless nation become big, united and powerful. But at the end, losing the strength, and broken in to pieces while facing outside challenges.

Arab peninsula which less than 2500 km in length and proximately 2000 km in width is abroad region, consist of desert and fertile soil. But
the widest part of it is desert in compare to its fertile region. Geographically Arab peninsula is a unique land of many destinative features peculiar to itself. It is apart of Asia but separated from mainland of Asia and stand apart as subcontinent by its self. It stand at the cross roads of three continents, Asia, Europe, Africa and has distinction of being the centre of the world.

The land comprises mountain, plateous, desert, low land, steppe land, dreary waste land and oasis. Arabia is one of the hottest and driest regions in the world.

The dreary wastes of desert with out shade and shelter are scorched by the direct and intense rays of the sun. The heat further intensified by the hot winds that blow accross the country. There are some rainfall in costal areas, but in the interior of the country the rainfall is scanty. There may be no rain for several years at a stretch, but then the rain may buest as a violent strom.

Inhabitants of Arab in did not maintain a permanent residence at one place. They always moved nomadically. They migrade frequents from form land to meadow and vice versa, and it is an importance feature in chronological development of this region.

Almost five sixth of Arab peninsula comprehend deserts, it is a region in the midle cast where no any alien force in pre-islamic period put a finger on it. Neither one of two superpower nations Roman (Bysantine) empire nor Persian empire that square off and be up against each other, interested
in this peninsula, despite the fact that both empires have embedded their power since long time in it surrendering areas. Eastern regions, from Arab peninsula upto Iraq territory now, surrendered under authority of Persian empire. While northern and northwest regions included Syria, Lebanon, Palestine, Jordan and North Africa all surrendered under authority of Roman empire.

There are possibilities for both giants empires for having no interest to conquer peninsula and abandon Arab as inhabitants who, some live nomadic life, some having clad administration or tribe government. First possibilities, this region-from economic point of view no profit. Second, from military interests point of view, it is hard and hazardous region for troops to hold out. Water shortage and less available of substances were the main cause that most feared by Roman and Persian nation while they were accustomed to live comfortably in fertile region. Both possibilities as stated above with addition of other matters caused reluctance of Roman and Persian to annex Arab peninsula. The matter is that the Arab society in that time possessed identifying features and characteristic that were scarcely found in other nations. Some of the features are primitive, harsh and cruel, free, hospitality toward guest, allegiance and loyalty to the customs and tribe traditions, bravery, materialist, narrow minded, unsensational but very sensitive when their dignity, repute and freedom get touched. Those characteristic features reflected in their habit of burying their daughter alive and killing their own son if they were
considered having cowardness character. The sons who have cowardness character are sought as doughters and considered in capable to defend the dignity, esteem and reputation of family and tribe.

Slave trading at that time was one of economic activities of the Arab. The slaves were treated rudely and brutally. They were not entitled to their rights as human being so did the woman, who was considered only as lust satisfying agent of man. They have no right at all and no social standing, one man can marry woman as much as he liked and divorce them any time he liked. The eldest matured son was a legal heir to his further wives except his natural mother.

Fazlur Rahman in his book "Conception of Islamic Modern Society" describes morality concept of Arab society such as loyalty, extravagance, bravery, patience, sincer, respect of self esteem, but it is pity that neither they have noble moral instinct nor ethic norm ideas with its principles. By that cause their expression about above matters are corrupted and flawed.

Following description given by fazlur rahman, truely represent the picture of characteristic features of Arab society in pre islamic period. Good deeds as benevolent services of pagan society in pure loyalty based on materialistic consideration which have no loftier concep about every thing at all. It is implanted in nepotism and blood relation. And by that cause, it can stimulate Arab paganist to sacrifice their life and soul and motivate them to do some horrified things in this view, no matter, the cause is morally good or bad, right or wrong.
Extravagance

It is more demonstratively of self superiority show off than sincere good deeds. By the other world, in paganist people such features motivated by arrogance and proud spirit and it is not self consiousness of moral virtuous at all, thus concept of Arab praganist is not pure generosity but ignorance extravagancy.

Bravery

The militray courage is in great demand for nepotist people as it is a vital device to protect the perpetuity of the tribe and should be implemented with out regard less of who it might be and ethie consideration at all, as animal lust, instinct and as unavoidable and uncontrolable biological demand that used for attacking and destroying other tribe enemy. Indeed, their teaching conspitosly suggest the bravery of Arab people as long as not only to hit and attacking enemy with out any dount, but also fertilize attitude where he must to have initiative to kill and ambush. Thus the bravery for Arab is the only other name of vicious acts and savage practices.

Patience

Condition and difficulties of life conditions with scarce of sources, disasters, starvation, haunted civil clash had made them accustomed to be patience and survived, dealing with hard life in drairy desert of Arabia, it
constitutes of most vital part of bravey in contact with crudity of savage war in the zone and others. Thus patience is not moral good deeds in reality, but it come to be actual demand related to existence of life and as efforts to keep survived.

**Sincerity**

Quality of sincerity, bravery courage that revived by life of desert create respect for honesty and sincerity as prime features and characters. Further more, sincerity is a benevolence services confess by mankind in all history whether primitive or civilized as an expression style of respected man thus, the paganist Arab who values the sincerity or the honesty, consider it as prime good deeds.

**Dignity**

Paganist Arab have deep instinct toward dignity but the full concept of it evolute in the mid of nepotism, philosophy. It is implanted firmly in celebration of the good deeds that have been done by their ancestor who create the benevolence criteria to be the foundation for all tribes, to glorify the dignity of tribes that in reality also taken as source for individual dignity and self esteem of tribe members. Thus, the dignity of tribe is the dignity of it's members and the highest benevolence of individual is to implant and keep strong desire and hold, enhence tribe dignity without discrimination and at the end bequeath it to next generation , by consideration that, no biggest sacrifice and suffering
more than doing it. This odd dignity instinct that strongly build the spirit of arrogance and solid vanity among paganist Arab, the spirit who make them think that surrender to the power of man or even submission to the God, considered as unrespected, undignity and unequal to their dignities. And such vulgar dignity instinct that also fertilize a spirit of despicable revenge as inchalson called it as a great thirstiness where nothing can satisfy it but blood, crazy about to be respected where is may be classified as insanity. This blind self respecting instinct is also responsible for massive murdering of women where in pre islamc period considered also as property possession and nothing else. Such irrational dignity instinct is also responsible for the presence of aristocratic feodalistic society where the dignity only as property of descendants of noble and exalted people or the aristocratic family and not as property of those who born among "lower class" families; those who were have-nots or heroic people and slave of all kinds. Cause by that reason, pre islamc period in history of Arab generally called as jahiliyah period.

This can be discribe as follow;

Each tent made a family; a group of families made a clan and a group of clans made a tribe. Each tribe was a world by it self, it had it's own code of honour, its own concept of law and order. All activities were conceived within the frame work of the tribe. Loyality to the tribe, courage to fight with others to vindicate the honour of the tribe, the glorification of one's own tribes absolute equality for all with in the tribe and protection of
those who sought refuge with the tribe were rated as the main virtues."  
Furthermore;

"Tribal loyalties led to inter tribal rivalries and hostilities, disputes among tribe arose over cattle, pastures, spring of water, horse racing and other trivial matters. Once the dispute began and some persons from either side become the victim of such disputes, a chain reaction was set up and vendetta become one of the strongest religio social obligation."

In belief, they follow polytheism. Each tribe have their own ideology, they worship a lot of Gods and they have a lot of idols. Beside worshiping idols, the Arab worshiped the sun, the moon the star, they also deem that such roch, trees and other natural object as holy things.

It is well known that, the skill of Arab society in composing poetry, that made as a means to mock and teased each other. Indeed their poetries have the essence of art with beautiful set of words and high literally values. But the tribal fanatism, chauvanism and deification of tradition, glorification of individual dignity, praising to the role of sword, in are clearly sensed and seen in their poetries.

At that time, Mecca was a center of economic activities and majority of citizen were traders. Their business links reached out for beyond the border of Mecca to Yaman, Syria and other places. The affairs of the city were managed by a council of elders, and it was common if the richs derive their wealth from sufferings and miseries of the poor. Mecca was steeped in materialism, and the people in their race to make money had little
consciousness of the higher moral and social values. System of excessive interest used arbitrarily and violently. This condition became the second nature of Arab jahiliyah society for centuries.

In the midst of such condition, the prophet Muhammad pbh was born. He came to them as a Messenger of Allah and brought to them the teaching of Islam with new values, norms and orders. The essence of Islamic tenets have function to fix the damage or devastation, eliminate the bad order, defy the evil deeds and supported the rights while straighten out the deviation.

To carry out the task, the prophet Muhammad based on the divine revelation, laid down the law whether it related to faith system and religions services or connected to system of governmental matters and social life order. He (Muhammad) reached the top of benevolence values as confirmed by the Holy book. With the good example that he provided as a model in the beginning of Islamic history, Muslim community followed his steps. All of that, created massive development of Islam in first decades followed by the decease of the prophet, Islam spreaded out to all regions, it's banners displayed high accordance to prevailed culture from the weak and devided nation become powerful nation and as pioneer of science and culture.
2. THE SOURCES OF PUNISHMENT REGULATION

Generally, there are three sources of Islamic law; the holybook (Al Qur'an), the prophets' tradition (Al-sunnah) and consensus opinion of sahabah (ijma). But, the detail explanation about law norms from both sources (Al Qua'an and Al Sunnah especially for the matters in outer aspect of religions services (ibadah) have not yet touched definitely the phenomenon that happen in early period. For this matter needed further analysis to understand it's law formulation without abandon or constant to refer to the meaning and spirit of Al Qur'an and a sunnah. For the significance of such studies, the scientist (Ulema) had created various methods and approaches for legal analysis and therefore spring out the methods of Qias (analogical reasoning), Istihsan, Istishlah, Al Dzariah, Istishab and Al urf.

Some scientist (Ulema), classify sources of islamic law or islamic jurisprudence (fiqih) into two classification;

1. Naqly (argumentation by reference) consists of:
   - Al Qur'an
   - As Sunnah
   - and linked to both of them like: ijma, the schools of disciples of Muhammad, the prior law, urf (tradition or custom, because all of them based on true and correct exposition).

2. aqly (rational argument) or ijtihad (individual interpretation and judgement) comprise:
Such classification more common in use and if there are any differences, it does not about principle matter as happened about ijma and ijtihad that will be discussed. Basically, the making of law is only the authority of God because He is the Creator of man and all other creatures, meanwhile law norms constitutes the formulation for organising human life. Moreover, God sent his messenger to extend and explain the norms to the mankind. But, due to the explicit statement of Al Qur'an that still much in global, general and as a juridical response toward products of human culture, while the clarification of Al Sunnah also closely related to the certain time and environment, therefore for some matters need individual interpretation and judgement studies as further classification of indictment of textual evidence (Nash) as well as the answer of various problem that were not yet touched by both sources.

Now, let us consider the all sources of islamic law one by one.

A. Al Qur'an

The first source of shari'a (Islamic law) is the holy Qur'an. It lays emphasis on the performance of several duties, but also contain general principles of relaxation.
Al Qur'an is the book which revealed to the prophet Muhammad p.b.h. son of Abdullah. This book revealed in Arabic language containing the tenets or norms about faith (aqida), law norms (Shari'a) and as well as norms of moral and ethic for human.

It is a fundamental principles and main reference for all axioms and shari'a law. So, Al Qur'an is a constitution, a source of all sources are a basic of all basics.

Al Qur'an itself (2:185; 10:37; 61: 17:106) had explained that, to whom, when, in which language, how and why Al Qur'an had been sent down.

Al Qur'an brought down in one of the nights of the Ramadhon, which is called *lailatul Qodar* (the night of power); (2:185; 44:3; 97:1).

Al Qur'an is commandement of God brought by the holy spirit (the angel Gabrail) and conveyed partially, verse by verse in verbal. Despite the Qur'an was revealed partially but as a whole is integrated.

According to some scientist (Ulema), the holy book were called Al Qur'an among of many God's holy book because in Qur'an composed all prior holy book, even it constitutes of complication of the results of all science as signed in the verses of the Qur'an; the book that explain every thing (12:14).

Al Qur'an was revealed to the prophet during a period of 23 years. The Holy Qur'an itself had explained to us that devine granted to mankind through three ways. Qur'an said; it is not fitting for a man that God should speak to him except by inspiration or from behind a veil or by sending of
massenger to reveal, with God’s permission, what God wills; for he is most high, most wise (42:51)³

The first way; wahy revelation utilized in its original meaning, that is al isharatus-shariah or the fast sign thrown by God in to the heart or mind of man or il Qaun Fir-Rau i. Infect, this is what the meant as the situation where messengers or men of spiritual insight speak under influence of the holy spirit. In this fact, inspiration thrown in to the pure heart and the topic of that inspiration become clear as if it enlightened by thunderbolt. It is verbal revelation, but inspiration that eliminates any doubts, and it is not a result of meditation.

The second way; revelation describe as a word from behind veil, what meant here is the sight during sleep or half a wake (intrance) and it is called Ru’yah (dreams) or Kash-shaf (Vision).

The third way is by sending of a messenger (the angel) whom carried the threatise (Risala) to the one who will receive the divine revelation that conveyed really and it is the highest for of revelation.⁶

By the third way of revelation, Al Qur’an have been sent down. Thus, it is sure, with out doubt that Al-Qur'an with all of its contents is the highest divine revelation.

Al Qur'an as stated above has been revealed during the strugle of the prophet for 23 years, verse by verse, announced and stored safely in memories of prophet and among reciters of his disciples.

The Qur’an is not only recited in players but also memorised and read
regularly and frequently by hundreds of hundreds of people to it fresh in
mind. In collective prayers when imam (one who lead the prayer) make
slightest mistake, at that very instant, ma'mum would maked correction and
it happen till now. Even during the time of prophet life, Al Qur'an have
been spreaded in perfect and arranged composition in the memories of
prophet disciples and the Qur'anic memorizers. Only at that time, the
complete manuscript of Al Qur'an were not available because it was not
easy to do the task, while the prophet was still alive and receiving the
devine revelation or commandment of God.

Al Qur'an had been revealed little by little, as a compromise to the need of
situation, and Al Qur'an itself aware of this fact as it's enemies do (25:32).
Indeed, Qur'an must be revealed as guidance for Muslim communities
from time to time in accordance with the emergence of needs (17:106).

And as apart of duties to comprehend Al Qur'an message is an integrated
and unity system is to study it through a set of background and it's direct
background is the activities of the prophet and his struggle for 23 years
under guidance of Al Qur'an. Some time any objections arise, that the
traying to comprehend and put it back into it's historical context means
to confine its message for that time and place only. There is no deviation
in more than this kind of objection. Because Al Qur'an should be placed in
its context and have to be comprehended as it should be. So, to understand
Al Qur'an and it's essence of it's message are one thing, while to compine
it's message for it's historical context is another thing, both matters do not be confused.7

Back to the history of Al Qur'an, after the demise of the prophet followed by the Qur'anic memorizer (Qurro') who killed in the battle, therefore, Sayyidina Omar initiated the compiling the standard manuscript of Al Qur'an in form of writing, because of some pieces of Al Qur'an afraid to be missing. The manuscripts for Al Qur'an compilation is not only arrange from a hundreds of hundreds scripts written by disciples of prophet for their own use, but also arranged under supervision of the prophet himself, and the formation that used is the formation of verbal recitation which already popular in the time of prophets life himself. After words, the manuscript that had been formatted, copied and it's copies were sent to various islamic centres, so that all scriptures written personally synchronized with the standard manuscript at every islamic broad casting centers, except all that, the originality and authencity of Al Qur'an text added by witnesses of hadists.

"Whenever any hadiest explain recklessly that any epistle (sura) or any verse which is not found in hte holy Qur'an testified as a part of Al Qur'an, it is wholly valueless as it is against the testimonies of scriptures of hadiest which it's authencity is irreputable when establishing the originality of the holy Qur'an text. In one side the aboved hadiest is made by enemies who want to weaken islam position deliberately, on the other
side this probably happen caused of misunderstand between narrators"\textsuperscript{8}

But in fact, all of hadiest that opposite with the originality of the holy Qur'an are only narrated by one narrator and no other narrator support that explanation"\textsuperscript{9}

Besides of all stated above, there are alot of things that can stand as evidence and prove the intelligence and authenticity of the holy Qur'an, whether from the contents and sentence composition or from the way of revelation and composing, which are out of reach of other books or scriptures. Trough scientific research evidence of natural phenomenon, historical evidence also have been exhibited to us, that Al Qur'an is not only a book contain basic principles of religion such as the existence and the unity of God, good deeds and bad, the day after, paradise, hell and so on, but also serve the mysteries of universe and the unseen would, further wore Al Qur'an gave direction to solve complicated worldly issues and social disorder and other matters related to benefit and development of Muslim communities (Ummah). It so happens that the prophet Muhammad was illiterate could not write nor read, because he never got formal education at any stage or from any one. Historical evidence about this are very complete and comprehensive even Al Qur'an having statement addressed to the prophet.\textsuperscript{10}

The one and only teacher of the prophet is God and no other teacher.

"But for thy grace of God to thee and his mercy a party of them would
certainly have plotted to lead thee astray. But (in fact) they will only lead their own souls astray, and to the thee can do no harm in the list for God hath sent down to thee the book and wisdom and taught thee what thou knewest not (before) and great is the grace of God un to thee" (4:113).

Thus, the holy book Al Qur'an is not arrangement of the prophet Muhammad or as product of his speculative idea, every word in the holy book is the word of God spoken to him through revelation.¹¹

"(This is) the revelation of the book in which there is no doubt from the lord of the worlds (32:2).

The Holy Qur'an rich with ideas, it is also proved to us that the Qur'an does not confront us with dogma, but all of it's statement is logic, it has argumentation whether is about spiritual life or material life.

Cause by the holy Qur'an constitute divine revelation, word of God, rich with sciences, free from entire possibilities of mistakes as well as doubt (11:2), all kind of fraud (17:1), every form of contradiction (4:82), and stigmas of evil (26:210). Reviewed from its positive side, Al Qur'an a symbol of truth and balance of though as well as balance of way of life (42:17), grant (6:155), illuminating light (4:174) guide the mankind from the darkness of spiritual and moral to the light of satisfaction (14:1). its teachings cure all deseases in heart, and as a guidance and mercy, good news for those who submitted to God (16:89) and a direction for mankind and clarification of that direction and as a distinction between the right and the wrong (11:85) in detail and complete guidance for problems that
unsolved by rational intellect of mankind (6:114; 16:89), and teaching whatever unknown to mankind (2:151), stressing all of who have knowledge (ahlul-kitab) believed the authenticity of holy Qur'an at the time of revelation (34:6), and as a prove to all, if Al Qur'an always accordance with the changing time and the developing of sciences (41:53)\textsuperscript{12}.

The changing and developing made by and cause of Al Qur'an also prove the effectiveness of Al Qur'an. The Arab with their characteristic features as have been described, altered by Al Qur'an through prophet Muhammad in to faithfull nation, civilized and love science and knowledge just in short time (23 years). Beside of that the holy Qur'an have brought the changes for entire mankind whether in moral, material, intelectual or spiritual that have never been made by other book or scriptures.

There are innumerable fact to be uncovered to explain the evidence of authenticity, originality, superiority and effectiveness of holy Qur'an like that have been done by researcher, writers, scientist thinkers and others, but it is too wide to be discussed and that is not the main target of this thesis.

B. Al Sunnah

Sunnah (the tradition of the prophet) or hadist is the second source of islamic law after the holy Qur'an. As sunnah is all statement, acts and approval of the prophet, have function as a direction and regulation (tashri). This definition show that there are three kinds of sunnahs;
Qauliyah (in word), fi'liyah (in act) and toqririyah (approval) toward statement or attitude of others.\textsuperscript{13}

The world sunnahs, it's original meaning, act or rule of manner or attitude while the word hadist, it's original meaning is statement addressed to mankind, whether by hearing or through revelation, so, according to the it's original meaning sunnah define the acts of prophet and hadist define the utterance of the holy prophet, but intrinsically both are in the same field and applicable to act, attitude and statement of the holy prophet.\textsuperscript{14}

The attitude of the prophet which give explanation to versis and tenets of Al Qur'an, whether it is done by acts and words, he really has been granted authority by Al Qur'an as God commend mankind to follow his orders and refrain from his prohibitions.

Verse 7 of Sura Al Hashr Stated:

"So take what the apostle assign you, and deny your selves that which he with holds from you, and fear God, for God is strict in punishment".

There are some, who said that as sunnah as a juridicial statement of the prophet, limited just to his statement that related to the religions teaching only, while the statement or the act excepts that, is not considered as sunnah, but irshad (direction). Further more, it said that the prophet Muhammad as a messenger is not \textit{ma'sum} (free from fault and mistake or sin) except in context of God's tenet, caused by that reason, muslim people are not being bound to follow the tradition and habits of the prophet that are found out of religions teaching or the things related directly to his
humanity dimension. This matters is also stated by Abu Rayah. Some Ulema positioned the prophet in to two position that are First, his position as ordinary man or bashar (Al-Kahfi: 110, Al fushilat: 6), where as he promitted to make ijtihad (individual argumentation and judgement) although without consultation with saying of God though revelation.

Second, his position as a messenger or prophet of God, where as whatsoever stated, done, approved by him, consists as a integral part of divine revelation. For this reason, as sunnah or hadist can be divided in to two classification;

1. tauqifi; where the contants received by prophet through revelation, than he explain it to people in his own words. This part where as the contents related to God but from the statement viewpoint it is more proper if it is related to the prophet, because the words rooted or related to the one who pronounce it, even if in the words found the meaning where received from others and

2. taufiqi; that is the conclusion made by the prophet according to his comprehension of the Qur'an, because he have duty to give explanation of Al Qur'an or he make conclusion with delibration and ijtihad. A part of this ijtihad conclusion confirmed by revelation if it is correct, and there are any mistakes, therefore the revelation for making correction sent down, for instance in the matters of
internees of Badr battle, where the prophet accepted Abu Bakr opinion with accepted the ransom from them, then verse of Qur'an revealed which condemn the prophet act (Al Anfal : 67).

This classification of as sunnah create two opinions, that are: 17

- Sunnah should be made as an argumentation in deciding all regulations and no distinction whether it is sunnah with revelation (tauqifi) or from ijtihad of the prophet him self (taufiqi) because he the one who is free from mistake and sin (ma'sum)

- Sunnah tauqifi absolutely applied, because as an explanation of the Qur'an where as the sunnah tauqifi have some alternative that are:

1. If the sunnah truely a result of ijtihad of the prophet, therefore that sunnah can be made as an argumentation as it should be.

2. if the sunnah specified only for the prophet by specific sign or identifying features therefore it can not be applied by his ummah (followers), e.g; right to marry more than four, it is exspecially reserved for the phophet (An-Nisa: 3).

3. if the sunnah related to criminal cases and civil cases; therefore two possibilities; first, the prophet determines the facts after investigate all involve party in dispute. Second, the prophet decisions based on the facts derived from investigation result. For the first category, the sunnah is not hujjah or argumentation for Islamic jurispaudence, because deciding the fact by investigation is not the exact thing, but it is preriction only which further analyzed
critically, while the second category, that is which can made as argumentation (hujjah) of islamic law (sharia) for muslim people, even though there are possibilities of mistake in prophet's decision and judgement due to the data that reached him are not factual.

4. if the sunnah is just the tradition of the prophet like the tradition of the Arab generally, therefore that sunnah can not be applied as argumentation, eg; the tradition of wearing such a robe.

5. if the sunnah related to the nature of human such as; eating, drinking, sleeping, walking, sitting etc. basically it is not the law direction for muslim people because all of that did not related to risalah (treatise) of prophethood, but that is human act at all. But if that acts have been determined by prophet direction that the act should be followed, therefore it can be as hujjah (argumentation) of islamic jurisprudence.

It have been said that now the significance of Al Qur'an and as sunnah as a direction and guidance for life of muslim not only when the prophet have been passed away but at the time when prophet still alive too, because generally, Al Qur'an contain principles, law broadly, so it need direction and examples from the prophet. Such as how to pray and pay the tithe and there are hundreds of hundreds matters have to be explained by the examples whether in form of attitudes or acts or in verbal explanation. Beside as sunnah hav function as explanation of the contents of Al Qur'an, it also have function to confirm that stipulation and even some time to
determine the regulation that did not yet determined by Al Qur'an.\textsuperscript{18}

The function of hadist as a tool to classify and confirm the stipulations in Qur'an, it can be seen in for examples some hadist that command to establish the prayer, to pay the tithe, to do fasting, to perform haj, like too commanded by Al Qur'an.

While the function of hadist as a means to regulate a law for matters which are not available in the Qur'an, can be viewed in prohibition of animals having tusk or fang, prohibition of gold and silk for man, probition of polygamy toward two woman whom they are close relative such aunt and her nice, another example, such as stipulation of dropping of Qisas for muslim who killed unbelieved and etc.

The third function of hadist is to regulated new regulation which are not mentioned in Qur'an, but with condition, it must not contradict to the basic principle of Al Qur'an. Thus, it strengthen the opinion of some ulama (muslim scientist) who state that; every law material presented by sunnah have it's root in the Qur'an, while the regulation or law and it's material considered as a new in sunnah, is only as a conclusion by connect the branch to it's root where found in Al Qur'an, only that connection is hidden. This matter is similar to analogy and interpretation in man made law.

That sunnah can be made as law and guidance of muslim life is really approved by all muslim with requirement that must be reached with true sanad (the chains of norators) so that provide the exact conviction
(mutawatir) or strong assumption (ahaad) that the sunnah is exactly came from the prophet.

For that reason, the scientists (ulema) compost a method to analyse hadists in order to enable to filter and apply that hadists to solve the problems of law convincingly.

Based on above matters, hadist can be divided into there catagories that is sahih, hasan and dhoif.

Hadist shohih is hadist that fulfill five criteria that are, continueation and connection of sanad (chain narrators), all norators are fair and have strong memories (dhabith), no defect (ilat) and no strange (shadz). Hadist Hasan is hadist which complete condition like hadist shohih, but the narator is rather less of strong memories, while hadist dhoif is hadist which can not reach the position of hadist hasan, more over hadist shahih.

Hadist shahih and hasan are classified as the applicable hadist or hadist ma'mul (hadist that can be utilised as yuridical reasoning), while hadist dhoif can not be applied as aguidence for solving law problems and all of scientist of islamic jurisprudence (fuqoha) abandon it except Ahmad Ibn Hambal.

If reviewed from narration (wurud of hadist) came from prophet, so hadist or sunnah can be divided in the three categories;

a. Sunnah mutawatirah
b. Sunnah mashhurah
c. Sunnah ahaad
Hadist mutawatir is hadist that narrated by many narrators at every grade or degree (thabaqot) which is impossible to collaborate to lie.

Hadist Mashhur, is hadist narrated by many narrators but in grade (thabaqot) of prophet disciples (sahabah) do not reach the minimum amount of mutawatir even in tabaqot of tabi'in (generation after sahabah or follower of sahabah) and so forth is mutawntir.

While hadist ahaad is hadist narrated by one or two narrators in every it's grade (thabaqot)\textsuperscript{21}

Hadist mutawatir and mashhur approved by islamic jurisprudence scientist (fugoha) for it can be applied as argumentation in determination of law, as far as hadist mashhur fulfill the criteria of hadist maqbul (accepted), while hadist ahaad absolutely rejected by Ibn Hanifah, put a side by Imam Malik as long as the problem can be solved by local tradition of Madinah society.\textsuperscript{22}

This hadists or sunnah, generally are not written before, occasionaly the prophet prohibited to write hadists due to afraid to be mix with al Qur'an. Actually, the first step of saving hadist had been started at the time of prophet life, although not all of follower or disciples gave special attention to this matter. But, there are group of disciple called Ashabus-Suffah that settled in Madinah Mosque where specially prepared for teaching religions matters to the Kabilah (tribes) out side Madinah in that small group there is a disciple name Abu Hurairah, famous with all of his strength and sacrifice, persisted to accompany the prophet and keep
savelly in his memory whatever said and done by the prophet, including his
ideal to compile the hadists.
Beside Abu Hurairah, Aishah is wife or prophet who made all efforts to
save hadists. She is famous for her strong memories and sharp wit and
intelligence. At that time there also are Abdullah Ibn Umar and Abdullah
Ibn Abbas, both are spreaded out and broad casted much the knowledge of
Al Qur'an and hadist. And so with Abdullah Ibn Amr who used to write
hadists. Every disciple made their all efforts and work hard to keep savely
the decree of prophet and his sunnah whatever they knew. After the
prophet passed away, every matter has to be determined according to Al
Qur'an and hadist. Thus, the hadists or sunnah filtered again and again, and
hadist or sunnah which would be applied must be reliable and popular.
In accordance with the development of social life and people convert
islam in massive amount, therefore, the need toward hadist became
immense.
Other important thing that motivated people to learn, study and compile
the hadist is due to their love and longing to islam and they assume all
relies of prophet as priceless and most valuable compared to other
important things. This is happen especially to the disciples of the prophet
as conform to the massege given by prophet that they should convey
whatever they saw and heard to those who not present and to the next
generation, therefore, where ever they go, they bring Qur'an and sunnah.
They houses be come a place of broad casting activities for hadist. Some
of them travel with cover very long distance, just to seek explanation about one hadist from the first source.

After generation of disciple (sahabah) which saw and heard hadist directly from prophet, so, compiling and writing of hadist become more activated and this is become a custom.

Before the midle of second century of hijriyah, books of hadist begin to be published, and more and more number of student who are in busy learning and studing hadist in various educational center. But to keep and memorize the names of narrators are very difficult due to they are new teachers and fresher. So that writing of hadist compilation in form of a book become very necessary.

In the third century of hijriyah, writing of master piece of hadist and complete start to be done. There are some books of hadist which is composed according to main topic, some according to the name of sahabah as a source of hadist. Beside of that, there are some book which have been started to be analyzed critically.

That is the stages of collection, writing, composing and analysing hadist as second sources of law in Islam. And how strict the stages of filtering is happened to avoid the mistake that may be occured, until the hadist can be studied up to now.

So, there is no doubt for Muslims to recognize and utilize their second source of law.
This is accordance with the trust given to the prophet as a source of sunnah and hadist.

Analysing and studying the biography of the prophet, reading and seeking the evidence he had left behind, therefore, more than just proper, if his follower (ummah) believe and convince what he have been conveyed as what happen to muslim faith and reliance toward his sunnah.

The holy prophet changed the course of the history. He stands as bridge between the ancient time and the modern age, the study of his life is, therefore, not the study of the life of man, it is the study of mankind come into age. Such transition from the ancient to the modern is not a matter of simple narration. It is primarily a matter of contemplation and evaluation. In any book of Islamic history, the life of the holy prophet must necessarily be assessed and adjudged not as a bare narrative of history, but as the vary life spring of history sustaining the myriad forces that have shaped the course of history.²³

C. Ijtihad

The third source of Islamic law is ijtihad. The word ijtihad rooted from the word jahd which means work hard or made all efforts, the word ijtihad literally contains the same meaning and technically applied for one who expertized in law with his intellectual abilities made all effort to determine opinion or idea in the field of law in connection with complicated and doubtful matters.²⁴
Using of logical reasoning is welcomed in Islam and furthermore, applauded and respected because Islam is a logical religion. The Quran has confirmed that divine revelation as a source of sciences and knowledge is far higher than logic, but at some moment holy book also approach that validity of divine revelation can be mulled over by using logic.

For several times, Al Quran had suggested for utilizing the logic, for examples in (2:171), (8:22), (25:44), (7:179), (3:189,190) and soon. Several hadist or sunnah also had confirmed this approach. One of them which is considered as very important of basic of utilization of ijtihad is, "when Muadz was appointed as governor of Yaman, the Prophet asked him, how he would judge, if a case was proposed to him, He answered; I will judge according to the Al Quran law,"but it you don't find any clue in AlQuran ask the prophet," then I will judge by the sunnah of the prophet", he answered, then the prophet ask further, but how if you don't find any clue or direction in the sunnah?, Muadz again answered," "therefore I will utilize my logical reasoning and I will judge accordingly", the prophet tap his chest while praising" to the God all praise go, he gave direction to his messenger's messenger as he desired".

Concerning to the above hadist, the ijtihad has been done since the prophet was still alive. After the death of the prophet, teaching of ijtihad became wider and developed. It is proper because the Arab continue to develop and muslim increase in number.
At the chaliphs times, they have such advisory council that took care of important issues, where their decision based on majority vote and accepted by the caliph and muslim communities.

Four great imam (leader), Shafii, Abu Hanifah, Ahmad ibn Hambal, Malik, all of them approved and accepted. The ijtihad has important position in formulation of regulation and they placed it as the third source of law after AlQuran and Alhadist. This matter is undeniable and inevitable due to the needs of muslim people toward new decrees and regulations which does not found in the Quran and Sunnah of the prophet, growing bigger and wider.

Accordingly the mujtahid (one who strive to attain to a higher position of scholarship and learning) endeavoured to fulfill this necessity by every method of ijtihad such as Qiyas (analogical reasoning), istihsan (litt: approving; this team used in the exegis of the Quran and hadist it implies the rejection of Qiyas and the admission of the expediency) istishab (a law or injunction contain in previous revelation and not abrogated by the succeeding law giver) and Al urf (tradition) Recently Islamic judispandence experts (fuqoha) talking about three degrees of ijtihad though there is no argument in Al Quran and Al hadist or scripture of great imam (A leader) about it. The three degrees of ijtihad are: ijtihad Fis Shar'i, ijtihad fil madhhab, ijtihad fil masail, or ijtihad in forming regulation or a law, ijtihad about schools thought concerning to the muslim law, ijtihad in certain cases.\textsuperscript{25}
The first one focused on four eminent imam, because they were considered have written all regulation and law in their schools of thought. Some scientist have opined that after the passing away of four imam, the first category of ijtihad does not exist due to the qualifications required for mujtahid to make ijtihad of their grade. This qualification are; having wide knowledge about al Quran and its various aspect, having broad knowledge about sunnah and its various aspect, having knowledge about Qiyas (analogical reasoning) and its various aspects. While the second degree of ijtihad, it only granted to the direct pupil of the four imam Abu Yusuf and Muhammad. And the third degree of ijtihad can be done by later Islamic jurisprudence expert whom considered having ability to solve certain cases or typical issues proposed to them and have not yet been resolved by the four mujtahid. The door of this such ijtihad considered as closed. After sixth century of hijriyah (the muslim era). They also stated that "The use of ra'y (logic) by the prophet was justified on the plea that he was always to correct in his opinion because God guided him, but the exercise of Ra'y by the people other than him is a sheer speculation (zann) and artifice (takalluf). The hostility on the part of the tradionist toward the use of Ra'y led them to the extreme. They stigmatised their opponents (people of opinion) as the enemies of sunnah.\textsuperscript{26} Adherence to the tradition (athar) was identified with the right path. Originally which is essentially based on the use of reasoning and intelligence was denounced as an innovation in religion (bid'ah). Hence
alegiance (ittiba) and originality (ibtida) become two conflicting strands of medieval legal touch. This attitude in legal reasoning paved the way for the close of the door of ijtihad.\(^{27}\)

There are difference of opinions in solving the problem based on ijtihad.

Quraisy shihal stated six kinds of causes of occurrence of controversies in ijtihad\(^{28}\) as follows:

1. Subjectivity of mujtaheed, including the influence of environment, time and place.
2. Error in establishing the method or principles.
3. Superficial of the mujtaheed, particularly in Arabic with its related subjects and auxiliary sciences.
4. Superficial knowledge about material analysed.
5. Less attention to the context, whether asbabun nuzul (causes of revelation), ashabul wurud (historical background of hadist), correlation between textual evidence (nash), or society social condition.
6. Without discussing who is the narrator and to whom the narrated issues intended.

The importance of ijtihad can be viewed from the function of the ijtihad itself which comprise three kinds\(^{29}\), that are:

1. Ar-Ruju' or Al-ladah (return) function, it is return of islamic teaching to its roots or main sources, that is Al Quran and as sunnah as sohihah which is free from any possibilities of less relevant interpretation.
2. Al-ihya (revive) function, is to revive the spirit and values of islamic teachings in order to be able to deal with the challenges of time, so that islam capable to be a furgon (distinguishing factor between good and evil or between lawful and unlawful), hudan (direction, guidance) and Rahmatan lil a lamien (a mercy to the universe).

3. Al-inabah (strengthen) function, it is to fix up the teaching of islam that had been exercised by prior scientist (ulema) but, probably it happened some controversies due to some possibilities of mistake in judgement in accordance with the context of time, condition, place which we are facing now.

Apparently, this three function of ijtihad remember us to the tajdid or reformation of islamic teachings, then the term develop into terms of reactualisation, reinterpretation, renovation, revitalisation, rationalisation, reformulation and modernisation.

Meanwhile, Al Quran clearly approved the freedom of thinking and to have opinion for every one, but the absolute submission and obedience only pointed to God and his messenger.

The holy prophet, his disciples or all prominent mujtahid never say that muslim is prohibited to make ijtihad on serious problems or on social necessities issues that always increasing together with time. It is clear that muslim communities have the right to determine a law for necessities of them self and the one and only condition should be fulfilled is that the
new regulation or law does not contradict with the principles of Al Quran and the hadist.

According to Dr Duwaliby as delivered by Dr. Wabah, there are three causes that create the difference of result of ijtihad as below:

1. Ijtihad bayan, that is explaining the islamic jurisprudences from textual evidences (nash) of shari' (the one who granted and regulated the shariah).

2. Ijtihad Qiyasi, that is establishing the regulation for the cases that does not found in Al Quran or as sunnah by applying Qiyas (analogical method) on what is found in the textual evidence (nash) of shari law.

3. Ijtihad istishlahi, that is establishing the regulation for the cases that does not found in Al Quran and as sunnah by using or Ra'y (reasoning) based on istishlahi (beneficial).

These three categories of ijtihad added with ijtihad istihsani by some scientists, that is the ijtihad similar with the ijtihad istishlahi, except for deliberation that based on istihsani (expediency).

Al ustad hakim, divided ijitihad into two kinds:

Ijtihad aqly and ijtihad shar'i, ijtihad aqly is ijtihad that only use logic as argumentation for establishing the law with delibration of taking benefit and rejecting disadvantage while ijtihad shar'i is ijtihad that use naql (reference to relevant citation from Quran and hadist) as argumentation of law.
D.  Ijma

Ijma literally have two meaning:32

1. Ittifaq (Agreement) as it said "people have made ijma" about something, it means people have agreed about some thing.

2. "Azam (firm intention) and tasmin (strong desire).

According to terminology of islamic jurisprudence experts (fuqoha), ijma means consensus of opinion amongst mujtahid or approval of opinion amongst islamic jurisprudence scientist of certain era in law matters.33

Ijtihad, ijma and qiyas are accompany or close to each other.

The Quran and the sunnah (as incorporated in the recognise traditions) are the two original sources, analogy being a source subordinate to them. Further, if analogy is supported by general agreement it assumes the form of ijma (consensus of opinion) which is accepted as a valid source of law to be again extended by analogy. Thus ijma and Qiyas are two more sources which according to Shafii are subordinate to the original one".34

Such interpretation is called ijtihad or striving to extract rule from the text by way of analogy.35

Thus, it can be said that ijma is supporter of ijtihad, There with ijma is ijtihad on wider basic.

"Ijma, thus guarantees the totally of the results of ijtihad legitimately exercised in accordance with the process liad down in theory of usul.36

It is clear that to consider ijma 'as separate source of law absolutely
incorrect because ijma is ijtihad, only the difference that ijma is ijtihad approved by all or majority of mujtahids in certain age. 

Approval of opinions in ijma concluded with three ways:

1. approval by Qoul (statement) that is the opinion about certain issue given by mujtahids legally approved.

2. approval by fiil (act or attitude), that is if approval occur in practical.

3. approval by sukut (silent) that is if the mujtahids do not opposed the opinion made by one or more mujtahids.

There are some verses of Al Quran which oftenly made as fundament to make ijma (consenses of opinion). Among the verses is verse 59 of sura An-nisa which contain: "o ye who believe! obey God and obey the apostle and those charge with authority among you, if ye differ in any thing among your selves, refer it to God and His apostle, if ye do believe in God and the last day. This is best, and most suitable for final determination". The word "ulil amri" in this verse connotes to the political authority and law authority (mujtaheed and Fuqoha).

Some hadists also can be made as basic of ijma- 'among them is," my community will never agree upon an error (narrated by Ibnu majah)

As for legal bindy of ijma is that if a law of a case have been decided, as a consequences, no law expert permitted to reopen that case, except if some of law experts at the time whose ijma had been implemenation expressed different opinion.
An ijma might be abrogated by the other ijma that realised at the same age or the next, with exception of ijma of prophet disciples can not be abrogated by next generation.

There is a controversy happen for, if amongs the disciples of the prophet did not agree about certain issue, it is permitted or not to make ijma for supporting certain opinion, the reason for this matter is that the disciples can also make mistake in their opinion. This matters acknowledged by all. Thus, technically no prohibition for ijma which is oppose the opinion of one sahabal (disciple of the prophet).

Islam does not oppose the difference of opinion. The difference of honest opinion is considered as a "Rahmat" (mercy) by the prophet. whereas it stated in one of hadist: differences of opinions amongst my community is rahmat (mercy).

"Consensus of opinion produces certain knowledge (ilm) of God will, but at the same time, where no consensus is in fact achieved, variant opinions are recognised as equally valid attempts to divine that will. \(^{39}\)

Caused by the fact, that variant opinion is considered as proper and the opinion of mujtaheed is not always absolutely correct, therefore like in ijtihad, ijma persisted to open it's door for correction.

E. Qiyas (analogy)

Qiyas constitutes of aspect of source of law tabiyyah (associate) and also as form of the widest argumentation in scope compared with the
prior. The nash (textual evidence) in Al Quran and as sunnah mostly did not establish the law for all cases, but some of it. While ijma is very limited in number due to variant opinion among mujtaheeds. For Qiyas there is no required of opinion agreement of mujtaheeds. So Qiyas is an individual work of every mujtaheed. Mean while, law matters take place every day in every place which is occasionally not similar like before, where as there are no argument, rule or opinion for that case, except qiyas itself by comparing of that matters with the problems where it's law had been determined or approved.

"The verbal noun of has been dirived from it root, q-y-s, meaning to measure. Qis Rumh or qas Rumh are the arabic idioms meaning the measure of a spear. This shows that it has also another root q-w-s signifying the same meaning.  

Qiyas literally means "measuring", accord, "equality". As a source of law it is defined as an extension of law from the original text to particular case by means of a common illah or effective cause, which can not be ascertained merely by interpretation of the language of the text.  

Other definition of Qiys is comparison of matter which have no textual evidence (nash) to matter which already have a definite nash in the shara (Islamic law), to seek the similarity or equality of legal cause. That means, if there is a case that typically, its law formulation did not decided yet then compared to other similar case where the law had been established, there in new law decided and legelized by a case which have similar legal cause.
"The term of qiyas has been frequently used in the sense of general perinciples or established law in the early legal literature."  

The different shades of meaning of qiyas may be summed up as a measurement, comparison, equality, ratiocination, analogy, establish law and general principle". 

Usually, qiyas in terminology of ulama usul (experts or scientists of islamic fundamentals) means relating issue which it's law have not yet decided by nash (textual evidence) to the issue where it's law had been decided by nash, for both issues have similar legal cause (illah)". 

What intended by "relating" in the above definition is equalisation of new issue found by mjtaheed and it's rule of new issue have not yet established explisitly in nash (text) whether in Al Quran or in Sunnah towards the issues where it's law have been legalized by nash (text). 

Start from the above definition, therefore Qiyas is valid and accurate if it fulfilled four principles as below:

(a) The original case covered by the text. This is known as asl (the original) or maqis' alayh (the case from which analogy is drawn).

(b) The parallel or fresh case which is not covered by the text. A jurist finds out a rule of law for this case by the exercise of qiyas. This is known as far (parallel case), or maqis (the case which analogically compared with a textual rule).

(c) The ratio legis of law. This is known as 'illah (cause of the textual law of the original case).
(d) the law of the original case covered by the text. This is known as hubn al-asl.is law applies to the parallel case by analogical extention. 47

Qiyas as one of source of islamic law is a gift for muslim communities. Much is made of the fact that Qiyas is very necessary and significant for muslim communities as response of changing time and society.

"There is yet another category of human affairs about which shariah has provided no detailed rules but only certain objectives coupled with major auxiliary principle. In such detailed operative order for achievement of these objectives are to be devised by an islamic legislature. Appropriate rules within the parameters of the standards laid down and objectives specified can be created and worked out by human agency in this sphere" 48

Analytical study of law by analogical method is the process of a very traditional of ijtihad aqly. Before it developed into a sophisticated doctrine in the post Shafii period, it was simply used to show a resemblance between to parallel cases.

The prophet himself acted as a juridical authority in Madina, and also reportedly a pointed a number of persons as judges in various part of Arabia. The settlement of disputes natually requires exercise of reason and personal opinion. The interpretation of a textual injuction and it's application to a particular case obviously pre supposes the use of reason and intelligence. The prophet we are told consulted his companions in doubtful situations when he was not guided by revelation. 49
Qiyas method in Islamic law analysis widely used by Islamic jurist from the period of sahabah and used by prominent mujtaheds that are: Abu Hanifah, Malik, Shafi'i, Ahmad Ibn Hanbal.

F. **Istihsan**

Istihsan is one of ijtihad method and as the second after Qiyas. Literally, istihsan means, to follow something which is according to logical analysis is considered good. According to Hanafi School, if a rule drawn up by qiyas can not be accepted because it contradicts with wider rule of justice or it is not public prosperity interest, and the one who subjected by that rule of qiyas probably will undergo inappropriate difficulties, therefore the judge allowed to refuse the qiyas and as its substitute, he permitted to take a useful rule for public prosperities, or a rule parallel to a wider rule of justice.

There are a lot of definitions of istihsan, given by jurist from various school; Hanafiyyah, Malikiyyah, Hambaliyyah etc. One of the follower of Hanafiyyah school is Al Baidavi who gave definition of Istihsan as shifting from one result of Qiyas to other Qiyas which is more occurrence to specialise Qiyas by using argumentation that more accurate and firmer than the previous one.

Ibn Arabi, one of the Malikiyyah School follower gave his definition of istihsan as; giving precedence to abandon the demand of argumentation (dalil) by exemption (istisna) and dispensation, because there is contradiction in some of it's demands.
Another definition of istihsan come from Abu Hasan Al Karokhi, a follower of Hanafi School; "to compare a case about it's excellence law with other law for striving a firmer and accurate law and then establish new law from the result of that comparision."\(^5^4\)

It means that in one case, there are two argumentations, one is general (am) and another is Khas or Khoﬁ (special). One considered using general argumentation if its general argumentation drawn up from it's prime (main) law, but after deliberation, he know that there is another argumentation that more firm, accurate and clear, then, he abrogate the first one and shifted to another.\(^5^5\)

One of Hanabilah School follower, Ath-Tufy also given definition of istihsan as: shifting the law regulation of one case from it's comparison cause by specific (special) argumentation of law (shara).\(^5^6\)

From above definition it can be concluded:\(^5^7\)

(a) The jurist of usual (principle of islamic law) from Hanafiyah, malikiyah and Hanabilah in difference definition about istihsan, agreed in basic meaning of istihsan that are:

1. Shifting from one decision of some legal cases to another legal decision, giving precedence of one legal decision from another legal decision, set a side or abandon of legal decision, exemption apart of law decision from general legal decision which embrace it or specialise apart of law unit from general law.

2. The shifting and so forth, must be laid on certain argumentation of
law whether from its textual evidence (nash) or from its implicit meaning or from benefite (maslahah) or tradition. And this the argumentation which in term of jurist of usul is called "the path of istihsan" or sanad of istihsan.

(b) The shifting occasionally occur from general legal of textual evidence, from legal decision of Qiyas and from legal decision as consequences of application of general law principles.

This istihsan method frequently used by Abu Hanifah and his prominent followers, Imam Malik with the jurists of Malikiyah and others prominent followers of Hanabilah school.

Imam Shafi'i rejected the utilisation of istihsan because applying istihsan means turning away from the will of shari (the one who made law). He said whomever exercising the law by istihsan meant he fabricate the law.

The difference opinion on this issue, actually is not whole correct, because istihsan which not utilised by imam shafii is not the istihsan which applied as argumentation by other imam. Statement of imam shafii in his two book "Al um and Al Risalah"; "Whomsoever exercising the law by istihsan meant he fabricate the law" is indicating that a statement based on carnal desire, not based on fundament of law. When the validity of istihsan become clear and tangible among the disciples of Abu Hanifah and His follower, finally, the disciples of imam shafii accepted it.58
G. Istinshah / Al maslahah Al mursalah

The other sources of Islamic law in istinshah istinshah (public interest) is considered important because it is one of shariah means for facing the challenge of change. "Traditional Muslim jurist focused their attention not on istinshah, but on its more general form that is maslaha, which means; a cause, a medium, an a chance or a good ideal. Maslaha also used for a good thing or agreement or some thing that having potential to create a goodness." 59

There are two terms commonly used by jurist of usul, one is istinshah which is pioneered by jurists among Hanabilah school, while the other is al maslahah al mursalah which is lead by malikiyah jurists. Semantically, the word istinshah means benefit or goodness, while the word al maslahah al mursalah means that become a basic or considerations in legal analysis for cases which are not found in the text (nash). 60

Its utilisation as a main medium to serve Sharia (law) is based on argumentation that "goodness" means "legal" and legal is definitly good. With reasoning like that, traditional Muslim scholars expand a set of category of maslaha, where some of it require direct evidence from Al Quran and sunnah, and the other can lead to bind legal sanctions, provided that they constitute a significant critaria such as preservation of life and wealth, teaching of Islamic moral and good reasoning of sharia. 61

In this regard majority of Islamic jurist agree that if sharia did not determine a law on legal case and did not show the way to reach the
determination of law toward the case that is not found in text, therefore the decision taken must be based on the establishment of human benefit. The benefit of human interest, generally revolve around: guarding the religion, human soil, his logic, his wealth and descendants.

"The purpose of muslim jurist in determining that law is to materialise beneficial (maslaha) for mankind and to guard them from all distruction and damage. Masalih (peace and prosperity) is beneficial, and Mafasid (distruction) is dangerous. Indeed, the jurist in determining the law is to permit beneficial things and prohibit the things that can cause damage and distruction. He would not decide a law according to the pleasure of people and their carnal desires."

Actually, every law determined by sharia will never fall from the beneficial purpose, if sharia determine a law regulation on certain legal case and show the maslahah (benefit) as purpose of that regulation as well as show how to find the legal cause (illah) as a legal binding because with that the benefit will be materialized. This determination is done by Qiyas method. e.g. : Allah said in Surah Al Baqorah 222:

"They ask thee, concerning woman's courses, say : they are hurt and pollution, so keep away from woman in their courses and do not approach them until they are clean". The text make it obligatory to keep away from woman in their courses because it is hurt and pollution, if the wife in her nifas or other similar ailments, then emerge the hurt condition as the hurt, when she was in haid (course, menstruation) therefore the husband is
obligated to keep away from his wife during the period the wife undergoes that conditions as Qiyas (analogy) of keeping away from women in their courses. The jurist who use Maslahah (benefit) in their legal analysis for every particular issue decide three principle conditions in order to make the result of analysis acceptable, these are as follows:

1. Legal regulation decided through deep analysis and intensive research till its benefit can be exhibited clearly and evidently, not just an assumption.

2. The review of the benefit must not be partial but must be more general and comprehensive, it means not only concern about the benefit of only one or two person on certain group, but it should for whole muslim communities, at least majority of them.

3. Legal regulation as a result of the maslaha analysis must not contradict with the text, whether A10 Qur'an or as sunnah, and must not contradict with the ijma.

The differences between al maslahah al mursalah and istihsan are:

a) Istihsan is a case which have two argumentation. The first argumentation is general (dhohir) which demanding certain legal decision while the other is special (khofy) which demanding other legal decision. In this case, it is not allowed to determine law toward that case which based on the first legal decision but it might be determined by the second legal decision as an exemption.
b) While maslahah mursalah only have one argumentation that is the maslahat (benefit) of that legal case, where it is a decision since begining with out other argumentation oppose it.

The attention of malikiyah jurists towards istihsan matter is very conspicuous there are some reasons for strengthening their view to use its method, among them are:

1) that, the shariah revealed in order that mukallaf (law subject) would not do anything by demand of carnal desire, because if the carnal desire became a basic in determining the law, certainly it will create disadvantage as stated in surah-mukminun 71: "if the truth had been in accord with their desires, truely the heaven and the earth and all being therein would have been in confusion and corruption".

2) the jurists agreed that in all of things always found the benefit (advantage) aspect and disadvantage aspect. The advantage aspects is the most essential for world beneficial and the hereafter. The shari'a sent down for giving explanation to the mukallaf (one who have responsibility and obligation) about which one is good and which one is bad.

3) most of the maslaha (advantage) or mudhorah (disadvantage) are conditional in character. It should be analysed by rational review by considering various aspects of human life.

Some examples of law determination based on maslahah mursalah such as, tax payment by people, when the government treasury does not have
sufficient funds to maintain public interests, prohibition of slaughtering small female animals for protecting it's population.

There one more method of legal analysis which was developed by jurists of Malikiyah school that also utilized to support realization of maslahah. That is Al-dhariah which means the way that connect something to otherthing, while the other meaning is something that will bring to prohibited act and cause mafsadah (disadvantages) or something that will lead to good act and cause maslahah (advantage or benefit).

Juridical legalization of prohibition of bad act can be realized by law decision of haram (unlawful, prohibition) or makruh (hateful) depend on quality of caused distruction (mafsadah). And the reason for giving permission and chance for the act that is considered as good can be done by law decision of wajib (obligatory), mandub (optional but meritious if perform) and mubah (optional, allowed).

H. Istishab

Istishab according to it's meaning is, drawing up the law or new regulation by persisting to prevail the exist regulation at the present and the future accordance to previous prevailed law, before there is other argument to change it.66

The jurists of Hanabilah, shafi‘iyah and dahiriyah proposed their argumentation to support the use of istishab method that is, the law regulation that have been determined before either by text or by result
of ijtihad analysis, logically remains to prevail as long as there is no new regulation to change it, and it is done to avoid the vacuum of law.

There are some principles in method of istishab:

1. every thing which have no decision of it's prohibition is mubah (allowed) and the persistence of law on unlawful thing before a new argumentation is established to allow it.

2. every general regulation or decision is allowed to prevail in its generality before there is any argumentation to specialize it.

3. every regulation that have been formed through the legal agreement (a'qd shar'i) to prevail before any other agreement obrogate it.

4. every legal decision that have been formed through realization of legal stipulation will continue to prevail before any incident or cases change it, eg. one who keep ablution is remain keeping it before any incident abrogate it.

5. every mukallaf (one who burdened by obligations and responsibilities) basically is not burdened by any thing, before any contract make him burdened by various acts eg. : every man have no obligation to maintain woman before marriage.

i. Urf (custom)

Usually what is meant by urf is that tradition which has become custom in society, whether in form of act or attitude or saying. The example of urf is like custom of people to do "sell and buy" by giving
money and goods to each other without saying "ijab Qobul" (consent between them).

Urf users in the process of law forming strengthen its reason by God's saying in sura al-a'raf 199 "hold to forgiveness, command what is right, but turn away from the ignorant". There is the word urf in that verse which connoted to good traditions which become popular and approved by society. Beside of that, one of hadist from ibn mas'ud state, "whatever is considered as good by muslims, certainly is considered good too by God.

The distinctions between ijma and urf are:

- Urf exist by approval of all people or majority of them, till if the urf devied by some people, it is not cause the taint of urf. While ijma exist by approval of all jurists (mujtaheed) of muslim communities unanimously at that time when ijma had taken place, if there are any denial from one or some mujtaheed, therefore the ijma is considered as not valid.

- The establishment of urf caused by approval of majority people on certain act or saying where the majority of people comprise all social strata, from ordinary people, elite class, jurist or non jurist while establishment of ijma caused by agreement or approval of the jurists only.

- Urf which made a basic of legal decision, when it change therefore its legal decision also change so it have no legal binding any more, while for ijma, especially ijma shakikh (ijma by statement) where
its legal binding is based on agreement (ijma) is considered as have no chance to exercise ijtihad on legal decision that have been determined by ijma.

The various sources of law as described above are generally used to draw up law on the legal case. Beside that, there is the other source of law called Al-dzariah. Al dzariah means the way that connect something to another. While according to the term is, something that will bring to evil deeds (prohibited acts) and create mafsadah (distruction) or it will bring to good deed and create maslahah (advantage, benefit).

The first one called sad al-dzariah and the second one called fath al-dzariah. Acknowledgement towards al-dzariah basically by considering the result of act, then, the law for that act decided, for example haram (prohibited) and makruh (hateful) for act that will create mafsadah (distruction or disadvantage) or law decision of wajib (obligatory) mandub (optional but merituous if perform) or mubah (allowence, optional) for good deeds that will create maslahah. Legal decision such as haram, makruh, mubah wajib and mandub, depend on the quality of mafsadah or maslahah that have been created.

From various sources of islamic law above, it can be said that the two kinds of source of law that are; the main sources like Al Qur'an and hadists and subsidiary sources as supporter such as ijma, qiyas, ijtihad, istihsan etc.
During the time of the prophet life, Al Qur'an always accompanied by practical form through sayings and acts of the prophet. Muslim society at that time did not need other sources to understand the law formulation and perception of attitude ethic. The prophet himself handled the problems faced by his community and gave the answer and solution when it was needed. After the prophet has passed away, direct explanation of law stipulations did not exist any more, then the ijma answered the problems beside Al Qur'an and sunnah.

With the growth of muslim communities, a lot of new problem and cases emerged where most of them were unique, so, to solve that problems, established the qiyas or analogy, that is making deductive analogic comparison from Al Qur'an and hadist. If this qiyas get general approval, it becomes the ijma. Some time this general approval could not be achieved, than ijtihad as a result of individual analysis based on Al Qur'an and hadist was applied for solving the existing problems.

Al Qur'an and sunnah give eternal law and foundation for shari'a while ijma qiyas and ijtihad make syariah enable to develop and more dynamic and adaptable to the change of time.

Beside of that the subsidiary sources of law as stated above make syariah more flexible and tolerant although must be presisted based on the basic values in Al Qur'an and hadist as a frame of absolute reference.

To achieve the aim in order to make shari'a applicable in every time, the muslim jurists also developed usul fiqh is the knowledge about approach
and evaluation of shari'a which is utilized for determining the methodology where the jurists and intelectual can make practical decision of the emerging problems.

Nowadays, especially Muslim communities need a sufficient theory for interpreting Al Qur'an for their need that specially giving character to social tenets of Al Qur'an.

Classical interpreters in medieval period treated Al Qur'an verse by verse, though occasionally they also give cross reference when interpreted the verse, but it was not done systematically, cause by that their Qur'anic interpretation have not produced a cohesive and significant weltanschaung (world view). The interpreters have admitted principle "the part of Al Qur'an interprete the other part" (Al Qur'an Yufassiru ba'duha ba'da), but the endeavours to combine the meaning of Al Qur'an systematically for building an integrated weltanschaung have not yet been done. In interpretation book, Muslim communities have written a bulk of methods and principles of Al Qur'an interpretation called usul tafsir (the principles of interpretation) in formulating this knowledge, the Muslim scholars have done great service for understanding the Al Qur'an, especially in literally style and idiom of Al Qur'an in it's literally and metaphoric usage, also in distinguishing between verses which have general meaning and verses which have special meaning etc. Actually these endeavours are very important for a understanding the text of Al Qur'an. Inspite of that, there is an urgent need toward hermeneutic theory that will help us to
understand the meaning of Al Qur'an comprehensively, so that whether the theological part or ethical part and legal ethic of Al Qur'an become comprehensive and cohesive.⁶⁷
3. KINDS OF PUNISHMENT

The islamic criminal law can be divided into several categories.

A. Reviewed from its sources of law, punishment can be classified into two categories:

a) Punishment which have argumentation in textual evidence, these are, hudood, qisas, diyah and kafarah (expiation) i.e. punishment for adultary, thief, robber, rebel, murderer, and one who divorce his wife by dzivar (divorce which is effected by a husband likening his wife to any part of the body of any of his kins woman within the prohibited degree)

b) Punishment which based on textual evidence. This punishment called ta'zir (penal punishment) such as: attempt to commit crime, breaking the mandate, false witness.

B. From relation between one punishment with other punishment, it may be classified into four kinds

a) Primary punishment (Al uqubat al asliyah), these are penalties originally prescribed for an offence. For examples prescribed punishment for fornication, stoning to death, homicide etc.

b) Substitutionary punishment (Al uqubat al badaliyah) if there is some thing inhibiting primary punishment, then some other punishment should be awarded. For instance, in case of
Quasy homicide diyat is the prescribed original punishment, and in case of ta'zeer offences, ta'zeer are the original or primary penalties. But if had or gisas punishment can not be awarded and instead of it diyat and ta'zeer are awarded, then these punishment would be substitute in nature.

c. Subsidiary punishment (Al ugubat al tabaiyah), that is the punishment which are awarded to offender on the basic of following the primary punishment, for instance prevented murderer from getting legacy of the murdered wealths.

d. Complementary punishment (Al ugubat al takmiliyah) that is the punishment imposed as a complement to the punishment that had been imposed previously. This punishment must be based on judges verdict seperately while substitutionary punishment does not need separate verdict. For example, the amputed hand of thief is to be hung from his neek till he is set free.

C. Punishment may be classified in to following kinds in relation to judical power as to the determination of the quantum thereof.

a) Punishment with a Single Unit

As regards to such punishment, the court has no power to enhance or mitigate the quantum thereof, although they may naturally admit of mitigation or enhancement, such as rebute, exhortation or flogging.
b) Punishment with two limits

These punishment involve two limits: minimum and maximum the court has the power to choose any penalty between them as it may claim fit; for instance, imprisonment or flogging as ta'zeer.

D. Punishment may be classified into the following kinds in relation to the object thereof:

a. Corporal punishment; punishment inflicted on the human body such as, execution, stoning.

b. Psychical punishment; punishment whose object is the offender's mind rather than body, such as exortation, intimidation and threatening.

c. Punishment inflicted on human freedom, such as imprisonment, banishment.

d. Pecuniary punishment; punishment whose object is the material possessions of person, such as, diyat, mulct and confiscation.

E. Punishment are classified into the following kinds in accordance with offence.

a. Punishment of hudood, for example, prescribed punishment for hudood offence.
b. Punishment of Qisas and diyat, i.e., punishment prescribed for offence entailing retaliation and blood money.

c. Punishment of expiations, prescribed punishments for certain Qisas and diyat offences as well as certain ta'zeer offences.

d. Penal punishment; punishment prescribed for ta'zeer offences.

In Islamic criminal law and its punishment system, the four kinds of punishment as stated above such as hudood, Qisas and diyat, expiation and penal punishment (ta'zeer) are an important part of punishment system. Generally, the four kinds of punishment classified into three parts, that are, hudood, Qisas and diyat, ta'zeer.

The following part will describe the hudood, Qisas and diyat and ta'zeer as important punishment system Islamic punishment concept.

*The fixed punishment (Al hudood)*

According to the classical manual of Islamic law, Islamic criminal law recognizes six major offences, each of which has a penalty prescribed in fixed terms in the Qur'an or the sunna. These offences are known to Muslim jurists as the offences of hudood. 68

The six offences generally recognized as offences of hudud are, the drinking of alcohol, theft, armed robbery, illicit sexual relations, slanderous accusation of unchastity and apostasy 69
Some jurists classified hudood punishments into seven offences there are:

1. Adultery or fornication
2. Qazaf (false accusation)
3. Drinking wine
4. Larceny (Theft)
5. Blood sheed
6. Apostasy (riddah) and
7. Rebellion (Al baghyu)

Even some jurists classified hudood punishment only into four classification, among them is Mohammed S. el-Awa.

"Al though the majority of jurists agree on the classification of the aforementioned offences, some authorities hold differing view, either adding to these six offences or reducing their number. Taking into consideration that a hadd punishment is a punishment defined by God in the Qur'an or the Sunna, it appears to me that only four of the six mentioned offences can be classified as offences of hudood.

The remaining two, namely apostasy and alcohol drinking, can not be so classified since neither of them warrants a punishment which has been strictly defined in the word of the Qur'an or the sunna.

Despite controversy as to classification of Hudood it would be appropriate to describe the various kinds of punishment in Islamic criminal law.

Hadd is a punishment prescribed by Allah and constitutes his right. It is laid
down in the interest of society. When jurist say that such and such punishment is the right of Allah, they mean that the punishment in question can not be annulled by the society. In other words, any punishment which has been declared obligatory in the public interest and is designed to eradicate corruption and ensure peace and security, is the right of Allah.  

After being reported to the judge, it (had) is not to be pardoned either by him, by the political authority or by the victim of the offence.

Hadd means prevention, hindrance, restraint, prohibition and hence a restrictive ordinance or status of Allah, respecting things lawful and unlawful.

A. Adultery or fornication

There are three punishments laid down in the shari'a for adultery or fornication; whipping, banishment and stoning to death.

In Al Qur'an the sanction for adultery is in phases. At the beginning of islam the sanction is house confinement up to death and condemned (An-Nisa': 15-16).

"If any of your woman are quitly of lawdness, take the evidence of four (reliable) witnessess from amongst you, against them and if they testify, confine them to the houses until death do claim them or God ordain them some other way."

"If two men among you are quitly of lawdness, punish them both, if they
repent and amend, leave them alone for God is oft returning most merciful".

Then, come another sanction, that is jild (whipping) a hundred lashes. The Almighty said: "the woman and the men quitly of adultery or fornication, flog each of them with a hundred stripes. Let not compassion move you in their case, in a matter prescribed by God, if ye believe in God and last day. And let a party of the believers witness their punishment "(An-nur : 2). And the last is the hadist of the prophet," take it from me, take it from me, take it from me, Allah have given way to them (women who committed adultery) unmarried man who committed adultery with unmarried woman, floged each of them with a hundred stripes and exiled for one year. And married woman committed adultery with married man lashed with a hundred lashes and stonned (narrated by muslim from ubadah ibn shamit). Based on above hadist, if unmarried man and unmarried woman committed adultery, as a sanction is a hundred lashes and one year exile. As for flogging, the jurists agreed that it is to be implemented, while for exile is the competency of the authority.

According to fathi Bahansi, stonning punishment is sanction pertaining policy of law where it is handed over to the policy of authority whether to apply it or abandon it in accordance with general welfare. 74 As to the banishment, Imam Malik has expressed opinion, that only the man that will be exiled, and the woman would not go out without mahram (keen who prohibited to marry to), so shall not be exiled. Mean while,
according to imam Shafii, iman Ahmad and iman Az-dzahiri, banishment of one year is imposed to both of them.

For married man and married woman, their punishment is stoning (rajm) to death, but some jurists maintain that their punishment is only a hundred lashes as followed by Azariqoh sect from khawarij.

Through critical analysis of studies on punishment of adultery. Some jurists deny stoning punishment on adulterer. 75

As for the punishment for homo sexual, lesbian, having sexual relationship with animal and corpse, the jurists differ in their opinion in accordance with their differences about whether it considered as adultery or not.

B. False accusation (Qazaf)

This offence may be defined as an unproved allegation that an individual has committed zina.

In Qazaf, there are primary punishment, that is jild (flogging) and subsidiary punishment that is rejection to his or her testimony.

The quantity of jild is eighty stripes, no less and no more. If the adulterer repent, according to imam Abu Hanifah, his or her testimony still can not be accepted. But according to iman Malik, iman Shafii, and Imam Ahmad, her or his testimony can be accepted again after repentence.

This punishment has been laid down in the Qur'anic verse: "and those who accuse honourable woman and bring not four witnesses, scourge them with eighty stripes and never afterward accept their testimony. They indeed are evil doers." (24:4).
C. Drinking wine

In the Qur'an, the drinking of alcohol and various other actions, such as usury (riba) and eating the flesh of swine (aklal khinzir) are simply declared to be forbidden (haram).

All the school of Islamic law consider the drinking of Alcohol to be a crime for which a hadd punishment is prescribed. Although they disagree about the number of lashes which should be inflicted, they all claim it to have been fixed by the prophet. According to the Hanafi school punishment for drinking is eighty lashes. The same view is held by the Maliki and Hambali school.

According to another Hambali view, and to the Shafii, Zahiri and Zaydi schools, the punishment is only forty lashes, although he then allowed the addition of lashes up to eighty lashes if the imam intend to do it. So the extra forty lashes, according to imam Shafii is considered as ta'zeer.

The reason behind the differences of opinion about the number of lashes is that the holy Qur'an did not determine it clearly and definitely and so does what have been practiced by the prophet and his disciples. Some times, the prop

het lashed wine drinker with few lashes and some other times with much lashes, but never exceed than forty lashes. In Umar's time, wine drinkers were inflicted with eighty lashes, while Abu Bakr inflicted forty lashes for them. Inflicting of eighty lashes for wine drinkers during Umar period,
was determined on the basis of deliberation result amongst disciples of the prophet on proposal of Abdurrahman Ibu Auf. And the reason behind it that the wine drinkers begin to increase at that time. While in Ali period wine drinkers inflicted by eighty lashes by analogy of false accusation. The source of this punishment is to the following saying of the holy prophet.

"the person who drinks wine, scourge him with lashes and if he drink again, lash him again.:

D. Larceny

Larceny in terms of punishment can be divided into two kinds; larceny threatened by hadd and larceny threatened by ta'zeer. Larceny threatened by hadd punishment is divided into two; sariqoh sugho (ordinary larceny) and sariqoh kubro (big larceny/robbery) also known as hirobah. Punishment for theft is prescribed in the Qur'anic verse: as for thieves, both male and female, cut off their hand, it is the recompense of their own deeds an exemplary punishment from Allah. (5:38).

The punishment of hand amputation can not be pardoned if the case have been submitted and handled by the ruler accordance with the hadist of prophet; "keep away punishment amongst you, if the case has reached in the hand of Imam, therefore Allah will not forgive him, even the victim forgive him". (narrated by Hakim from Ibu Umar). 76

Nearly all jurists (Imams) agree that the thief's right hand should be
amputated from the wrist for the first theft. But they differ in respect of subsequent thefts.

According to the four Sunni school, if there is a second theft the thief's left foot should be amputated. The Hanafi hold that for subsequent thefts there should be no further amputation, and that the only way to punish the offender is by ta'zeer.⁷⁷

On the other hand, the Malikis, Shafiis and Ahmad b. Hanbal hold the view that for the third theft, the left hand should be cut off, and for fourth, the right foot.⁷⁸

According to Atha's view, the thief who has committed the first theft, his hand should be amputated. If he committed the second theft, he should be punished by ta'zeer, as the reason is that in the holy verse, there is no commandement to cut off the foot.⁷⁹

The different view was expressed by Ibn Hazm in Al Muhalla. He claimed that the Qur'anic verse previously cited allowed no amputation except the theft's hand. Thus according to Ibu Hazm's understanding of this verse, in the second theft, the left hand should be cut off, while for subsequent thefts there should be no further amputations.⁸⁰

As to compensation to section of theft, the jurist differ in their view. Hanafi school jurists, generally have opinion that the owner of property can claim the return of his property after the thief had suffered sanctioned punishment.
If the property is still found, whether in the hand of the thief or had been handed over to other person, therefore the victim can ask for compensation from the thief. While according to Abu Hanafi, compensation and sanction cannot be combined, it means, if the hadd punishment have been inflicted on the offender, therefore, no compensation should be paid by him. But, Imam Shafii and Imam Ahmad hold a view that sanction and compensation can be combined because according to them, offender have violated two rights that are the right of God in the form of prohibition of larceny and the right of man in the form of taking some one's property illegally.

Thus, if the goods still be in the hand of offender, all jurists agree that the offender should return it back. However views differ, if the goods are not in the hand of thief any more.

E. **Blood sheed (Al Hiraba)**

Three terms are used for this crime: Al Hiraba, or armed robbery, al sariqa Al Qubra or the great theft and Qat'al tariq or high way robbery, the three terms are used interchangeably by the jurists and in the book of figh.  

It may be noted that the difference between the crime of theft and the crime of armed robbery appears in the basic element of each crime. In theft, the basic element is the taking some one else property by stealth conversely, in armed robbery it is the intention to take property by force.
The Qur'anic verse prescribed four punishments for the crime of hiraba, i.e., death penalty, crucifixion, cutting of the hands and feet on the opposite side (the right hand and the left food or vice versa) and banishment (nafi). In the text of Islamic law, we find lengthy discussions about the inflicting the punishments prescribed in the Qur'anic verse.

To summarize this discussions, one can divide the jurists into two groups. The Maliki and Zahiri schools hold that the judge has the right to choose the punishment suitable in each case and to impose it. To explain this freedom of choice, Al Qarafi stated that the judge has to do his best to determine what is most beneficial for the community and then to act on it.\(^\text{83}\)

On the other hand, the Hanafi, Shafii, and Hanbali schools deny the judge this authority, holding that this crime involve more than our possible punishment, depending on the manner in which the criminal act is committed. Thus, if the criminal kills his victim, he should be sentenced to death; if he steals his money, he should have his right hand and left foot cut off, and if he threatens travellers, he should be banished, in other words, the imposition of punishment is to differ according to the nature of the crime and not according to the nature of the personal character of the criminal.\(^\text{84}\)

**F. Apostasy**

Apostasy in Islamic criminal law means turning back from Islam after being a Muslim.
The common view among Muslim jurists, as well as among western orientalists is that apostasy from Islam is a crime for which the death penalty is prescribed.

The majority of the Muslim jurists classify this punishment as being in hadd category.

Nearly all Muslim jurists recognize two punishments for apostasy: the one is primary punishment which is death penalty and the other is subsidiary which is confiscation of property.

Some jurist stated that the punishment for apostasy is submitted to Allah. There is no profane punishment for him. As the reason for that view is the saying of God in Surah Al-Bagorah verse 217, only indicate the futility of his good deeds and eschatological sanction is in hell for ever.

As for, the hadist narrated by Ibn Abbas, said "whomsoever change his religion, kill him," this hadist apparently, revolve due to a lot of jurist at that time, discussed the matters about different punishment for man and woman, the importance of giving opportunity to repent as well it's time limit to repent. Beside that, this hadist is hadist ahad that can not be a basis for inflicting hudood. Another reason is that the (infidel) apostasy itself does not make some one allowed to be sentenced to death, the reason which permitted the death penalty for infidel or unbeliever is if he war on and fight against Islam. This is also in accordance with what is stated by Muhammad S. EL-Awa;
To sum up, the Qur'an prescribed no punishment in this life for apostasy. The prophet never sentenced a man to death for it. Some of companion of the prophet recognized as a sin for which there was a ta'zeer punishment as did some jurists. Actually, Islamic law considers apostasy as the most major sin and the limits for ta'zeer are not in its case of binding force, thus a court may either sentence an apostasy to death, imprison him, or prescribed what ever other punishment it thinks appropriate. Also, the law makers of a muslim community may enact what ever punishment they feel to be suitable for this offence.

G. Rebellion (Al baghyu)

There is no agreement amongst Islamic jurists about definition of Al-baghyu. The Hanafi jurists define it as the exit of the one from the obedience to legal Imam (leader) without reason.

While shafiyyah jurists stated that rebel is muslim who violate the imam (leader) by the any of not obeying him and release from him or refuse the obligation with having force and having leader.\textsuperscript{85}

The rebels are responsible for criminal acts, specially after and before rebellion. The crime at the time of rebellion are two kinds :\textsuperscript{86}

The crime which is directly related to the rebellion and the crime which have no direct relation to the rebellion. The crime which is directly related to the rebellion, such as : destroying the bridges, bombarding weapon wire house, killing or capturing leaders. So all of that should be
punished by punishment of rebellion which is submitted to the ruler, that means may be sentenced to death. For the crime which have no direct relation with the rebellion such as drink alcohol, fornication which they commit in the time of rebellion where they persist should be responsible to their act as an ordinary hudood classification.

**Qisas (equal punishment)**

The Islamic Shari'a has prescribed Qisas (equal punishment) or retaliation as the punishment for intentional homicide and wound caused intentionally. The crime involving Qisas and diyat are as under:

1. Intentional or felonious homicide
2. Quasi intentional murder
3. Unintentional homicide
4. Intentional infliction of wound and
5. Unintentional infliction of wound

The meaning of Qisas is that the offender is to be awarded punishment identical with his offence: he would be killed or wounded in the same way as he kills or wounds his victim.

The legal cause of imposing Qisas are as under:

Al-Isro : 33;

"nor take life which God has made sacred, except for just cause and if anyone is slain wrongfully, we have given his heir the authority (to demand
Qisas or to forgive) but let him not exceed bounds in the matter of taking life: for he is helped (by the law)".

Al-maidah : 32

"For me I intend to let thee to draw on thyself my sin as well as thine, for thou wilt be among the companions of the fire, and that is the reward of those who do wrong."

Al-Furgon : 68, 69.

"Those who involve not with God, any other God nor slay such life as God has made sacred except for just cause, nor commit fornication and any that does this (not only) meet punishment (but) the penalty on the day of judgement will be doubled to him, and he will well therein in egnominy."

Al-bazorah : 178, 179

"O Ye who believe! the law of equality is prescribed to you in case of murder, the free for the free, the slave for the slave, the woman for the woman, but if any remission is made by the brother of the slain, than grant any reasonable demand, and compensate him, with handsome gratitude. This is a concession and a mercy from your lord. After this, whoever exceeds the limits shall be in grave penalty in the law of equality there is (saving of) life. To you, O Ye men of understanding, that ye may restrain your selves."

In retaliatory punishment, the victim and vis lawful heir have the right to forgive the offender. Hence if they do forgive, the punishment of Qisas would stand invalidated. This remission may either be without
compensation or involve blood money. But pardoning or remission does not mean that the person in authority can not award appropriate penal punishment. In relation with the pardoning or remission, all the jurists agree on the pardoning of Qisas, and consider it as most important thing than accusate it. This thing is in accordance with God's saying in Surah Al-Bagorah: 178 as stated above and Surah Al-maidah 48 as under:

"We ordain therein for them, life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal. But if any one remits the retaliation by way of charity, it is an act of atonement for him self, and if any fail to judge by (the light of) what God hath revealed, they are (no better than) wrong doers."

Beside of that, Anas Ibn Malik narrated:

"as far as I know, every case of Qisas reported to the prophet, so, he always order to be remitted." 87

What is meant by remission, according to imam Shafii and imam Ahmad is forgiving the Qisas and diyat with out any compensation. While according to Imam Abu Hamifah and Imam Malik, remission or pardoning toward diyat can be realised if there are the willingness or agreement of offender. Thus, according to Imam Malik and Imam Abu Hanifah pardoning or Qisas is without any compensation, while pardoning diyat is considered as a reconciliation not pardoning.

And one who have the right to give pardoning is the one who have right to claim it, while the one who have right to make reconciliation is the one
who have right on Qisas and pardoning. And through reconciliation the offender can pay compensation less, equal or more than diyat.

**Diyat or price of blood**

Diyat has been prescribed by the Shari'a as the basic of substantive punishment for quasi intentional and in advertent homicide or infliction of wound.

Diyat in intentional homicide is not a primary punishment but as substitutionary punishment toward Qisas if Qisas can not be realized or abrogated due to special causes.

Diyat is the fixed blood price which is taken from the offender and given to the victim of his lawful guardian. Although this price is received as a punishment, it is never deposited in the state treasury, but become the property or asset of the victim.

Kinds of diyat punishment according to Imam Abu Hanifah and Imam Malik are three kinds: those are a hundred camels, a thousand dinar in gold or twelve thousand silver dirham.

There is no difference between the diyat of a child and an adult, the weak and the strong, the law brows and the high brows, the ruler and the ruled. Diyat is imposed on the goods or property of the offender or on the family if he can not pay the whole of diyat, whether it is diyat for life or what is less than life.

The source of this punishment is the Holy Qur'an (4:92):
"never should a believer kill a believer, but (if it so happen) by mistake (compensation is due, if one (so) kill a believer it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely. If the deceased belonged to a people at war with you, and he was a believer, the freeing of a believing slave (is enough). If he belong to a people with whom you have a treaty of mutual alliance, compensation should be paid to his family, and a believing slave should be freed. For those who finds this beyond their means, (is prescribed) a fast for two months running, by way of repentance to God, for God hath all knowledge and all wisdom."

The prophet (saw)'s verdict in this connection is as follows:

"whoever is killed in advertently as by flogging or beating with a stick or being hit by stone, his blood price is a hundred camels.88

*Diyat of a hundred camels known as a complete diyat, whether it is heavy or light. While if the blood price less than complete diyat is termed as arsh. There are two kinds of arsh: the fixed arsh and the unfixed arsh. The fixed arsh is that the quantity where of has been determined by the law giver. For instance, so much arsh for a finger and so much for a hand. Unfixed arsh is that, the quantity where of has not been prescriber in the holy Qur'an or Sunnah, and whose amount depends on the discretion of the court. This unfixed arsh is also knwon as the ruling of the government or the fair judgement.*
Penal Punishment or ta'zeer

As have been stated previously that every act which have been prescribed it's punishment by Al Qur'an or hadist is called hudood crime. While the act (crime) which have not prescribed its punishment by Al Qur'an and as sunnah is called ta'zeer, for instance, breaking the promise, belitting, bribery, false witness.

The word ta'zeer is derived from the verb 'asar which mean prevent, to respect and to reform. The verb is use in it's first and second meaning in the holy Qur'an. However, in islamic legal terminology ta'zeer is a punishment aimed firstly at preventing a criminal for committing further crimes, and secondly, at reforming him.

With the exception of offences involving hudood, qisas and for which specific punishment have been laid down, penal punishments also constitute basic punishments in the case of hudood and qisas offences when they may be awarded as alternative penalties. Hudood crimes can also change into ta'zeer crimes, if there are any doubt like wise, if hudood crimes do not fulfill requirements, for instance attempt of theft, attempt of murder. And other form of ta'zeer crimes are crimes where its kinds and forms determined by the ruler although it must always suitable or not contradict with the values, principles and the aim of shari'a. In other words, ta'zeer as a penal punishment also can be utilized to determine and punish the crime that be and develop due to the development of society and era where it has not been prescribed in Al
Qur'an and hadist such as, punishment for environment degradation, traffic matters, computer crime etc.

The jurists, generally allow the merging of fixed punishment (hadd) and penal punishment (ta'zeer) as long as it is possible.

The jurists divide ta'zeer into two:
1. the crime related to the right of God and
2. Crime related to the right of person.

The crime related to the right of God means every thing related to the public benefit for example: cause the destruction on earth, robbery, larceny, disobey the legal ruler etc. while what is meant by crime which related to the right of person is every thing can then threaten individual benefit, such as, person not paying the debt, denunciation etc.

The Kinds of ta'zeer

Unlike hadd punishment for qisas, ta'zeer punishment has many varieties and the judge can choose the one suitable to the particular crime, depending on criminal circumstances, psychological condition, his record etc. Although the judge has a wide range of punishment that he can select, but the authority of the judge is limited by his obligation not to order a punishment which is not allowed by Islamic law.

The punishments allowed as ta'zeer as below:

A. Admonition (al wa'z) exhortation etc

Admonition means reminding the person who has committed at
transgression that he has done unlawful thing for example, as the first stage in dealing with wives in case of disobedience, the holy Qur'an says: "as the these woman on whose part you fear disloyalty and ill conduct, admonish them (first) (4:34)

B. **Repriment (al-tawbikh)**

Repriment may be through any word or act which the Qadi (judge) felt sufficient to serve the purpose of ta'zeer. Jurists usually refer to some specific words or acts as a means of repriment. However, may vary according to the offence and conduct of offender.  

C. **Threat (al-tahdid)**

Threat is a ta'zeer penalty by means of which the offender may induced to mend his behaviour out of fear of punishment, it may consist of threatening him with punishment, if he repeats what he has done, or by pronouncing a sentence against him the execution of which is delayed until he commits another offence (within a given period of time). A part from the normal condition of the suitability of the ta'zeer punishment, implementation of the threat, in the even of another offence, must clearly be intended.

D. **Boycott (Al-hajr)**

Boycott as a ta'zeer punishment is recommended by the Qur'an (4:34), and it was practical by the prophet in the case of the man who did not
participate in the campaign of Tabuk. Hazrat Umar (R.A.A) instructed the people to have no intercourse with rebel, in addition to awarding him the punishment of flogging and banishment. Accordingly no body talkes to him until he repented and the governor of the town reported it to Hazrat Umar (R.A.A) who then, allowed the people to end his boycott.  

E. Public disclosure (Al-tashhir)

According to Fugoha (islamic law jurists) ta'zeer punishment in the form of announcement of the offender act is intended in order that offender to be frightened and other people would not do the same crime. And this sanction is hoped to have represive and preventive effect.

Among crime where punishment is given as examples by jurists are false witness, larceny moral distraction, judge arbitrariness selling and buying prohibited goods. From those examples it appears that ta'zeer punishment which take form as public disclosure or announcement of ofenders crime, it implemented in response to crimes which have great impact or influence and are dangerous to the society. 

As for, the basic of this public disclosure punishment is Umar decision on a false witness on whom has been inflicted flogging punishment then paraded around the town. According to Shuraih, a well known judge who served under Umar and Ali, the false witness must be publicly identified in order to warn people not to trust him. The means of public disclosure usually consisted of the taking of the offender by some of the judge
representatives to every part of the city and telling the people that he has committed an offence for which he had received ta'zeer punishment.  

F. Fine

The first view is held by the Hanafi school and some of the Shafii. According to the Imam Malik, the Imam Ahmad bin Hambal, the Imam Abu Yusuf, the famous Hanafi jurist and some of shafii's, financial punishments are allowed as ta'zeer. The Hanafi jurist explained that the view of the Imam Abu Yusuf means that the Qadi, or the ruler, should keep the offenders money away from him until he has repented. On the other hand, the jurists who deny financial punishment as a lawful ta'zeer punishment claim that it was legalized in the beginning of Islam but abrogated afterwards. Tahawi was the first jurist who expressed this view in his famous book "Sharh Ma'ani al Athar" (explanation of the meaning of the tradition). This claim of abrogation was, however, strongly rejected by ibn taymiyya and his student, Ibn Al Qayyim on evidence taken mainly from the prophets practices and from some of his companion decision. It is an established fact that fine has been imposed as a penal punishment under shariah. For instance; fine for stealing fruit by plucking it from its tree, is double the price of the stolen fruit. The offender will be liable to some appropriate penal punishment in addition to fine in accordance with the following edict of the holy prophet (saw):
Whoever steals some thing is liable to fine equal to double the values as well as punishment.  

G. Imprisonment (Al-habs)

Al-habs literally means restrain. According to ibn Qoyyim, Al-habs means to restrain some one in order not to act crime, whether that restraint take place in house, in mosque or many other places. Thats, what al habs means in the time of the prophet and Abu Bakr. But when the muslim communities and Islamic theorities grew bigger and wider. In the ruling time of Umar, he bought the house of syafwan bin Ummayah with the price 4000 dirham and further the house transformed into a prison. On this basis, most of the Ulema allowed the ruler to build a prison although, there are the Ulema who does not allow it because the prophet and Abu Bakr never build it, though ever have arrested some one in his house or in mosque.

The jurists who allow prison punishment beside have reason on Umar action as has been explained above and Ustman action that imprison Zhabi Ibn Harits, also well founded on Ali action where he imprisoned Abdullah ibn Zubair in Mecca. This prison punishment can be as primary punishment also can be as subsidiary punishment in ta'zeer.

In Islamic law, imprisonment is of two kind, imprisonment for a definite term and imprisonment for an indefinite term. Imprisonment for a definite term may be inflicted for minor offences, the jurists prefer flogging as
the punishment for major ta'zeer offences. 

The minimum period for imprisonment is one day, but the schools hold different views concerning the maximum period. Some of period hold the view that the maximum period of the imprisonment is two or three month, and some other have opinion that the maximum period of imprisonment is submitted to the judge in accordance with the condition of offender and kind of its crime. The shafiyyah jurists hold the view that the maximum limit of imprisonment's period's is one year by analogy to banishment.

Imprisonment with unlimited period can be in the form of life long imprisonment. It also can be limited up to the repertance of the offender. As for imprisonment for an unlimited term, it is imposed on habitual criminal who, in the judges view can not be reformed by ordinary punishments.

All the school of Islamic law authorize this punishment to last either until the criminal's repertance, or until his death in the case of dangerous criminal.

**H. Banishment**

We have already referred banishment in the context of the punishments for fornication.

Hanafi school considers this punishment as an additional ta'zeer punishment for fornication, while other school consider it as hadd.
Generally, this punishment is imposed on offender of dangerous crime and worried to give influence to others consequently, the offender must be banished in order to avoid that influences.

I. Flogging (al-jild)

The punishment of flogging is one of the basic penalties laid down by the Islamic shari'a, as it constitutes one of the hudood. It is also included in the ta'zeer. As a matter of fact, it is preferable to all punishments for dangerous ta'zeer offences.

In accordance with Hanafi schools, Jild or flogging in ta'zeer can not exceed the limit of hadd punishment by the reason of:

"Whoever imposed a punishment reaching the limit of hadd punishment on other than fixed crime (hudood)), so he is one of those whose over act exceedingly (narrated by Al Baihaqi from Nu'man ibn Basheer and Al-Dhahar."

As for, the minimum limit of flogging in ta'zeer is considered as jitihad matter. Cause by that, it is proper if the different opinions occur amongst jurists. Only that, for the sake of law certainty, the ruler is entitled to determine the minimum limit by the reason of the criminal law matters related to the benefit of society.

Among the views of the jurists about this matter is the view of the jurists of Hanafi school where generally stated that the flogging as a ta'zeer for which of its minimum limit, must be able to give preventive and refresive impacts to the offender as well as the communities.
J. The death penalty (al-ta'zeer bil-Qatl)

As has already been mentioned, the death penalty or hanging is prescribed as a hadd for an offence involving blood shed and according to some jurists, the offender is to be hanged alive and then slain. As a matter of fact hanging as a hadd is a punishment of high way robbery and on this ground some jurists have expressed the view that hanging way also be a ta'zeer punishment. According to Hanafi texts the offences in which death penalty is imposed are adultery, dacoity, the murder where in qisas can not be imposed and those offender whose harmful conduct may not be stopped by other punishment. For the Maliki school, the principle that the ta'zeer punishment should fit the crime, the criminal, and the victim as absolute application. ¹⁰¹

Thus, the death penalty is permissible in certain cases, where either the offence itself is of a very serious natural, such as spying for the enemy, or propagating heretical doctrines, or practices which split the community, or the criminal is habitual offender whose wickedness can only be so stopped. The shafii and the Hambali school allow the death penalty to be imposed in some cases for which it is allowed by the Malikis. ¹⁰²

The punishment mentioned above are important ones and may be imposed for any offences what soever, but there are other punishments which are not common and can not be awarded for every offences.

The more important of these other punishment are as follow. ¹⁰³
1) demotion: these holding public offices whether as public servant or in honourary capacity are liable to this punishment,

2) deprivation: this mean to diprve the offender of some the rights he legally enjoys, for instance the right to testify, holding of an office, diseritance of a share in the booty to a slain person and invalidation of wife's expenses for living.

3) confiscation: this applies to all the instruments used in committing of an offence and all forbidden things.

4) making amends: it means eradication of the effects produced by the offender as criminal act, for instance demolition of a building constructed on thorough fare, destruction of utensils used for drinking wine and mixing water in milk.

These punishment are also included in the law enforce and are put into effect.

That are all of kinds of punishment found in islamic punishment stelsel that generally known.

As for ta'zeer punishment as one of important punishment in Islamic criminal law system, applicable to face the social change.

Change in law, like in society, is parennial, the case of Islamic law, change applies to its interpretation, approach and application, although the material sources remain unchange.

In ta'zeer punishment, there is no restriction, as far as the islamic law manual are concerned, on the judges authority to choose the punishment.
he considers suitable for the crime keeping in view the criminal's character and the victim where applicable. All kinds of punishments stated above will be imposed on offender if all conditions or requirements demanded including all elements of every crime are fulfil. Moreover, before imposing the punishment, the judge must be convinced that the act is a really evil and the offender committed with out the fact of being forced and there is no intigating factor (criminal defences) also it should to be determined, in how for the responsible capability of offender, it means there must not be any doubtness at all when imposing penal sanction.

This principle too is supported by the prophet saying:
"avoid realization of punishment in doubtfulness".

Beside that, islam obligate the carefulness in imposing the punishment. The following events described how much the carefulness needed and how important the condition or requirement that there must not be any doubtness in imposing the punishment. If there is any doubtness, even slightest of it, therefore the primary punishment can not be impased or no punishmetn at all.

As for the incident that took place during the time of the caliph Umar as follow:
"reported to the caliph that some of boys who work for Habib ibn batar, have stolen she camels belong to the one of muzkah people, when Umar ask those boys, they confessed to having stolen, and Umar ordered that
their hand to be cut off. But when he thought twice, he said at last" for the
God sake, I would cut off their hands, if I do not know that you employ
them, but you make them starving until allowed for them to eat what is
prohibited to them, for God's sake, due to that I don't amputate their hands
but I will punish you instead, amputate their hands but I will punish you
instead, with fine inflicted on you" and he ordered the employer to pay
doubled price of that she camel.104

The diversity of punishments in Islamic treasury as stated above, can be
seen that there are kinds of punishment which have eternal character such
as hudood, qisas and diyat. Beside that there is ta'zeer which has unlimited
and changeable character, where it can be developed and formed in
accordance with the demand of society in a developing of era.
4. THE BASIC PRINCIPLE OF PUNISHMENT

Islam does not recognize the dichotomy of worldly life and hereafter life, material life and spiritual life. Basically, according to Islam there two lives are two sides of a coin and are inter related. The obedience of Muslim in serving, implementing the law that organise his life is asset, requirement or vehicle for reaching of the hereafter life beside indeed, including for pursuing the goal of worldly life.

So, material life or profane life and spiritual life (religious life) is realized together. It is in accordance with thesis that stated by the prophet Muhammad; "whole of this earth is mosque".

Like wise, between the individual life and social life, the integration of mankind is imperative.

Muslim is obligated to live as an integrated comminity, guard the collectivity, but beside that Islam also respect the individual right. Thus muslim as an individual human being with his collective life is united and complementer.

The place which for to serve all of life activities is society or a state. So it is also in accordance with the goal of state in islamic view.

"The state according to Islam, is not intended for the goal of administrative and political only, and also not for fulfilling the collective demand of certain people, so, the state is not the last goal, but it is only a mediator to achieve the last goal."
All the fundamental policies that have been determined by Al Qur'an and Al Sunnah are based on the principle of justice, truth and honesty, can not be changed by state.

All citizens of state including the head of state are equal before the law. For administrative purpose, Islam does not recognize the liberty of legislation. For it would be incompatible with the ethical control of human actions and ultimately of society.¹⁰⁶

The executive needs no clarification as it is concerned with the carrying out of the law of God which is complete in itself and punishment are well defined in case there is any difficulty the rule of necessity may be invoked.¹⁰⁷

The judiciary in Islam is independent of the executive, but is bound by the Qur'an and the Sunnah for those who do not judge by what God has sent down are the disbeliever (5:44), wrong doers (5:45), law breakers (5:477).

Even so with the other system of life, beside system of law, such as politic, economy, socio cultural etc, all of them, are interlinked, depended and complementary to active one goal, that is to implement and realise the God commands as the ruler, the excator of whole universe, or the prosperity of mankind under the protection of Shari'a. All of that basic principles as stated above prevail in all systems of life including the system of punishment. Punishment system in Islam is based on the same fundamental principle with what have formed the islamic basics its self.
The basic values and principles for building the fundament of Islamic society with all of its system including criminal law system with its punishment stelsel are tawheed (the unity of God), Risalah (the prophet hood of Muhammad) and Khilafat or caliphate (vicegerency of man).

**Tawheed (the unity of God)**

According to Al Qur'an tawheed contain the meaning that Allah is one in his substance, one in his character and one in his act.

One in his substance means there is no God but him and no ally for him,

One in his character means there is no other substance exceed one or more of his perfect divinity character.

One in his act means, there is no one can do whatever has been done or probably will be done by God.

With this concept of tawheed, Islam prohibit worship, and absolute obedience to the other except God. The tawheed doctrine also award to the human amandate about progressing of life quality and improving the development in every aspect, whether in material, spiritual, moral, etc.

Tawheed will liberate human from slavery and devotion to fellow human, goods or wealth, position, status etc, although the searching of wealth or property, status, position and obedience to leader is compelled required in Islam, but some how, remain in certain limits and not exceed than love and obedience to God.

No one is allowed to occupy position or dignity over than dignity of ordinary human even the prophet Muhammad, the most perfect man, as
commanded by God to say, "I am but a man like your selves (but) the inspiration has come to me, that your God is one God", (18:110), further, God says;

"God, there is no God he, the living, the self subsisting, eternal, no slumber can saize him nor sleep. His are all things in the heavens and on earth. Who is there can intercede in his presence except as he permitted? He knoweth what (appeareth to his creatures as) before or after or behind them. Nor shall they compass rought of his knowledge except as he willeth. His throne doth extent over the heavens and the earth, and he feeleth no fatigue in guarding and preserving them, for he is the most high, the supreme (in Glory) (2:255).

Thus, tawheed free human from the shakle of slavery that bound the soul, and more over tawheed contain the ideals of mankind union, because all the mankind are equal before God and obey only to one absolut authority and persue one goal that is the God's favor.

Al Qur'an said in surah Al-Mulk verse 1;

"Blessed be he, in whose hand is dominion and he over all things hath power".

And At-Imran : 64;

"Say, o people of the book, come to common terms as between us and you that workship none but God, that we associate no partners with him, that erect not from among our selves, lords and patrons other than than God,
if the turn back say ye : bear witness that we (at least) are muslim (bowing to God's will)"

These verse indicate that God is independent, self sufficient, not asking advice from any one and not giving accountability to anyone.

"He can not be questioned for his acts, but the will be questioned (for theirs)" (21:23).

Allah is the source of all power and authority and it can not be limited or bound.

"and recite (and teach) what has been revealed to thee of the book of thy lord; non can change his words, and none wilt than find as a refuge other than him". (Al-Kahfi : 27).

God is face from any mistake and only he who has the sovvereignty that will never end.

In law activities, only God as the authority, the ruler and the law maker. This tawheed principle abolish concept of politic sovvereignty and law of human. This doctrine also contain principle or theory of equality before the law, by the reason that all of human are equal before God (the law), the ruler and the law maker, no distinction or discrimination on the ground of race, group position, states etc.

God says in the holy book;

"O mankind we created you from a single (pair) of male and female and made you into nations and tribes, that ye may know each other (not that ye may dispice each other) verily, the most honoured of you in the sight of
God is (he who is) the most rightious of you and God has full knowledge and is well acquainted (with all things)" (49:13).

The principle of equality before the law or theory of equality newly exist in the system of man made law at the end of eighteenth century or the beginning of nineteenth century, while Islam has already recognized and applied this principle even on wider scale at the seventh century. With this principle of equality that is based on tawheed doctrine, therefore, the proporsional justice principle can be achieved. By the principle of tawheed, law enforcement can be well supported because fear of God by means of obeying him, it also meant of obey and enforce the law that it will lead the progression of human life. On the contrary, the violation or the disobedience will cause obstruction to progress and create destruction. Beside that, this doctrine also contain the principle of layality or obedience that it is very much need for the sake of existence of law enforcement. This kind of obedience is more valuable than the obedience caused by man made law, because the obedience toward God promised a reward in the form of merit and torture for disobedience in life of here after.

Inspite of that, tawheed is also related to the doctrine of the here after life.

The doctrine of tawheed and the doctrine of here after are deeply inplanted in the heart of every muslim more than man made law. The moral force that
come from man made law with all of its intrument proved is not always effective to prevent the precipitation of criminal acts.

Fazlur Rahman discribe the importance and significance of here after doctrine as under:

Frequently, the occurrence of the inharmonious of world with the ideals moral, especially in case where moral sincere efforts defeated or made prustated by those who have evil motive for doing moral violation, apparently, it almost shake the moral loyalty.

But, moral conciousness oppose to all of idea that the benevolence will remain not find orl bring the equitable merit as well as will be prustated, and the crime and evil will flee from retribution whether apart or full of it.

Cause of that, for facing as well as and make perpect the moral struggle as well to make it realize and to absorb in mind the reciprocal character between the benevolence and success, evil and punishment, therefore the moral consiousness require that the man must be alive again after death. Moreover, the exertion efforts to achieve a moral ideals can not be expected from mankind with out the belief of here after life. The belief of the here after life will make easy to inplant moral concept and even it will make easier to base some one's life for the sake of moral ideals. In the principle of tawheed are also found the restriction theory of competency or right of judge and ruler. This is intended in order that the judge will not act arbitrarily.
Generally there are three principles that restricts the authority of judge. The principles are; the limited authority of judge, responsible to violation and guilt that he has done, and giving freedom and opportunity to people to dismiss him if it is considered as importance.

The history have recorded a lot of consequences caused by ruler and judge whom have been given the absolute authority. In islam, the duty of judge and the ruler are to implement what have been determined by God, and for certain fields, he has freedom, but still limited and should always refer to the Qur'an and the hadist in determining punishment.

*Risalah (the prophethood of Muhammad)*

There is a vehicle that given to mankind to accept the law of Allah which is known by term of al risalah (the prophethood).

The mission carried out by messenger is to convey the Gods' saying to mankind, and to propagate and to spread out the God's tents as well to implement it on the earth.

All of this constitutes a mission of all prophet that exist since man occupy and leave on this earth till the last messenger of Muhammad.

A messenger is not only to carry out the mandate of God, but also should give direction how to practice that mandate in the daily life. For that reason, the messenger is the example or good model that should be followed. The messenger sent to reform and liberate human from the slavery of evil.
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Have a source from the prophethood mission, there are two things which should be accepted that are; (a) Al-Qur'an the holy book where God has laid down his law and (b), giving and providing a good model and the true interpretation of Al Quran contents by prophet Muhammad.

The prophet Muhammad has set up Islamic life model according to the God's saying by practical method in implementing the God law and giving the needed important detail. The combination of both constitutes the highest sources of law in islamic law.

Allah says in the holy Qur'an;

"we sent a fore time our apostles with a clear signs and sent down with them the book and the balance (of right and wrong), that man may stand forth in justice, and we sent down iron in which is (material for) mighty war, as well as many benefits for mankind, that God may test who it is that will help, unseen, him and his apostles for God is full of strength, exalted in might (and able to enforce his will)" (57:25) and,

"a similar (favour have ye already received) in that we have sent among you an apostle of your own, rehearsing to you our signs, and sanctifying you, and instructing you in scripture and wisdom, in new knowledge". (2" 151) and then,

"ye have indeed in the apostle of God a beautiful pattern (of conduct) for any one whose hope is in God and the final day and who engages much in the praise of God (33:21)."
The important principles needed for reforming the law such as principle of justice, equality, truth, etc, will exist by itself, if the law which based on the holy Qur'an and the Sunnah being enforced and implemented.

*Khilafah or caliphate (representation or viceguence)*

The caliphate is the third basic principle in islamic law system. The word khalifah literally means representation. The place and the position of man according to islam is act as vicequence of God on earth cause by that, his every acts or conduct in every aspect has the standart which, have been determined by God through Al Qur'an and As Sunnah. With that reason, God and his law is the center of rotation and control of human activities. The truth and deepest value of human will be determined by his relationship with God, him self, fellow mankind and with nature. Like wise in enforcing the law, he must act in accordance with the rules and law that has been prescribed by God and his apostle. Because he (man) is only implementer, representative of God and not as a maker and ruler.

The concept of representation discribed by Al Qur'an in surah Al Baqorah verse 30 is as follows:

"Behold, thy lord said to the angels, "I will create a vicegerence on earth", they said "will thou place there in one who will make mischief there in and shed blood?" whilst we do celebrate thy praises and glorify thy holy (name)?" he said
"I know what ye know not".

And in Surah Sadd verse 26;

"O David; we did indeed make the a vicegerent on earth, so judge thou between men in truth (and justice) nor follow thou the lusts (of thy heart) for they will mislead thee from the path of God. For those who wonder astray from the path of God, is a penalty grievous. For that they forget the day of account."

Thus, the vicegerency concept make man whether he is a ruler, a leader or ordinary people, avoid and keep away from arbitrary character in implementing all his activites, because he is a vicegerent of God on earth, he must account for all his acts before God. It means, among human, there is no ruler "and" the ruled.

The knowledge given by God to human about God him self, about his laws with it's sanction, where all of that have positive effect for establishment of moral and characteric.

The vicegerency concept obligate muslim to prohibite evil deeds and order the good deeds (Al-amru bilma'ruf wan nahyu anil mungbar). With this obligation, Islam can create it's society wary on anykind of state and or outhority which act out of bounds.

The prophet has said that the best jihad (holy war) is declaring the truth in from of the arbitrar and despotic ruler.

If some one has died in defending his right, he is honoured with the martyr status (shaheed).
The prophet also said that; whom soever one of you see an evil deeds, therefore he should stop it by his hand, if it is not possible, then by his tongue, but if it is too not possible, then he should hate it by his heart and this is the form of the weakest of faith (imam) (narrated by Abu said Al Hudriy).

The above hadist form of a basic theory of social control. In Islam this right given to even a common man. And conversely if the people oppose his the right and just rulers and make harm, therefore the rules can give mandate to punish them. Thus, the concept of tawheed, risalah and vicegerency with it's the have after doctrine constitute of the source of community inspiration that will never end to fight and prevent any form tyranny and despotism.
5. THE GOAL OF PUNISHMENT

In Islamic legal terminology, the goal of sharia (jurisprudence) is more popular with designation "maqasidul tashri" where basically that goal refer to principles of established lifes such as materialization of general welfare, justice, equality, integration, approval, humanity. Therefore Islamic law intrinsically applicable to every condition although the configuration can change in accordance with needs of situation. If we look into the holy Qur'an, the obligation of punitive action beside as law obligation, it is also moral obligation as well as spiritual's. While in secular system it only considered as legal obligation. This is undeniable fact. Al-Qur'an view about the essence of law is that the values which form the pulse of social community, must be preserved although have to take the life out of the offender or beheaded him if it is necessary. No need to be soft where at the end even cause law evasion, it cause degradation of respect towards moral standards.

The penal system in Islam with its gradation, from heavy to light punishment its goal is generally to materialize the general welfare of society in this world and hereafter, avoid the disadvantage and distraction, and materialize justice for society without discrimination.

The above goal must remain as a basis even if the punishment decision is the result of individual interpretation and judgement (ijtihad)

The punishment arranged in the holy book and as sunnah and that determined by exertion (ijtihad) have some goals, among them are:
1. Daruriyah
2. Hajiyah
3. Tahsiniyah

1. The meaning of daruriyah is everything that must be there for the sake of existence of human life whether spiritual life or material life, if daruriyah is not exist, the human life flawed and gone the bliss and comforts, and in life here after deserve severe punishment.

The daruri stipulations is legal decision that can preserve the necessity of human life by guarding and keeping their welfare and benefits. When the norms are disobeyed there will occur much destructions. In respect of punishment for example, the aim of the punishment included in daruriyah in imposing Qisas, diyat, and hadd. In case of murder there are Qisas and diyat. This punishment is imposed with the aim to preserve the life and soul. Though the holy Qur'an permitted equal retribution by qisas but also allowed compensation or ransom if agreed by both sides.

So in qisas and diyat beside retaliation (Qisas) there is compensation of love and mercy (diyat) too.

For drunken there is hadd to preserve the soul, hadd for treason is for the sake of respect. Hadd for theft, deception fraud, is to make offenders frightened. The hadd for adulterer and adulteress is intended to guard the descendants and their dignity. The hadd punishment for one who has
committed adultery is reformative and contain the meaning of spiritual cleansing of offender.

Thus, generally speaking the aim of punishment included in daruriyah category are:

a. protect the soul
b. protect the religion
c. protect the intellect
d. protect the descendant and honour
e. protect the property

2. The hajiyah. It is everything comprehended fully by society to avoid difficulties and problems, in order to eliminate the narrow mindedness.\textsuperscript{113}

The hajiyah stipulation give opportunity and chance for mukallaf (responsible person) to gain case and laxity where they are in critical condition to materialize the daruri stipulation. If the hajiyah stipulation does not come into effect it will not rain the life, but it can cause narrow mindedness and stuck. For instance, laundry man or tailor are obligated to pay the lost or compensate whom gave him the cloths to be washed or sewed if there is any defect.

Including here an instance, prohibition of good accumulation, selling alcoholic drink, etc. This hajiyah stipulations intended to protect individual freedom, freedom to have religion.
3. Tahsiniyah, it means to utilize everything proper and worthy which is justified by good tradition where all of these covered by makarimul akhlak (moral). For that reason, it can be said that the aim of tahsiniyah, firmly related to the reformation of good moral, good customs, and up grading the quality of implementation of various stipulations of daruri in better way.

Examples of what are included in tahsiniyah stipulation are: prohibition of trickery in war, prohibition of killing women, children, preachers, in war, prohibition of women wearing minimum clothes which can stimulate sexual desire on the street. The aim of daruriyah, hajiyah, tahsiniyah above, demonstrate that the purposes of punishment in Islam are very complete and varied.

Those purposes are not only for retribution and or compensation, prevention or deterrent, justice and general welfare.

The three kinds of that purposes appear stratified, in accordance with the level of guilt and the emerged destruction. And it should not be forgotten that the three kinds of purposes above remain have the element of based on element of general welfare to maintain the benevolence of life.

The three interest above, which are classified as the tahsiniyah the hajiyah, and the daruriyah are complementary to each other. However the daruriyah constitute the main purpose of Islamic law. If it is ruined then it will run the others, and if hajiyah or tahsiniyah is ruined, it is afraid that will ruin daruriyah too.
Yahya Muhaimin, cs. observe the purpose of Islamic law from 3 points of view as below:

First, the purpose which is observed from the aspect of giving and burdening the taklif (responsibility) on the mukallaf (responsible person). From this viewpoint, the Islamic jurisprudence aims at to reform, to guard and fulfill the need of human life in its various dimensions, to avoid human acts which are dominated by authority of carnal desire and return to the purpose of his life. Which includes devotion to God only, it aims at to protect human nature so that its existence remains intact. The purpose of the law is also to protect and preserve the law itself as a mandate of Allah that must be carried out. Thus the ibadah (religious services) in Islamic law is having two positions. The first position is obligation, because the command of ibadah has come from Allah. This command must be followed as it is. The human being have no right to make law of his own pertaining the method of ibadah. The second position is considered as necessity because the implementation of ibadah basically is to fulfill the need of human life which have positive impact and can preserve the existence of human as unique being that received the mandate of God.

Second, the purpose that considered from determination of Islamic law capacity.

Viewed from legalization of law capacity therefore the purpose of Islamic law is preserving human existence in various levels of his life, whether in primary (daruriyah) secondary (hajiyah) complementary (tahsiniyah).
The primary level is a stage of human essential need, where if it is not fulfilled, it will evoke the nonexistence of his humanity. For that reason, this level require the realization and materialization in contact with real life, and preservation of its existence.

The secondary level is a stage of human need which is important though not so essential as in primary level. The main purpose in this level is to make all difficulties perished and pull the advantages and benefits or general welfare, until the fulfillment of primary needs gain dispensation in this secondary needs. The complementary level is a stage of human adornment needs to beautify himself as to be the servant of Allah, who have the status of more value than the others for instance the manners of eating and drinking, interacting, dressing, cleaning, subsidiary religious services, etc.

Third, the purpose observed from the mukallaf (responsible person) in receiving the taklif (responsibility) viewed from this purpose, therefore the purpose of islamic law is to give choices of certain law capacity which consciously done without being forced and on his own will, to give the relevance between the law order and the law implementation which is done by mukallaf (responsible person), because if that implementation is not based on law regulation, therefore his religious services are in vain and unaccepted. The implementation of shara (law) must be oriented to the main purpose, that is to fulfill the right of Allah as a creator (Kholiq) and to fulfill the right of human as being, and to create the benevolence and
reject the disadvantage and destruction where all of that can not be engineered by human in one side without being consulted to the ethic code that have been determined previously.

In the sentencing process, there are some parties involved directly or indirectly. There are the victim, the offender, the judge and his colleagues, and society. Although the purposes of punishment have been explained from Shariah terminology, it would be appropriate to examine from general terminology where in the purpose of punishment is retributive, deterrent, and reformatory.

The purposes of punishments from viewpoint of those parties involved whether directly or indirectly are as below.

For the offender

1. to impose the punishment equal to his offence as a caution and a lesson for upgrading the self awareness
2. to prevent the recidivism
3. to rehabilitate and re-educate offender

For the victim/his family

1. to perish the revenge
2. to give the caution in order not to commit crime
3. to educate the soul in order to be more obedient and beneficial for society.

For the society
1. to enforce justice, to create the secure feeling as a basic needs of human
2. as a lesson and or a caution so that not be followed
3. to strengthen the moral force and faith of society
4. to restore the balance that have been disturbed
5. to protect the honour and chastity
6. to preserve the benevolence of life
7. to create the stability and certainty.

For the judge and his colleagues (rulers)
1. to increase the self consciousness and persisted to be consistent
2. to grow and strengthen the authority
3. to strengthen the confidence of society

6. THE RELATIONSHIP OF PUNISHMENT CONCEPTION WITH LAW AND MORAL

Law and moral are unseparable things. In other ward the concept of law must be always accompanied by the concept of moral, to explain this statement, can be seen in the process of trial. For instance, in the trial, both sides of those who have disputes and their witnesses intentionally lie or give false witness (and this tendency often performed by offenders or their witnesses), therefore the result of this acts, the judge will face difficulties to uncover the truth and consequently, the fair and just sentence is hard to be achieved. Where as one of the many purposes of law
is to uphold the justice. And that is the main principles of law. Refer to the case above, it make use feel the need of "the other law" behind the present law and this "the other law" is able to stimulate and motivate them to give correct information or true admission, till the truth can be uncovered.

For that reason the court obligate the witnesses to take the oath before deliver their witnesses. The reason of giving correct information or true admission is springing out from what is called "moral" that originated from belief, creed, or faith or religion.

Every acts that break the law and can be legally prosecuted must be approved or considered as crimes by society, because the society also convince that the acts are sin and it's proper to be punished. Society's support, create situation where law enforcement will operate smoothly and safely. The police, the prosecutor will do their duties peacefully. And the judge can give the sentence correctly. As the result, the society, the offender, the victim will accept the sentence with peace. Thus every law and regulations made, to be applied on the society it will be succeeded if supported and in accordance with the faith or creed of the majority of that society.

On the other side, the role of this concept of moral in the building of society character, fear to court and its instruments is not sufficient to prevent man to do crime, because if he can ascape from the reach of law, therefore he will do it, cause by that, it should exist the awareness that
Inplanted in heart of majority of society to restrain them do the crime. Bribery, discrimination service of famous lawyers, and false witness, all this thing is enough to protect criminal from the reach of law.

This awareness also should be inplanted in heart of leaders or rulers. It is not difficult to see, even with a little sight, that the factor which determine human advance or decline depent largerly on the nature and the role of those who exercise control over the sources of power and direct the affairs of society. It is clear that mankind can hardly resist moving along the road shown by those who lead, if only by virtue of the fact that leaders control all resources, hold the rein, power and possess the means of shaping and moulding minds and behaviour, they have the power to influence individual as well as social system and moral values.

Conversely, if leadership is in hand of those who have no moral, the life style of that society drifts toward rebellion against God, exploitation by man, moral degeneration and cultural polution.

All of this will lead to "anomic society," general corruption of ideas, affecting the arts and science, politic and social economy, cultural ethic and behaviour, law and justice.

In Islam, moral is akhlaq, akhlaq is moral. The meaning of akhalq etimologically originated from the word "khuluq" and its plural is "akhlaq" which means good behaviour, ethic, moral. The word "khuluq" have compatibility meaning with "khilqun", except that the khuluq is human
attitude from inside (ruhaniyah) while khilqun is human attitude from outside (jasmaniyyah)

The term "khuluq" also firmly related to "kholiq" (the creator) and "makhluq" (the creature).\textsuperscript{116}

The etimological meaning have implication that akhlaq (moral) related and connected to God, the creator who create human, so the akhlaq demand must came from "khaliq", and there is comformity too with "Makhluq", that indicate that the source of akhlaq also came from collectively human determination.

So in life, human must have good moral and attitude in accordance with the standards from God and human.\textsuperscript{117}

To have akhlaq with Allah means to devote him and obey what ever he command (51:52), make as compass of life what he have granted, (17:9, 41, 82) (2:12) promise to obey all his commands (51:3) by the way of implementing his tenets (51:3) carry out the task as vicegerent of God (2:30) where all of it will be called to account (16:93) so that the human gain happiness and prosperity by the way of implementing his good and true tenets (13:29) where all that covered whole aspects of life (2:208) which is done by exertion (22:78) even have to sacrifice whatever he possess and loved (9:111) that he ready to suffer (2:214) in the meaning of what as much as capable and as much as what is possessed (2:286).

Further more, to have akhlaq with people means tolerance to other religions, giving the right of neighbor whether as citizen of country or
member of certain religion, not egoistic, responsible to social matter, help each other, forgive each other mutual respect, mutual love, the existence of equality concept, just, creative, and dynamic. While to have akhlaq with nimals and plants means to preserve and utilize them for interest of ibadah (religious services) not hurt them and not exploite them etc.  

From all what stated above, it is tangible that between akhlaq (moral) and shariah (law) and aqidah (doctrine of the unity of God) constitute as unseparable thing and complementary. 

The moral force of islam exist on the obedience with will and awareness and the belief in life here after doctrine. 

The obedience which does not come from the will and the awareness and the belief is not the true obedience. The obedience also does not means something ephemeral or temporal and irregular. Because the true obedience is the attitude continuously and constantly being believed and comprehended fully to whole aspect of ethic life of individual, as a sign of faith and obedience to the law of God.

As have been stated previously in the concept of khilafah, the purpose of creating and existence of human on this earth is to devote by the way of carry out the trust that given by God and his messenger. And all of his services, devotions and dedications called ibadah (religious services). Thus, islamic moral contain the meaning of belief (Al Iman) submission and devotion (al islam) which carried out by approval of heart (Al Qalb)
and logic (Al Aql) which is confirmed by tongue (Al lisan) as well as acts and endeavour (Al Amal). This is the superiority of islamic moral concept compared to western moral concept.

With the concept of devotion, submission, piety, awareness, and will, muslim obey and carry out legal decision willingly and fully aware. Law obedience by the above moral concept is two unseparable thing, interlinked and complementary, because law and moral in islam is like both sides of a coin.

The obedience and piety or devoutness to God's law is as a one and only of distinguishing factor of human dignity in accordance with God saying "verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you".

The obedience in western moral emerge from awareness and fear of the result that will cause harm which is tangible, direct and sheer material distraction. While moral in islam have higher values. For it does not merely emerge from awareness and fear of the result that will cause tangible, direct and sheer material distraction as aboved. But more than that, the obedience which caused by devotion to the creator, belief and fear of the hereafter doctrine. The fear of God and the judgement day evoke the awareness, responsibility, seriousness and courage of moral. Therefore the islamic moral is also afraid of prohibited acts by God although the consequence of the offence characteristically is unclear, indirect, and non-material to the society. For instance, the drinking of
alcoholic drinks although the impact of the drunk did not caused other
offences, for another instance, fornication by mutual agreement and the
offender is not bound to marriage.
The hereafter doctrine also evoke great responsibility towards God
including to fellow mankind and nature. Because a muslim believe that not
on act in this world can escape from being called to account to God.
Caused by this accountability, muslim became discipline in realizing the
determined decisions, including legal decision. Thus the legal discipline
that longed for can be materialized
Islamic moral also based on justice and equality as comform to God's
saying:
"O ye who believe ! standout firmly for justice, as witness to God, even is
gainst your selves, or your parents, on your kin, and whether it be
(against) rich or poor, for God can best protect both. Follow not the lusts
(of your hearts) lest ye swerve, and if you distort (justice) or decline to
do justice, verily God is well - aquainted with all that ye do. (the holy
Qur'an : 4: 135)
The verse contain the meaning of institution of judicature that free from
emphasis, the influence of other institution.
Because the different of moral concept it lead to the difference concept
of crimes/offence and punishment. Western moral make very much cult of
individual. This attitude reflected from their ideas about crimes and
punishment. They assume that crimes emerge from situation or dilapidated
system and psychological complexity and nerves which is very difficult to be tackled. That is why they lean to give freedom to individual particularly the right that considered as personal. Therefore consuming of alcoholic drinks or liquors, fornication by mutual agreement, according to them, it is not a crime or offence and if it is considered as having an element of crime, than the punishment is very light. While communist moral is very much make cult of society. For that reason they impose heavy punishment on individual who rebell against the government. Islam recognize and acknowledge that the western and communist moral concept is true in some part and indeed the surroundings of individual, whether it is come from environment or psychological matters can influence the individual.

There are a lot of moral schools emerged and as much as that too the criteria used for determining good and bad, right and wrong. The empiricism school is focusing good and bad on account. Of the human experiences. The intuitionism state that good and bad determined by human in tuition whether such as the inspiration, conscience and instinct. Rationalism consider that good and bad based on human logic because logic is the sources of ethic. While traditionalism stressing good and bad on its consistency with prevailing tradition or custom. Hedonism viewing good and bad on its pragmatic values or it's pleasure. Egoistic hedonism state that good and bad depend on individual happiness, Universalistic hedonism say that good and bad depend on general happiness.
Evolutionism consider good and bad based on how near or how far its good and bad with the ideal as a purpose of life, its process occur continuously and slowly.

Ahlus sunnah wal jamaah consider bad and good based on religion, not on logic because logic is not possible to know good and bad. While mu'tazilah having opinion that good and bad depend on its comformity to logic, because logic is a gift from God. Al Ghazali consider good and bad on logic that based on religion (Al Qur'an or Al Sunnah), while Abu Ala Maududi consider it from determination of experience, logic and intuition that guided by God through his revelation, it appears if this last view that can be as a principle of ahlaq (moral) in islam, because in reality, moral consitute as reflective habit that should be supported by the truth of logic and intuition and quided by God revelation.120

From various discription above, it can be seen that the are the harmonic belance in islamic moral, that is between moral towards God, moral towards other people and society and moral toward nature and the other creature where the three is an integral part.

Differ with the western approach which focus their attention on moral that pertaining to relation between man and man only. In islam, the system of moral not only relate to moral itself or to tradition or culture system but it also firmly related to law system (sharia) and faith system (Agidah) as an integrated and complementary system. The three systems (law, moral, religion or faith) is supported by the doctrine of here after.
Human, according to islam is not a mainly passive human being in facing the condition that surround him, human is created by God as human being by having will and capable to determine his will based on his awareness of good and bad. It is also true that some condition and situation of economy, politic, social and structural institution influence human act, but it is also appears that even in affluent countries where its political, economy condition that considered well and secure, the crime is persisted to go rampant.

The difference view about the matter above, caused by the difference analysis about the status and function of human. Some schools of moral consider human is only animal among the groups of animal, while the other schools consider human is more than just animal and therefore it is remain to be said as a community or being, while even its humanity function put by the various way, from social animal, moral being, economic animal, rational animal, spiritual being etc.  

According to Al Qur'an view, the essential attribute of human being is "the personality" that compaise the possessing of self awareness and self determination, will and intelect creative. He is different with others creatures among creation of God on the earth, even his superiority is recognised by holy creatures in heaven like angels (11:34). More over stand up in his special relation with God in meaning of having "personality" that possessed by & both, and as consequences, his status among all of God creatures is of God's vicegerent (2:30). He burdened with the
responsible where it can not be sustained by sky, earth and mountains (33:727). He has cosmic mission, because what ever that be in the sky and on the earth have been ordered or commanded to devote and obey to him (47:3). That is supra cosmic. Because he is belong to God and to him he will return (2:156). Allah is the last destination of human.\textsuperscript{122}

Thus, he is a theocentric being that sent down to earth in scope of limited dimintion of space and time with physical environment that also limited by space and time; and status of his God's vicegerent meant he should has function as integrated being, that is a complete, harmonic and creative being in all dimention of his personality whether it phisically, spiritually, morally or intelectually and esthetically.\textsuperscript{123}

If that matters above connected to punishment issue, so, islam award the punishment to human based on in how for, he could account for his guilt. In determining of punishment, islam delibrate the offender condition and condition of his society. The kind of punishment in islam such hudoodoo, qisas and diyat at glance are appear strict and cruel, but thats must be keep in mind that, before the policy of the punishment determined, first, islam will make efforts to cleanse society from every kind that can evoke criminal act, obligate the apparatus act justly, create sociale structure and well and secure, clean government including maintain fair economic system. After, the above situation is conduced, then islam determine a fair preventive sanction that will be imposed to offender who has no plausible reason for committing crime. As long as if there are the certain doubtness
about that crime, so, punishment will not be imposed, and the judge can free him or impose a light punishment which is equal with the gradation of his guilt, in this matter ta'zeer punishment will be considered.

Thus, qisas and hudood is the limit for human activities for giving the probability of legal freedom for every one. It can not deny that the authority is not possible to give to every one on every member of society. And qisas, hudood and diyat give the limitation for law activities of human. Without restriction from God, the freedom and independence that possessed by human tend to change to be wild and arbitrare, affected national taste or individual eppetite and it will destroy the doer together with society and social structure.

The restriction above constitutes the democratical principle which is found is islamic law system and it lead to public responsibility principle. Occasionally, law is not capable to regulate whole of human activities, in other words, law regulation not always can reach every human activities which considered as evil, caused by that, if has to be backed up by other norms that prevail in that society where it also contains moral tenets such as ethic norm, social norm or religious norm.

Moral also is very needed for law enforcement because a lot of law matter can not be reached by law regulation it's self, such as sincerety in giving testimony, prejury where the clue and evidence see very difficult to find. On the contrary the presence norms in society except law norm are not accompanied by real and clear sanction and unforcedly. This thing
especially occur in western society. In islam between law and the others norms such as ethic, social or religious norm, there are firmly relationship, where actually there is no distinction among them. All of norms system above is only have one form, that is shari'a law (islamic law) in other words, the law norm, beside it is the form of law norm itself, it also is social, ethic and religion norms.

As a reason, law obligation also the form of moral obligation as well as social and ethical obligation, even spiritual obligation; while in western concept, law obligation is only as law obligation or as well as moral obligation but with out spiritual obligation.

Based on that matter, frequently, at glance, islamic teaching or islamic law is considered as the system or doctrine that dominated by faith matters only. Observing the islamic concept about law and moral above, it convince us that the existence, function and duty of human can be performed consecutively, balance, harmony and complementary. By concept of human with it's moral system in islam, there are no law and regulation in islam considered as heavy, irrational, unjust, unequal, primitive or out of date.
7. THE RELATIONSHIP OF PUNISHMENT CONCEPTION WITH THE IDEA OF HUMAN RIGHT

As had been known that the issue of human right is not a new issue, but still trigger interesting discussion among the experts. Human right issue have very long historical background. It indeed is very difficult to determine since when and where the issue of human right in the history's discussion came from. But as have been stated above the discussion pertaining human rights issue will always emerge if the rule and regulation or man made law that regulate other human is oppressive or even obliterative to human rights. In other word human rights emerge since human know socialization.

The western writers in writing about human right, always trace back it's root to Greece or Roman civilization. According to these writers, the concept of human right for first time was discovered by Greece philospher named Zeno. Then this concept came into Roman civilization,. After being abandoned at the time where they call it "the dark age", then suddenly return with the Europe reneisance in the seventeenth century.

In it's further development this concept find it's way to Magna charta that emerge in Britain in 1215 and considered as the origin of human right wich formulated in detail. Further The magna charta gradually gaining approval and at the end became the Universal Declaration of Human Rights wich declared by U.N.
In fact, magna charta is nothing more than just an-agreement between king and Baron (aristocrate) of Britain, where by king can make effort for protecting their special rights. Whereas only after passing through a very long time Magna charta can be interprete in context of human right. At the begining there is no connection between magna charta and the rights wich is proper to be possessed by a man.\textsuperscript{124} Likewise when this concept entering the U.N. declaration up to now where the slogan of new world order being proclaimed.

The reason is tangible. The structure of authority of new world order is very disproportionate. Political, militery, economic, technological and cultural power is in the hand of few elites, corporation, and state located in the north. The new world order is indeed only slogan, trap word, wich created purposely to perpetuate the pattern of domination and control of west where in one or other form have been existed for almost last two hundred years.\textsuperscript{125} Because it's main purpose is to serve the interest of the rulers or who hold the power, new world order will persist to deny and up root humanity from it's rights. When a system is to be oriented to the powerful or the possessor of special rights therefore the rights of ordinary people are in danger. This is the fact that happen frekwently at nationalist country level. However the comprehensive rights that have been promised to the people in the aconstitution of a state, it's actual realization is depend on how far
the power structure of that society implement it. If the power is
distributed evenly, the citizen will probably benefit from the rights
granted to them. In contrary, if the power or authority centred only on elite
level society, the human right is more possible to be violated than to be
obeyed. 126

From the reality above, the islamic concept of human rights which have
been exist seventh century with all its applications had been forgotten and
neglected, whereas this religion (islam) have ever dominated Asia, Africa
and some part of Europe continent for long period and as motivative factor
behind the occurrence of Europe renaissance.

State life order which is comprised in law system, economic, politic,
social, etc, in islam, it based on three principles, those are tawheed
(the unity of God), risalah (the prophethood) and Khilafah
(vicegerency).

To understand the islamic concept of human right therefore the
understanding of the three basic principles above is very important
and necessary.

Tawheed means only God can be the creator, sustainer, master of the
universe, and as a consequence, the sovereignty of the universe
belong to only him. There is no individual, family, social strata, or
human race make him self superior to God. This is the limit of
power and authority according to islam. Political power and state
must be operated by guidance and direction of shariah which have to be obeyed as God's law and the highest law for Muslims community. The sovereignty of God which reflected in the sovereignty of shariah constitutes the first protection effort from violation of human rights. This limitation protects human rights from human authority over human where it become the main cause of human right violation.

Limitation principle contain also the principle of equality no one can act arbitrarily or superior to other people cause by discrimination of race, group, class, religion, belief, nationality, position etc.

The unity of God principle also taught that every acts done by human in this world however little it be, will be called to account to God with sanction if it is evil deeds and with merits if it is good deeds.

With the consciousness and awareness about the concept of accountability, Muslim avoid to do offence and violate the rights but respects the rights of others instead, wherever and whatever his position is. This concept is also confirmed by one of duties of Muslims in associating with other people, that is al amru bil ma'ruf wan nahyu anil mungkar (command others to do good deeds and prevent them from doing evil deeds), this obligations is imperative and it prevent Muslim and other members of society reciprocally to cause destruction or violate the rights of others. Thus a Muslim who obligated not to violate the right of others, also obligated to prevent others to from violating the human rights,
because the good deeds or benevolences it self does not individualistic. A muslim is considered not good muslim if the good deeds he did is confines to him self only and does not care about evilness of others. This constitute a massive preventive power and wider range. Thus the prevention of human rights violation is wider in range and more effective for it also involve ordinary members of society.

On a larger scale the concept of God's sovereignty in tawheed and in the obligation of amr bil ma'ruf nahy anil mungkar, passed over the geographical boundaries. In other word islamic state where muslims community gathered, also have obligation to prohibit human rights violation wherever it happen.

The medium through wich the law of God received is known as risalah. God have revealed the holy Qur'an as compass to determine the concept of human behaviours, and hadist that have been said by the prophet also have made and ideal model of human rights through his life. God said in the holy Qur'an of sura Al ahzab verse 21;

"Ye have indeed in the apostle of God a beautiful pattern (of conduct) for any one whose hope is in God and the final day, and who engages much in the praise of God" everything that have been given example by the prophet about how to act and respect human right as interpretation of shariah (islamic law) is binding all muslim communities.

Al-Qur'an and Al-sunnah wich constitute basic source of islamic constitution, have provided concept in detail about rights and duties of
human which is absolute and immortal, nevertheless in this source, there are boundaries and limits for this rights.

Rights, obligations, and boundaries prevail for individual, social, as well as state.

Thus the life of Muhammad (peace be upon him) during his prophethood period providing a model for how the state should interpret and implement the human rights. These examples and interpretations was carried on up to the period known as the period of Khulafa ar rashideen (the four well directed caliphs).

The third principle is khilafa which means "representation". The real position and place of man according to islam is that of the representative of God on this earth, his vicegerent that is to say, by virtue of the powers delegated to him by God, he is required to exercise divine authority in this world within the limits prescribed by God.

The concept of vicegerency or khilafah is other protection effort after concept of tawheed and risalah to protect the human rights. In the concept of khilafah in accordance to the holy Qur'an and hadist determined that whatever possessed by human in this world is possession of God. Human can have it only as a representative or as the trust holder, every man responsible in accordance with the responsibility or the mandate he hold. This concept also taught that in islam there is no one superior to the other except for his benevolence and devoutness to God. For this reason only those who hold this mandate can lead and preside with rules and limits
determined by God which will never be changed. If they break this rules and limits of rights, therefore the society or citizens are not obliged to obey or follow them.

Beside of that, the concept of khilafah (vicegerency) effected to everyone though he is not a ruler or leader, this will evoke the participation of society and its members in holding up the human rights. Thus, enforcement of human rights which is the duty of a ruler, it also constitute the duty of every members of society as individual. This will result the upholding of human rights is far more effective.

The prophet said "in collective matters muslims must hear and obey the orders of those who hold responsibility, whether, agreed or disagreed provided that the orders does not bring sin if it is done. If muslims ordered in matters which is disobedient to God therefore they do not have to do it".  

The above matter was continued by caliph Abu Bakr, he said to his people, "obey me as long as I obey Allah and his prophet (peace be upon him), when I disobey him and his prophet (peace be upon him) obey me not."  

With the conditional obedience above, islam provided sturdy protection for human rights, because even ordinary citizen can refuse to obey the ruler who violate the rule. Islam reject a social order of society which legalized the domination and the control of a group of people over others. It often happen that most of the domination evoke the majority serving the wills of the minority although it came out of the limit. More over,
domination often humiliate the dominated one, lower and even eliminate the dignity. Split and even compartmentalize human community. And this is the real enemy of ideals of human unity.

Thus, generally, based on the three principle above, the values contain in human rights which is according to islamic concept is very holistic and theocentric. Performing a group of rights by sacrificing the other right is not allowed. The right can not be divided because human can not be divided too. Rights must be performed parallel to responsibility and obligation. In islam, for instance the rights granted by God, means no one have authority to abrogate the right that have been granted by God. Likewise the human responsibility top responsibility is to God. This is the responsibility that transcend any other responsibilities verily every other responsibilities is came from the responsibility toward God.

Theocentrical view of islam on human and obligations that adhered to him, appear that human seem to have no right but sheer obligations. This is happen because rights and obligations prevail paradoxically and reciprocally, it means the obligation of human to God which also covered his obligation to state, society, and individual create the human rights, and all at once, these rights are authomatically protected, because of the obligation of human to God. The state which is also under this law, forced to protect the individual rights, because his obligations, obedience and responsibility are merely to God.

The standard value of human rights which was determined by islam such
above, automatically is primary, absolute, immortal and universal in order to be acceptable by every one.

The need of this primary, absolute, and universal value is a necessity. Necessity is to handle the diversity of characteristics and human wills, the variety of problems and complexity of life from different aspects and views.

This necessity intended to protect the existence of human life and society entirely and even state. For that reason obeying and implementing these values consistently is a basic obligations.

The top of implementation of basic obligations and basic rights all at once proportionally and consistently is the existence of justice. The reality of social life all over the world indicate that the problems of human rights is the problem of justice too and the historical journey pertaining formation of human rights charter in general is talking about justice.

The justice matters also firmly link to authority matters, because when we discuss about justice, we will also discuss about power or authority. Islam have determined that the justice and the highest authority is in the hand of God. And the characteristic of justice and authority above is must be absolute. The obsoluteness of the highest authority and justice is absolutely needed.

If the obsoluteness of authority is in the hand of human it means we accept the consequence that human is the ruler, the law maker as well as the subject of law. And there are a lot of results and proofs when human
consider him self having the power and the authority and the absoluteness is in his hand.

Proof and consequences suffered by human because of human arbitrariness who win the power and authority, gave lesson that since long long ago upto now, human carnal desire is never change.

Likewise, human as justice authority holder, too much lessons and events wich prove that the human justice is the justice which is influenced by emotion, personal taste, nationality and group.

In islam, moral, law, ethic, including right and obligation (human rights) are complementary. Moral, law, ethic, and human right can not be untied from the faith system, by that cause, every dangerous acts that threaten the offender or the other people is considered immora! because it is contradictive to the soul of islamic teachings. The human right in islamic concept wich is contained in islamic constitution as what in the model developed by islamic council, and endeavoured by a group of international muslims scholars, who emphasize the equality of all men and women before God, give command for implementation of islamic rules pertaining to human rights wich consider life, body, honour, and freedom of human as a holything and can not be violated, and reminded muslim state all over the world that they are a part of one community and one civilization. This model build a constitutional structure around the islamic concept of khilafah (vicegerency) a'dl (justice) wich softened by the term love, and shura (confrence in government, formulation of policy, decision making,
implementation of the authority). The Islamic concept of God, human, and universe, is inseparable concept. Human or mankind is the best creature, he have been granted ability to beautify himself with godly characteristics, but he can choose to benefits his ability or to neglects it. His fate is in his own hand.

With the concept of Khilafah (vicegerency), human have distinguished position as God's attributes carrier. Beside he have rights, he also have responsibilities or obligations to maintains himself and other creatures in the world. The rights of all human are interlinked and interdependent. All of human rights must grow and develop together. This basic rights are not merely rights but also basic obligations. Because right granted by God together with responsibility wich have to be borne. By this reason, God is the top source of right and responsibility. Thus, there is no one and no institution have authority to abrogate the rights wich have granted by God and likewise the top responsibility of human is to God. so every other responsibilities are rooted from responsibility to God.

As a vicegerent of God human is the holder of God's mandate. So it is amust for human to use the rights and bear the responsibility for benevolence of whole human being. As the vicegerent of God on earth, every person have to apply the principles and rules of acts on every individual and society consistently.

Thus, there is no double standard, inconsistence, discrimination (selective evaluation) in application of human rights. With this method by
collective values, by universal rights and responsibility, by collective principles and rules based on truth and care and love, will be formed the unity human family which is free from any form of discrimination and oppression.