

## The Philosophy of Punishment between Sharia and law in Terms of Cause and Purpose

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### Abstract

This is an academic article on the philosophy of punishment in Sharia and secular law. It addresses a nuanced issue: it can be argued that Sharia and secular law agree—indeed, are identical—regarding the cause and purposes of punishment. Does this mean that they are based on the same philosophical foundation?. The most significant findings that addressed this issue were as follows:

The philosophy of Sharia dictates that the legislator of punishments must be superior to human beings, more knowledgeable than them, and characterized by perfection, free from any imperfection; and this applies only to the Creator of humankind. This contradicts a law that grants humans the right to enact punishments against their fellow humans, thereby violating the principle of justice by elevating some people above others. In contrast, the philosophy of Sharia places everyone on an equal footing when determining punishments.

Therefore, the theory of punishment in Islamic law was fully established with the completion of revelation, whereas modern theories of punishment did not emerge all at once; rather, they were the result of a profound and gradual transformation that accompanied the evolution of human thought, the concept of the state, and human rights.

Another key finding of the study is that the philosophical basis for punishment in Islamic law rests first and foremost on belief in God and on the acknowledgment that He has the right to command and prohibit because He is the Creator; the law, however, does not require belief in anything specific for its application, as it applies to everyone, and believers and non-believers are equal before it.

**Keywords:** Philosophy, Punishment, Sharia, Law, Reason, Objectives

### Introduction

Because Islamic law and secular law are identical in terms of the reasons for and objectives of punishment, most scholars, even specialists, assume they are identical in their philosophical underpinnings. This is a subtle issue, and this research aims to examine it by addressing the following question: If Islamic law and secular law agree on the reasons for and objectives of punishment, do they also agree on their underlying philosophical foundations?

This research aims to disentangle the apparent philosophical underpinnings of Islamic law and secular law, where they seem to converge. In other words, this research will explore the underlying reasons for and objectives of punishment in both Islamic law and secular law.

Understanding the philosophy behind the reasons for and objectives of punishment in Islamic law and secular law will determine whether there is a complete and genuine

correspondence between them. To answer this question, I employed both inductive and comparative methods. The research is structured around two main axes and four sub-sections, as follows:

## **1. Beyond the Rationale for Punishment**

### **1.1 The rationale behind Islamic punishment:**

The jurists' definition of punishment revolves around two concepts: retribution and pain. Al-Sarkhasi defined it as follows: "Punishment is the retribution that must be imposed for committing a prohibited act that warrants punishment (al-Sarkhasi, 1993). This definition emphasizes the concept of retribution.

Jurists have also emphasized the concept of pain in their definition of punishment as: the pain inflicted on a person as just punishment for a crime (al-Tahtawi, 1865).

Although the two previous definitions of punishment were based on different considerations, they agreed on a single reason for punishment: the commission of a crime.

This is consistent with logic: there is no punishment without a crime, and there is no crime or punishment except as provided by Legal Text.

Based on this consistent principle linking Sharia and the law, it can be said that Sharia and the law agree on the basis for punishment, which is the crime itself. This is precisely what prompted me to write on this topic. However, from a philosophical perspective that goes beyond appearances to the essence of things.

After a careful analysis of the texts of Sharia, we discover nuances that run deeper than what is apparent regarding the rationale for punishment, leading us to conclude that the philosophical basis of Sharia regarding the rationale for punishment differs from that of law—a point we aim to demonstrate in this section.

What Can we learn from the Verse of the Holy Quran Regarding the Punishment for Theft? God, the Exalted, says in the verse: (IslamiCity, 2026)“ { Now as for the man who steals and the woman who steals, cut off the hand of either of them in requital for what they have wrought, as a deterrent ordained by God: for God is almighty, wise } ”« The Holy Quran, Surah Al-Ma'idah: 38 ».

What we first understand from this noble verse is that the reason for this punishment (amputation of the hand) is the crime of theft, as the verse states: « man who steals and the woman who steals, cut off the hand of either of them in requital for what they have wrought ». It is clear from the verse that the reason for cutting off the hand (the punishment) is theft (the crime).

However, we find a deeper philosophy behind punishment in the second part of the verse, where God says: « as a deterrent ordained by God ». The original Arabic text of this part of the verse also conveys this meaning: « A punishment from God ». As you can see, the punishment here comes from God, and it is due to theft, which God has made a crime. This is contrary to the law in which humans have the right to criminalize and the right to impose punishment.

We arrive at the same conclusion when we analyze the verse that prescribes the punishment for the crime of adultery. Look at what the verse says: (IslamiCity, THE NOBLE QURAN @IslamiCity, 2026) “ { As for the adulteress and the adulterer flog each of them with a hundred stripes, and let not compassion with them keep you from [carrying out] this law of

God, if you [truly] believe in God and the Last Day; and let a group of the believers witness their chastisement) ”The Holy Quran, Surah An-Nur: 2.

The apparent meaning of the first part of the verse establishes that the crime of adultery is grounds for the punishment of one hundred lashes; therefore, Allah, exalted be He, says in it: « As for the adulteress and the adulterer flog each of them with a hundred stripes ».

However, in the second part of this noble verse, God commands those who believe in Him and in the Hereafter not to show mercy out of place, lest they nullify this punishment, for it is God’s law for them. Therefore, Allah, the Exalted, said: « and let not compassion with them keep you from [carrying out] this law of God, if you [truly] believe in God and the Last Day ».

Thus, we arrive at the same conclusion we reached in the previous example, namely, that the One who establishes the reason for the punishment is God, because He is the One who has declared the act of adultery to be a crime.

From the foregoing, we can draw an important conclusion: namely, that the philosophical basis for punishment in Islamic law is founded first and foremost on faith and belief in God, and on the recognition that He has the right to command and forbid because He is the Creator.

Yes, the law agrees with Sharia in that the basis for punishment is the commission of a crime, but the philosophical foundation of Sharia in this regard differs from that of the law. Sharia assigns to God the right to criminalize acts as well as the right to determine the punishment for a crime. This means that Sharia’s philosophy regarding criminalization—which is the basis for punishment—is grounded in faith and belief in God, and this gives the believing community confidence in the justice of the punishment, so they apply it willingly and with acceptance; indeed, they view its application as an integral part of their worship of God. As for the law, it does not require those subject to it to believe in any particular doctrine; it applies to believers just as it applies to atheists, and its enforcement does not require faith.

Therefore, if we return to the philosophical basis for the rationale behind punishment—namely, criminalization—we will find that, like any of God’s commands, it is grounded in faith in God as Lord. This philosophy is based on a simple and clear principle that can be deduced from the texts of Islamic law in general and the verses of the Holy Qur’an in particular, and this is what we will attempt to derive in the following discussion.

The principle is simple: the Creator knows His creation best; He knows what is good for them and what is not. As long as they are His creation, He has the authority and the right to decide. This is sound and just reasoning for those who believe in this, and this is exactly what is stated in the Holy Quran.

Let us consider the words of Allah: (IslamiCity, THE NOBLE QURAN @IslamiCity, 2026)“{ How could it be that He who has created [all] should not know [all]? Yea, He alone is unfathomable [in His wisdom], aware! }”.

God knows His creation best, and therefore He has the right to command; this is what the noble verse affirms: (IslamiCity, THE NOBLE QURAN @IslamiCity, 2026)“{ Verily, your Sustainer is God, who has created the heavens and the earth in six aeons, and is established on the throne of His almightiness. He covers the day with the night in swift pursuit, with the sun and the moon and the stars subservient to His command: oh, verily, His is all creation and all command. Hallowed is God, the Sustainer of all the worlds!}” « The Holy Quran, Surah Al-A'raf: 54 ».

In the first part of this verse, God tells us that He is our Lord, the Creator of all things, and the Sustainer of all things: « Verily, your Sustainer is God, who has created the heavens and the earth in six aeons, and is established on the throne of His almightiness. He covers the day with the night in swift pursuit, with the sun and the moon and the stars subservient to His command ».

In the second part, our Lord tells us the following: Just as He is the Creator, so too is He the One who commands: « oh, verily, His is all creation and all command. Hallowed is God, the Sustainer of all the worlds! ».

Because the philosophy of Sharia in legislation is based on the principle that judgment belongs to God, the authority to define crimes and determine punishments belongs to God; this is what we understand from the words of God Almighty: (IslamiCity, THE NOBLE QURAN @IslamiCity, 2026)“{ Judgment [as to what is right and what is wrong] rests with God alone- [and] He has ordained that you should worship nought but Him: this is the [one] ever-true faith; but most people know it not }” « The Holy Quran, Surah Yusuf: 40 ». Therefore, Allah has decreed in the Noble Qur'an that disregarding His rulings is an injustice; this is what we deduce from the words of Allah, the Exalted: (IslamiCity, THE NOBLE QURAN @IslamiCity, 2026) “{ And they who do not judge in accordance with what God has revealed - they, they are the evildoers!}” «The Holy Quran, Surah Al-Ma'idah: 45».

In addition to the philosophical background we have previously established, punishment in Sharia is not merely a violent reaction to a crime; rather, in the philosophy of Islamic legislation, it is a regulated act that falls under one of the three pillars of criminal policy in Sharia.

Here, we must distinguish between criminal policy and criminal protection, because the former serves as the philosophical foundation for the latter; therefore, in my view, criminal policy is: The doctrine of the Legislative Branch in Ensuring Criminal Protection (Kharef & Djeddi, 2021).

However, criminal protection is defined as the provision of legislative protection for the interests intended by the legislature, which is expressed through criminal sanctions or penalties (Al-Humaizi, 2008). In my view, this involves safeguarding legitimate interests from crimes that threaten or undermine them by imposing prescribed and unprescribed penalties (Kharef & Djeddi, 2021).

Having distinguished between criminal policy - which reflects one of the philosophical foundations for the rationale of punishment in Sharia - and criminal protection, we return to criminal policy to define its role as a philosophical foundation for the rationale of punishment.

After a thorough examination of the texts of Sharia law in an effort to understand and deduce the pillars of criminal policy in Sharia, I came to understand that criminal policy in Sharia is based on three pillars of criminal protection, namely:

First: Preventive criminal protection, which is primary and precedes the commission of the crime; its purpose is to prevent the crime from occurring in the first place, and this is achieved through what is known as the promotion of the public good. This is evident in the texts that enjoin all that is good and beneficial, on the one hand, and the texts that prohibit all that is evil and corrupting, on the other.

Second: Simultaneous criminal protection, or deterrent criminal protection, which results directly from the crime; what is meant here is, of course, punishment. This aspect is evident in the provisions of Sharia that specify the penalties for each crime, and its function is to put an immediate stop to criminal activity.

Third: Retrospective criminal protection – or, as I call it, restorative criminal protection – which is achieved through the system of repentance in Sharia law, which is based on four elements: ceasing the crime, expressing remorse for it, resolving not to repeat it, and restoring rights to their rightful owners.

From the foregoing, we can deduce that one of the reasons for the existence of punishment in Islamic law—as a philosophical foundation—is to establish the central pillar of criminal policy, which we have termed “deterrent criminal protection.”

### **1.2 Beyond the Reasons for Punishment in Positive Law:**

It can be said from the outset that, on the surface, the reason for punishment under the law is clear and corresponds to the apparent reason in Islamic law as well—namely, the crime. We can therefore say with confidence that the reason for punishment under the law is the crime.

Does this mean that the law is consistent with Islamic Sharia with regard to the grounds for punishment?!! ... This simple question is not what we will examine in this section of the study.

However, given the title of the study, the real question that must be posed and answered is: Is there a correspondence between the philosophical basis of the law and the philosophical basis of Sharia with regard to the grounds for punishment?

Since we have already explained in the previous section of this study the philosophical basis for the rationale behind punishment in Sharia, the answer to the question posed in this section will suffice simply by clarifying the philosophical basis for the rationale behind punishment in law, and then comparing the aforementioned philosophy of Sharia with the philosophy of law that we are about to explain. We therefore ask: What is the philosophical basis for punishment in law?

The first step we take in answering the previous question is to define the concept of punishment in law.

As a general rule, there are two sources of legal definitions: legislation and legal scholars. Generally, legislative definitions are technical in nature and aimed at the formal application of the law, whereas definitions derived from legal scholarship embody the spirit and philosophy of the law.

Although the task of defining terms falls within the purview of legal scholars, the Algerian legislature has included in Book I of the Penal Code—which concerns penalties applicable to natural persons—what may be considered a definition of punishment when it provides that: “The penalty for crimes shall be the application of punishments....” (PenalCode, 2006)

Under Algerian law, penalties are: a punishment for crimes. What is noteworthy here is the emphasis on the link between the term “penalty” and the concept of punishment, and the exclusion of the concept of pain or harm.

Since, in this section of the study, we are examining the cause of punishment rather than its purpose, a formal definition of punishment is sufficient for our purposes.

In terms of its form, punishment is defined as: “a criminal penalty prescribed by law and imposed by the judiciary on the offender.” (Suleiman, 2005)

Or that it is “the legal consequence imposed as a penalty for violating criminal laws, which is enforced in accordance with the procedures governing criminal proceedings and by the judicial authority against those found liable for the crime.” (Salama, 1990)

If the reason for punishment is the crime, then punishment follows the commission of the crime. However, upon closer examination, the reason for punishment is the criminalization of the act; if an individual commits it, he becomes a criminal and thereby deserves the punishment prescribed by the legislature.

Here, we go beyond the cause to delve into the philosophy of punishment in law... If we look at the crime or criminalization in the law that served as the basis for the punishment, we find that it was established by human beings. Herein lies the first fundamental difference in the philosophy of the basis for punishment between Sharia and law: in law, criminalization is established by human beings, whereas in Sharia, it is established by the Lord of humanity.

This is where the philosophical debate arises: Does man have the right to legislate for man?!! For man is imperfect, and everything that emanates from him is inevitably characterized by this imperfection. Furthermore, man has self-interest and personal desires that inevitably creep into his legislation.

While God, exalted be He, is characterized by perfection and is free from any deficiency, His laws are based on absolute justice, for all human beings are equal before Him.

The second difference in this regard is that the Sharia’s theory of punishment was completed in its entirety with the completion of revelation, whereas modern theories of punishment did not emerge all at once; rather, they were the product of a profound, gradual transformation that accompanied the evolution of human thought, the concept of the state, and human rights. This historical development can be summarized through five pivotal stages as follows:

The first phase, which took place during ancient and medieval times, is known as the “Phase of Retribution and Atonement.” This period, which predated the 18th century, was characterized by the prevailing philosophy that punishment was based on personal vengeance; it later shifted to the authority of the ruler in the name of “divine justice”. Punishments were characterized by extreme cruelty (execution, mutilation, physical torture) with the aim of inflicting pain on the offender and appeasing the victim or the gods. The most prominent features of this phase were the lack of proportionality between crime and punishment and the absence of the principle of legality, as “the ruler punished according to his own whims.” (BAR, A HISTORY OF CONTINENTAL CRIMINAL LAW, 1916).

Phase Two: The Age of Enlightenment, or the First Classical School, during which the principles of legitimacy and proportionality emerged in the mid-18th century, around 1764.

The catalyst was the publication of the book *\*On Crimes and Punishments\** by the Italian Cesare Beccaria, who was influenced by the ideas of Montesquieu and Rousseau. The intellectual shift lay in the transition of punishment from the concept of “revenge” to that of general and specific deterrence.

The result was the establishment of the principle of legality in criminal law—“no crime and no punishment except as provided by law”—along with an affirmation of equality before

the law and the necessity of proportionality between the offense and the punishment, as well as the abolition of torture. (Shukla & Shivani K Savita, 2024)

Phase Three: The Classical Reformist School, which introduced judicial individualization in the first half of the 19th century; the most prominent figures and pioneers of this school were Guizot and Rossi.

The intellectual shift within this school of thought was its criticism of early classical theory for treating “crime as a mere act” without considering the circumstances of the perpetrator.

The principles that emerged from this school of thought include linking punishment to the degree of free will and moral responsibility of the offender, establishing a system of mitigating circumstances, and distinguishing between minors, adults, and the mentally ill—marking the “beginning of individualized sentencing.” (Claessen, 2025)

The fourth stage, represented by the Italian positivist school, marked a shift toward a focus on the offender and the seriousness of the crime. This school emerged in the late 19th century, and its most prominent figures included Cesare Lombroso, Enrico Ferri, and Bellino Garofalo.

The intellectual shift within this school of thought involved shifting the focus from “crime” to “the criminal” and studying the “biological and social” causes of crime.

The principles that emerged from this school of thought were the rejection of absolute free will and the assertion of determinism, as well as the replacement of moral guilt with criminal culpability, which led to the emergence of preventive measures—such as “committal to a psychiatric hospital or confiscation”—alongside traditional punishment. (Nevisi, 2025)

The fifth stage in the historical development of the theories underlying punishment in positive law is the school of thought known as the social defense movement and contemporary criminal policy, whose guiding principles are rehabilitation and humanity. This school emerged in the second half of the 20th century and remains the standard of reference to this day.

The most prominent figures in this school of thought are Marc Ancel and the New Social Defense School, and the most significant intellectual shifts they introduced include: redefining punishment as a tool for the rehabilitation, reform, and social reintegration of offenders, rather than merely as a means of inflicting pain and deterrence.

The most important principles emerging from this school of thought are: expanding the range of alternatives to custodial sentences and replacing them with penalties that preserve a degree of freedom—such as “community service, electronic monitoring, and daily fines”—and emphasizing the humane nature of punishment and individualized treatment within prisons. (Alschuler, 2003)

To summarize the historical development of the theories underlying punishment in positive law: punishment has evolved over time from harsh physical retribution “during ancient times” to a legal sanction governed by statutory provisions “during the Enlightenment,” and then to a means of rehabilitating the offender and protecting society “in the modern era.”

However, all of this applies only to European and Western history; as for this historical period among Muslims, the penal system was at its peak in the Muslim world.

Herein lies the vast difference—and the most important conclusion we draw from this historical account—which is that the current philosophical foundations of punishment in law are the product of the historical evolution of various theories. This stands in contrast to the

philosophy of Sharia regarding the rationale for punishment, which is based on fixed principles that have remained unchanged in their current form for fourteen centuries, ever since the revelation came to an end.

At the conclusion of this section of the study, it is worth noting a general conclusion: that time continues, time and again, to confirm the truth of what Muhammad, peace be upon him, brought. For no sooner does human thought settle—after experience—on a good thing than a solid foundation for that good is found in Islamic law.

And this is no surprise, for every believer in God already recognizes this truth, in confirmation of the words of the Exalted and Glorious One: (IslamiCity, THE NOBLE QURAN @IslamiCity, 2026) “{ although there is no beast that walks on earth and no bird that flies on its two wings which is not [God's] creature like yourselves: no single thing have We neglected in Our decree. And once again: Unto their Sustainer shall they [all] be gathered }” «The Holy Quran, Surah Al-An'am: 38 ».

How beautiful it is when divine revelation aligns with the insights of sound experience. Humanity believed it had reached the pinnacle of human perfection—as far as it was capable—in the field of legislation when it established the principle of the individual nature of punishment, as well as the principle of legality, one of the most important applications of which is the rule: “There shall be no crime, no punishment, and no security measures except as prescribed by law.” Yet the civilized person of the twenty-first century is surprised to discover that these two principles have been deeply rooted in Islamic law for more than fourteen centuries— a truth understood by anyone who comprehends the words of Allah, Exalted and Glorified be He: (IslamiCity, THE NOBLE QURAN @IslamiCity, 2026) “{ Whoever chooses to follow the right path, follows it but for his own good; and whoever goes astray. goes but astray to his own hurt; and no bearer of burdens shall be made to bear another' burden. Moreover. We would never chastise [any community for the wrong they may do] ere We have sent an apostle [to them] }” «The Holy Quran, Surah Al-Isra: 15 ».

## **2. Beyond the Purposes of Punishment**

### **2.1 The Philosophy of the Purposes of Punishment in Sharia:**

Scholars of Islamic law, like scholars of positive law, hold that punishments have purposes, objectives, or aims that can be inferred from the texts.

Scholars from both schools distinguish between two types of purposes of punishment: those that all or most punishments seek to achieve—which are a common factor among all punishments and are therefore called the general purposes of punishment— There are also purposes specific to each individual punishment; that is, a punishment is designed to achieve these purposes exclusively, unlike other punishments. These purposes are therefore called the specific purposes of that punishment. However, these specific objectives must serve those general objectives.

What is meant by these objectives are those associated with punishment insofar as it is punishment; they apply to all punishments to varying degrees. Thus, these are objectives specific to punishments, yet at the same time they apply to all punishments. The best summary of these objectives in this regard is the statement by Muhammad al-Tahir ibn Ashur, who said: “The purpose of Sharia in prescribing hadd punishments, qisas, ta'zir, and fines for criminal

offenses is threefold: to discipline the offender, to satisfy the victim, and to deter those who might follow in the offenders' footsteps." (ibnAshur, 2001)

Furthermore, the specific purposes of punishments referred to in this study are those purposes that each punishment is specifically designed to achieve.

Let us compare the penalties prescribed by Sharia and law for the crime of drinking alcohol, by way of example only, in order to weigh their merits.

The first criterion in this balancing of interests is the extent to which each punishment fulfills the general objectives of punishment, especially since there is a convergence between Sharia and law regarding these objectives, as previously explained. The objective of punishing the offender in Sharia corresponds to the objective of specific deterrence in statutory law; the objective of deterring potential offenders in Sharia corresponds to the objective of general deterrence in statutory law; and the objective of satisfying the victim in Sharia corresponds to the objective of achieving justice in statutory law. One of the factors that makes a punishment more appropriate is that it better fulfills these general objectives of punishment.

Here, we want to examine the philosophy of Sharia that underlies the purpose of punishing the offender. Is this philosophy based on the idea of revenge and inflicting pain?!!

Punishing the offender for the crime of drinking alcohol "does not mean taking revenge on him, but rather reforming him" (Awda); thus, the punishment here is "a punishment intended to reform and deter." (al-Mawardi, 1989)

And punishment for a crime under Islamic law should not exceed its limits to the point of deviating from its intended purpose, which is to deter the offender; this is "because the purpose of punishment is to deter crime." (Awda)

Since the punishment for drinking alcohol is one of the prescribed punishments in Islamic law, "the original purpose of this law is to deter people from that which harms them." Hudud—including the limit regarding alcohol—are deterrents before the act and deterrents after it: that is, knowledge of its illegality prevents one from committing the act, and its enforcement afterward prevents one from repeating it." (ibnAbdal-Wahid, 2003)

In other words, when a "potential criminal" considers that if he drinks alcohol, he will be subjected to corporal punishment and flogging, he refrains from doing so in advance; but if his impulses get the better of him and he commits the prohibited act, the punishment will serve as a deterrent and a warning, helping him to give up the sin and not return to it.

The pain of punishment in Islamic law—a pain rooted in the divine message—serves specific purposes, one of which is to discipline the offender. This discipline is not motivated by vengeance or contempt, but rather by mercy and cooperation in righteousness and piety.

Thus, disciplining a drunkard through the prescribed punishment does not permit anyone to speak ill of him or belittle him. Indeed, the Prophet, peace be upon him, rejected any deviation of the punishment for drinking alcohol from its purpose of discipline toward humiliation, even if only through words.

Al-Bukhari narrated two important hadiths on this topic under a chapter he titled: "Chapter on What Is Disliked Regarding Cursing a Drinker of Alcohol, and That He Is Not Excluded from the Faith" (al-Bukhari, 1980)

Hadith 1: (It was narrated from 'Umar ibn al-Khattab that during the time of the Prophet, peace be upon him, there was a man named 'Abdullah who was nicknamed "Himār" [Donkey].

He used to make the Messenger of Allah, peace be upon him, laugh. The Prophet, peace be upon him, had previously flogged him for drinking alcohol. One day, he was brought before him, and the Prophet ordered that he be flogged again. A man from among the people said: "O Allah, curse him! How often is he brought before us!" The Prophet, peace be upon him, said: "Do not curse him, for by Allah, I did not know that he loved Allah and His Messenger.") (al-Bukhari, 1980)

Hadith 2: (Abu Hurayrah reported: A drunkard was brought before the Prophet, peace and blessings be upon him, and he ordered that he be beaten. Some of us struck him with their hands, some with their sandals, and some with their garments. When he was led away, a man said, "What is wrong with him? May Allah disgrace him!" The Messenger of Allah, peace and blessings be upon him, said: "Do not be an ally of Satan against your brother.") (al-Bukhari, 1980)

In the first hadith, the Prophet, peace and blessings be upon him, forbade cursing the drinker of alcohol and affirmed that such a person loves Allah and His Messenger, peace and blessings be upon him. In the second hadith, he forbade the Companions from aiding Satan against the drinker of alcohol and affirmed the bond of brotherhood in faith.

It is as if the Prophet, peace and blessings be upon him, is asking the Companions to limit the punishment for drinking alcohol to the purpose of discipline, and not to go beyond that to humiliate or shame the offender—even with words—in a way that is unwarranted.

The philosophy behind the imposition of punishments in Islamic law—whose purpose is to discipline the offender without exceeding the bounds of justice—derives from "His Majesty's wisdom and mercy, by which He prescribed punishments for crimes committed by people against one another, whether against their lives, bodies, honor, or property... Thus, He, Glorified be He, has perfected the means of deterrence against these crimes to the utmost degree, and has prescribed them in the most comprehensive manner to achieve the objectives of deterrence and punishment, without exceeding what the offender deserves in terms of deterrence. Therefore, He did not prescribe cutting out the tongue for lying, nor death for lying, nor castration for adultery, nor has He prescribed capital punishment for theft.

"Rather, He has prescribed for them in this matter what is befitting His Names and Attributes—His wisdom, mercy, kindness, benevolence, and justice—so that calamities may be averted, desires for oppression and aggression may be cut off, and every person may be content with what his Lord and Creator has given him, so that he does not covet what is not his right." (IbnQayyim al-Jawziyya, 2002)

If it follows from His justice, may He be glorified, that punishment should serve to discipline the offender, then it follows from His kindness and mercy that such punishment should not exceed this purpose, lest it become an act of vengeance and retribution against the offender intended to humiliate him.

One of the distinctions we can deduce at this stage of our research, based on the foregoing, is that the philosophy of punishment in Islamic law is founded on respect for the very existence of the prohibited act, and on respect for his freedom. Thus, punishment under Sharia preserves the offender's social standing on the one hand, and maintains his active role in society on the other, because there are no punishments that deprive him of his freedom in Sharia law.

Deterrence is considered a secondary objective of the prescribed punishment for drinking alcohol, in addition to the objective of disciplining the offender to ensure that he does not reoffend. For “the purpose of the prescribed punishment is not merely to ensure that the offense is not repeated; if that were the sole intention, it would suffice to kill the offender, but rather the intent is deterrence, humiliation, and punishment for the crime; to bring him closer to refraining from his aggression; to serve as a lesson to others; to inflict upon him pain that leads to sincere repentance; and to remind him of the punishment in the Hereafter, among other rulings and benefits.” (IbnQayyim-al-Jawziyya, 2002)

However, the philosophy of Sharia in this regard is that it is not permissible, under the pretext of achieving the objective of deterring the public, to be excessive or arbitrary in punishment.

It remains for us to discuss, within the general purposes of punishment, the purpose of satisfying the victim or the purpose of achieving justice.

The philosophy of Sharia, in pursuit of this objective, requires that the legislator of punishments be superior to human beings, more knowledgeable than them, and characterized by perfection free from any deficiency; this can only be true of the Creator of humankind. This stands in contrast to law, which grants human beings the right to enact punishments for their fellow human beings—thereby violating the principle of justice, as it elevates some people above others. whereas the philosophy of Sharia in prescribing punishments places everyone on an equal footing.

The philosophy of punishment among the Arabs during the pre-Islamic era, which preceded the mission of Muhammad, peace be upon him, was based on injustice; it was rooted in extremism in its two forms: either excessive severity, which made the punishment disproportionate, or leniency, which allowed the offender to escape any punishment at all.

An example of going to extremes in this regard is what was narrated “from Qatadah: The people of the pre-Islamic era were characterized by transgression and obedience to Satan. When a tribe among them—if they had sufficient strength and power—had their slave killed by the slave of another tribe, they would say: ‘We will not execute anyone for this except a free man,’ to assert their superiority over others. And if a woman from their group killed a woman from another group, they would say, ‘We will not execute anyone for this except a man.’ So Allah revealed : (IslamiCity, THE NOBLE QURAN @IslamiCity, 2026) { O YOU who have attained to faith! Just retribution is ordained for you in cases of killing: the free for the free, and the slave for the slave, and the woman for the woman. And if something [of his guilt] is remitted to a guilty person by his brother, this [remission] shall be adhered to with fairness, and restitution to his fellow-man shall be made in a goodly manner. This is an alleviation from your Sustainer, and an act of His grace. And for him who, none the less, wilfully transgresses the bounds of what is right, there is grievous suffering in store } «The Holy Quran, Surah Al-Baqarah: 178 ».

An example of such negligence is a man who would bury his daughter alive, and no one would condemn him for it; this would allow injustice to begin with no end in sight, for every crime that emerges gives rise to a chain of even more heinous and abhorrent crimes. The victim was the weakest link in this philosophy of punishment, whether that victim was an individual or a group.

Finally, it is worth noting in this section of the study that the Sharia philosophy regarding the objectives of punishment has an impact that assigns specific objectives to each individual punishment—objectives that we do not find in law, either in form or substance. In our example concerning the Sharia punishment for drinking alcohol, these specific objectives are:

- \* Preserving the mind from destruction.
- \* Preventing the means to crimes resulting from the loss of reason.
- \* Living in reality, not in fantasy.
- \* Combating health and social ills.

In summary, one of the most prominent topics in criminal law where there is agreement—indeed, complete alignment—between Islamic law and positive law is what the law refers to as the “goals” or “purposes” of punishment, and what Islamic law refers to as the “objectives” of punishment.

Nevertheless, there is a significant difference in the philosophical basis of the objectives of punishment between Islamic law and positive law, just as great as the difference between the Creator and the created.

## **2.2 The Philosophy of the Purposes of Punishment in Law:**

The philosophy of punishment in law holds that punishment has multiple aims, objectives, or purposes, but “the ultimate aim of punishment—or its true and indeed sole purpose—is to protect the interests and rights that the legislature has deemed worthy of criminal protection, that is, to combat crime; However, punishment seeks to achieve this goal through other closely related purposes, the fulfillment of which serves as the means to attain that goal.” (Akaz, 1982)

These purposes are the general objectives of punishment under positive law, or what legal scholars refer to as the “purposes of punishment,” which are defined as: “the functions assigned to punishment or its effectiveness in producing the consequences that result from it, and for which the state employs it as a response to crime. The effectiveness of punishment, in terms of its effects, may relate to the past or to the future.” The function of punishment with regard to the past is expressed through retribution, whereby the offender is punished for criminal conduct that he has actually committed and for which his liability has been established. As for the future, its function is both general and specific deterrence. General deterrence is achieved through the effect that punishment has on individuals other than the offender, while specific deterrence is achieved through the effect that punishment has on the offender’s own psyche, preventing him from committing future crimes. General and specific deterrence together achieve general and specific prevention of future crimes.” (Salama, Criminal Law—General Part, 1990)

And there are those who limit the purposes of punishment “at present to fulfilling two functions: a moral function and a utilitarian one intended to combat crime.”

As for the moral function, it is the pursuit of justice, whereby “society upholds the necessity and obligation of punishing the offender in order to restore balance to the social or legal values that were disrupted by the crime committed... Justice requires—in addition to the obligation to punish the offender—that there be some form of retribution or proportionality between the crime and the punishment.”

As for the utilitarian function, it is the function of deterrence, and by “deterrence” we mean warning people and threatening them with the necessity of refraining from crime. There are two types of deterrence: general deterrence and specific deterrence.”

General deterrence means that: “The legislature addresses the entire population, instructing them to refrain from criminal conduct and threatening to impose punishment on anyone who dares to violate its commands and prohibitions.”

As for specific deterrence, it means that: “The fact that the offender committed the crime indicates that the general threat of punishment did not deter him or dissuade him from committing the crime, and this reveals to us the need to impose punishment on him in the hope that its effect will be effective and influential in preventing him from reoffending.” (Suleiman, *Commentary on the Algerian Penal Code—General Section—Criminal Penalties*, 2005)

Thus, the purposes of punishment under the law—or the general objectives of punishment—are: the realization of justice, general deterrence, and specific deterrence.

The purposes of punishment in law have been grounded in numerous philosophical perspectives, beginning with the absolutist school—or the philosophy of retribution, or abstract justice—in which proponents viewed punishment as an end in itself rather than merely a means to achieve a social good; punishment is imposed because crime is evil, and evil must be met with a just punishment—“philosophical retribution.”

It then focused on the utilitarian approach—or utilitarian philosophy, or the preventive approach—in which proponents of this school of thought view punishment not as an end in itself but as a means to achieve a social benefit: the prevention of crime and the protection of society from future dangers.

Finally, she settled on the philosophy of the contemporary conciliatory approach, or modern criminal policy, whereby contemporary positive laws no longer adhere strictly to a single philosophical approach, but rather blend moral and utilitarian ideas to strike a balance between justice and proportionality—or the moral foundation—on the one hand, and deterrence and rehabilitation—or the utilitarian foundation—on the other. (Khatun & others, 2013)

Legal scholars have emphasized the general objectives of the law, but commentators have not emphasized the specific objectives of punishment; therefore, they have not addressed them in their books—or at least not in the books relied upon in this study—except by way of passing reference.

However, this does not mean that specific purposes do not exist in legal penalties; rather, they are embedded in the provisions of the special section of the Penal Code.

As for the reason why legal commentators have not focused on the specific purposes of punishment, it is that the legislature—by adhering to the formal procedures for enacting laws and issuing orders in this era—has spared them the trouble of deducing and deriving these purposes.

This is because the legislature includes penalties specified in legal provisions under specific headings, which makes those penalties specific to the subjects covered by those headings.

In other words, the legislature explicitly states in advance the specific purposes of the penalty through the title or name of the law or decree, or through the titles of the chapters.

Applying this to penalties related to alcohol consumption—using the example we cited earlier—and referring, for instance, to Order No. 75–26, which the Algerian legislature titled as follows: Decree No. 75–26, dated 17 Rabi’ al-Thani 1395, corresponding to April 29, 1975, concerning the suppression of public drunkenness and the protection of minors from alcohol,

We find that the Algerian legislature has stated from the outset—without the need to analyze the text of the articles—that all penalties set forth in this decree are specifically aimed at combating public drunkenness and protecting minors from alcohol; indeed, it went even further by dividing the decree into two sections: Section One: Suppression of Public Drunkenness, which spans from Article 1 to Article 13. The penalties set forth in all these articles are specifically aimed at “suppressing public drunkenness” as their primary objective.

Chapter II: Protection of Minors from Alcohol, which spans Articles 14 through 26. The penalties set forth in all these articles are specifically aimed at “protecting minors from alcohol” as their specific purpose.

Therefore, there is no need for legal commentators to infer the specific purposes of the penalty, as long as the legislature states them so clearly in laws and decrees.

However, there are those who have pointed to the specific purposes of punishment, though this is a subtle reference that a casual observer would hardly grasp without careful analysis. An example of this is what Fikri Ahmad Akaz stated in his book *\*The Philosophy of Punishment\**, when he said: “The ultimate goal of punishment—or rather, its true and sole purpose—is to protect the interests and rights that the legislature has deemed worthy of criminal protection, that is, the fight against crime [and here he listed the purposes of punishment]. However, punishment seeks to achieve this goal through other, closely related objectives, the fulfillment of which serves as a means to attain that goal. Indeed, the fulfillment of these objectives—or, more precisely, these means—[and here he alluded to the specific purposes of punishment] is sought through other means [namely these], the fulfillment of which is expected to lead to the fulfillment of the aforementioned means.” (Akaz, 1982)

Based on the foregoing, the specific purposes of penalties in the law can be defined as: the title of the law, ordinance, or chapter that the penalties set forth in the relevant articles are intended to achieve.

It can also be defined as: the objectives stipulated by the legislature in the subject matter of the law, decree, or chapter, such that all penalties prescribed in the relevant articles are specifically intended to achieve those objectives.

Returning to the penalty for the crime of drinking alcohol under the law and the specific deterrent purpose, the first point to note is that the Algerian legislature’s criminalization of drinking alcohol is limited to drinking that leads to public or flagrant intoxication, drinking involving minors, or drinking while driving. This means that penalties for drinking alcohol are limited to the scope of criminalization mentioned above.

Here we can see the philosophy adopted by the legislature regarding the specific deterrent, as it has traditionally criminalized the consequences of drinking alcohol, rather than the act of drinking alcohol itself; this is a fundamental difference between the philosophy of the law and the philosophy of Sharia.

It is assumed that the aforementioned legal penalties—including “the severity of the punishment and the offender’s fear that it will be imposed on him again”—will deter him and prevent him from committing the offense, in what is known as “specific deterrence.” (Suleiman, Commentary on the Algerian Penal Code—General Section—Criminal Penalties, 2005)

Legal doctrine also posits that these penalties, by achieving the specific deterrent objective, serve a rehabilitative function.” Thus, specific deterrence plays an educational and

psychological role in correcting the offender's deviant behavior; by suffering the pain of punishment, the offender is dissuaded from committing crimes in the future.

The ultimate goal of legal sanctions in our time is to restore the offender or criminal to socially acceptable behavior." In this sense, specific deterrence approaches the concept of rehabilitation, which has become a goal of punishment and entails the obligation to work toward restoring the offender to behavior that complies with the law.

For if punishment does not eradicate the root of malice from the offender, it will serve as a vaccine that grants him immunity, causing him to return to crime; for a blow that does not break the back only strengthens it." Achieving such a goal is no easy matter; for how can punishment reform the offender's behavior and ensure that he does not return to crime again?.

I do not intend here to go through every provision of the law, but rather to clarify the difference between the law and Sharia due to the difference in the philosophical background upon which the specific deterrent purpose was established, for the title of the section [Suppression of Public Drunkenness] strongly implies the deterrence of the crime of public drunkenness. This means that this strong implication of deterrence should be evident and reflected in the penalties, so that the penalties serve as a means of severe punishment and deterrence.

However, the first article of this section—before it was amended—was shocking, as the penalty it prescribed was merely a fine ranging from 40 DZD to 80 DZD.

This is an amount that kids wouldn't even accept as pocket money these days, so how could it possibly serve as a deterrent for a criminal who buys a bottle of alcohol worth many times that amount—perhaps hundreds or even thousands of times as much?

Here lies a fundamental difference between law and Sharia: the philosophical basis of legal penalties recognizes human fallibility and the inability to fully comprehend or foresee the future, which makes it necessary to review these penalties in order to update them; otherwise, they become meaningless—for example, if the penalty is a monetary fine.

What has been said about the specific deterrent purpose applies equally to the other purposes, as long as the philosophical basis for enacting these penalties remains the same.

Referring to the specific purposes of the penalties related to our example, we find that the specific purposes of the penalties for drinking alcohol under the law—as indicated by its title and the titles of its chapters—are based on three objectives:

1. Maintaining public order.
2. Combating traffic accidents caused by drunk driving.
3. Combating the illegal sale of alcohol.

One of the problems caused by the philosophy of legislation is the blind imitation of the philosophies of others, particularly Western countries such as France, which often leads to a contradiction between the legislator's intent and the actual text of the law. One of the main reasons for the discrepancy between the law and Sharia is the philosophy of blind imitation practiced by local legislators toward foreign legislation, whereas Sharia is a universal system of law suitable for every era and every country.

One of the ways in which law and Sharia differ—due to differences in the philosophy of objectives—is that the specific objectives of Sharia punishments were greater in number, more diverse, and of broader benefit than the specific objectives of legal punishments, and the

philosophical reason for this is the vast difference between the two legislators; for there is a world of difference between a servant and his Lord.

The most important conclusion we draw is that the similarity between Sharia and law regarding the purposes of punishment does not make them compatible or equivalent, because the difference in the philosophy underlying each legal system results in a different spirit, even if the text appears identical.

We have demonstrated that there is a significant difference in punishments between Islamic Sharia and positive law, as great as the difference between the Creator and the created, even if they appear to coincide in their rationale and objectives.

## Conclusion

The most valuable aspect of this study is the findings that provided comprehensive answers to the research problem, the most important of which are as follows:

- 1- On the surface—and I say on the surface—there is agreement between Sharia and the law, indeed a complete alignment regarding the basis for punishment. And if the principle is that “there is no crime, no punishment, and no security measures except as provided by law,” then what we must necessarily deduce is that: “ There is no punishment except after a conviction of the crime,” and this necessitates that the crime be the basis for the punishment.
- 2- After a careful analysis of the texts of Sharia, we discover deeper implications than are apparent regarding the rules of punishment, leading us to conclude that the philosophical basis of Sharia in matters of punishment differs from the philosophical basis of law.
- 3- Punishment in Islamic law comes from God and is imposed for crimes that God has declared to be criminal. This differs from a law that grants humans the right to define crimes and impose punishment.
- 4- In Islamic law, it is God who determines the grounds for punishment, because it is He who defines what constitutes a crime, whereas in secular law, it is humans who determine the grounds for punishment because it is they who define what constitutes a crime.
- 5- The philosophical basis for punishment in Islamic law rests first and foremost on faith in God and on the acknowledgment that He has the right to command and prohibit because He is the Creator. As for the law itself, its application does not require belief in anything specific, since it applies to everyone, and the believer and the non-believer are equal before it.
- 6- Human beings are imperfect, and everything they produce is inevitably marked by this imperfection. Furthermore, human beings have their own personal interests and desires, which inevitably find their way into their laws, whereas God, Glorified and Exalted be He, is characterized by perfection and impartiality, and His laws are based on absolute justice, for all human beings are equal before Him.
- 7- The theory of punishment in Islamic law was fully established with the completion of the revelation, whereas modern theories of punishment did not emerge all at once; rather, they were the result of a profound and gradual transformation that accompanied the evolution of human thought, the concept of the state, and human rights.

- 8- The philosophy of punishment in Islamic law is based on respect for the offender's humanity and respect for the offender's freedom. Thus, punishment under Islamic law preserves the offender's social standing on the one hand, and maintains his active role in society on the other, since there are no penalties under Islamic law that deprive him of his freedom.
- 9- The philosophy of Sharia requires that the legislator of punishments be superior to human beings, more knowledgeable than them, and characterized by perfection, free from any imperfection; this applies only to the Creator of humankind. This contradicts the law that grants humans the right to enact punishments against their fellow humans, thereby violating the principle of justice, as it elevates some people above others. In contrast, the philosophy of Sharia places everyone on an equal footing when determining punishments.
- 10- The objectives of punishment in law have been based on various philosophical perspectives, ranging from the absolutist school to the utilitarian approach; ultimately, they have settled on the philosophy of the contemporary conciliatory approach, or modern criminal policy.

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