

## **The extent of Legitimacy of Punishment for the Public Interest -A Comparative Teleological Study between Sharia and Law –**

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**Received:** 04/2024

**Published:** 09/2024

### **Abstract:**

This research primarily revolves around the legitimacy of imposing punishment, whether in Islamic Sharia or positive law, with the motive behind it being the protection of public interest. It can be asserted that public interest has become a legitimate objective that must be preserved, and thus, in certain circumstances, individuals may need to sacrifice or waive their rights for it.

This study delves into the content through analysis and study via two sections: the first is dedicated to conceptual study, such as the linguistic, Sharia, and legal concepts of punishment, the distinction between Sharia and positive punishment, the types of punishment in Sharia and legal jurisprudence, as well as the linguistic, legal, and Sharia concepts of public interest. The second section elucidates the imposition of Sharia and positive punishment for the sake of protecting public interest, represented by some incidents from the actions of the Prophet Muhammad, peace be upon him, and the actions of the Companions, may Allah be pleased with them, wherever possible, along with examples from positive law illustrating this noble punitive purpose.

**Keywords:** Sharia punishment – Positive punishment – Public interest – Sharia objective – Islamic legislation.

### **Introduction:**

With the praise of Allah and His assistance, I present this humble research, striving to grasp everything that serves the title and content of the research to the best of my ability. If I have succeeded, it is by the grace and favor of Allah upon me. If I have failed to reach the correct conclusions, it is due to my weakness and limitations. All praise and thanks are due to Allah in all circumstances.

The research before us is entitled: "The Legitimacy of Punishment for Public Interest - A Comparative Teleological Study between Sharia and Law." Punishment is established for deterrence, prohibition, and discipline, regardless of its source, whether divine or rational. Its purposes also include protecting society and advancing it towards virtue. However, Sharia

punishment differs somewhat from positive punishment, with the difference lying in their essence and source. What originates from Allah is effective and enduring, whereas what stems from human reasoning, though effective, is not sustainable. This is the secret behind the continual amendment and enrichment of legal provisions from time to time. Nevertheless, both legal systems agree on the obligation to protect public interest.

The protection of public interest by both Sharia and law is ensured by enacting and enforcing punishments, acting as a barrier safeguarding the rights of the community and society to enjoy social stability, as well as religious security in the case of Islamic legislation. So, what is the legitimacy of punishment for public interest? Addressing this question requires posing a series of inquiries: What is meant by public interest in Islamic Sharia, and what is its meaning in positive law? How is it protected in both legal systems? How did Islamic legislation distinguish itself in safeguarding public interests related to preserving the religion and morals of the nation? Perhaps this is also the secret behind its perpetuity, validity, and sanctity.

To study this topic, a dual-plan approach was adopted, consisting of two sections:

- The first section: devoted to conceptual study, comprising two demands: the first focuses on the concept of punishment and explaining the difference between its Sharia and positive aspects. The second demand discusses the types of punishment and the concept of public interest.
- The second section: dedicated to punishment for public interest in Sharia and positive jurisprudence, also comprising two demands: the first focuses on punishment for public interest in Islamic criminal legislation. The second demand addresses punishment for public interest in positive criminal legislation.

### **Chapter One: Conceptual Study**

In this chapter, I will delve into the conceptual study of the research entitled: "The Legitimacy of Punishment for Public Interest - A Comparative Teleological Study between Sharia and Law." It is imperative for me, as an academic, to clarify several scientific concepts in a suitable manner, avoiding redundancy or oversight, and striking a balance between elaboration and conciseness, all related to the research topic in a clear manner, ensuring that no aspect is overlooked or omitted. These conceptual choices include elucidating the concept of punishment linguistically, legally, and terminologically, as well as providing a concise explanation of its types, purposes, and distinguishing features.

Furthermore, it is necessary to provide a comprehensive and general understanding of the public interest as a legal objective that must be safeguarded. Can it be considered a purpose of punishment, or is it a barrier to preserve the rights of the community and society to enjoy security and social stability?

## 1) The Concept of Punishment and Explaining the Difference between Punishment in Sharia Law and Positive Law

In this request, I will elucidate the concept of punishment linguistically, legally, and in legal terminology, along with related aspects that enhance clarity and understanding, such as the distinction between Sharia and positive punishment. This study will be conducted through the following sub-sections:

### 1-1) The Concept of Punishment

#### A) Definition of Punishment(العقوبة ) Linguistically

delay, and the other indicating severity. Punishment is derived from the verb "عاقب" (aqāba), meaning to follow or pursue, and it is named "عقوبة" (uqūba) because it follows and accompanies wrongdoing. Its synonyms include "معاقبة" (mu'āqaba) and "عِقَابًا" ('iqāban), denoting severe retribution for evil deeds, as mentioned in the Quranic verse: "And if you punish [an enemy, O believers], punish with an equivalent of that with which you were harmed." (An-Nahl 16:126). "العاقبة" (Al-'Āqiba) refers to reward, while "العقاب" (Al-'Iqāb) refers to punishment (Ibn Faris, Mu'jam Muqayyis al-Lughah) <sup>(1)</sup> .

Punishment is the outcome of an action and is preceded by it. It does not exist until after the occurrence of the crime, as it follows it (al-Talqani, Abbad al-Sahib Abu al-Qasim Ismail, 1994)<sup>(2)</sup> .

Upon examining these linguistic meanings, it becomes clear to us that punishment conveys connotations of severity and harshness. It serves as a subsequent retribution for the wrongdoer after violating the commands of the law. Therefore, punishment cannot precede the commission of the prohibited act. If it were to occur otherwise, it would be considered an act of injustice and tyranny.

#### B) Definition of Punishment in Sharia Terminology:

Punishment has various definitions, and I dare say not contradictory ones. Each proponent of a definition approached it from a specific angle regarding the nature of punishment. I will mention some of them in chronological order:

- Al-Hanafi scholar Ibn al-Hammam defined it as: "Preventives before the act, barriers after it. Meaning, knowledge of its legitimacy prevents the commission of the act, and implementing it afterwards prevents returning to it" (al-Humam, Kamal al-Din Ibn)<sup>(3)</sup>

- Al-Aziz ibn Abdul-Salam defined it as deterrents, saying: "As for deterrents, they are of two types. One is a deterrent from persisting in a specific sin for which the doer is not sinful... And the second is what serves as a deterrent for a past sin, which is not waived except by fulfillment" (al-Salam, Al-'Izz ibn 'Abd)<sup>(4)</sup> .

- Ahmad Fatahi Bahnsi defined it as: "A penalty established by the law to deter from committing what is prohibited and to encourage what is commanded. It is a predetermined material penalty that makes the accountable refrain from committing the crime" (Ahmad Fathi Bahnsi, 1958)<sup>(5)</sup>

- Professor Abdul Qader Oudah defined it as: "The prescribed penalty for the benefit of the community for disobeying the command of the Sharia" (Abdul Qadir Oudah, 2003)<sup>(6)</sup> .

### **C) The Difference between Punishment and Retribution in Sharia:**

Sharia scholars have distinguished between punishment and retribution, as evident from their writings. They consider punishment to be what befalls a person in this worldly life due to their Sharia violations, such as committing crimes that warrant fixed penalties, practicing sorcery or witchcraft, blaspheming religion or the infallibles, and other major sins if they meet their conditions and prerequisites. On the other hand, they view retribution as what awaits a person in the afterlife for committing crimes and violating Sharia if the Sharia-prescribed punishment is not carried out on the transgressor in this world by the Sharia ruler authorized to enforce it. This also includes committing acts prohibited by clear evidence that were not punished in the world, and then the person dies without repentance.

While we find that Imam al-Mawardi, may Allah have mercy on him, sees a correlation between punishment and legal penalties, as evident in his definition of "Hudud" (legal punishments), wherein he refers to them as forms of punishment (Azzouz, Dr. Ali, s.d.)<sup>(7)</sup> : "Hudud (legal penalties) are preventive measures established by Allah to deter people from committing what He has prohibited and neglecting what He has commanded, due to the allure of indulging in worldly desires over the fear of the consequences in the Hereafter and the immediate pleasure. Allah has thus made some of these legal penalties serve as deterrents for the ignorant, warning them against the pain of punishment and the shame of disgrace (Imam Abu al-Hasan Ali ibn Muhammad al-Mawardi, 1427 AH / 2006 CE)<sup>(8)</sup> .

### **1-2) Definition of Punishment in Positive Law and Explanation of the Difference between Punishment in Sharia Law and Positive Law**

**A) Definition of Punishment in Positive Law:** Punishment is both a penalty and a remedy imposed by society on a legally responsible person for the crime they committed, based on a valid judicial verdict issued by a competent court. It involves deprivation or restriction of the right to life, freedom, certain rights, or property (Henry Campbell Black, 1990)<sup>(9)</sup> .

Punishment in the legal context is characterized by the following:

- Legality of Punishment: It can only be imposed if there is a legal provision specifying its nature, extent, and the judge's authority to apply it.

- Credibility of the Source: Punishment is only imposed by a competent criminal court.
- Personal Nature of Punishment: It applies only to the person responsible for the criminal act.
- Equality in Application: Punishment for a specific crime applies equally to all individuals.
- Reviewability: Punishment is subject to review if improperly applied.
- Appropriateness: Punishment must be suitable in its nature and extent to the individual offender.
- Punishment serves as both retribution and rehabilitation, rather than solely being about vengeance or retaliation. Therefore, forms of punishment such as burning, crucifixion, or torture are not permissible.
- Some punishments are imposed by the community as a social reaction to protect societal security, ensure stability, and safeguard individuals from criminal impulses within themselves. This social reaction does not grant individuals the right to take revenge for themselves, as individual retaliation is rejected by all legal systems. Only society has the right and authority to criminalize and punish (Wikipedia Encyclopedia, s.d.)<sup>(10)</sup> .

## **B) The Difference Between Sharia Punishment and Positive Punishment**

There is a consensus between Sharia (Islamic law) and legal punishment regarding their purpose, which is to deter, discipline, rehabilitate, protect social values, safeguard society, and provide individuals with peace of mind. This indicates that regardless of whether the source of the law is divine or rational, the goal is nobility. Therefore, it always seeks to elevate and achieve social and individual protection and stability. However, success is ensured when the law originates from a divine source. Differences arise when the source is human reason, marking the beginning of distinctions.

**- Difference in Source and Origin:** Sharia punishment originates from the divine, making it valid for all times and places. What comes from Allah does not need perfection from any of His creations, as He knows what was, what is, and what will be. He created communities and established laws for them to adhere to in all circumstances. What was suitable for the first community in the early days of Islam remains applicable to subsequent generations. On the other hand, legal laws are products of society. As societies evolve, their laws become outdated and require enrichment. Laws from the past cannot suffice for the future.

**- Flexibility and Stability:** The Sharia punishment, divided into prescribed punishments (Hudud) and discretionary punishments (Tazir), demonstrates the flexibility of Sharia law and its ability to adapt to all ages. The discretionary punishment, entrusted to the judgment of the Imam, allows for extensive interpretation. However, the prescribed punishment remains constant to preserve the five essentials of Sharia.

While we find the statutory penalty flexible altogether, subject to change and choice in many circumstances.

- **The Sanctity of Sharia Laws:** The source of Sharia laws has a significant impact on their sanctity and complete respect by both the ruler and the ruled, as they believe it brings them closer to God. In contrast, statutory laws completely lack this sanctity. Therefore, if trust is lost between the ruler and the ruled due to conflicting interests, how can these laws be respected?

- **Protection of Morality:** Sharia penalties are keen on protecting morals, even strict in this protection, almost punishing every action that undermines morals. Nations rise by morals and collapse and vanish without them. Conversely, statutory laws often neglect moral issues and only punish them if they cause harm to individuals or public order (Abdul Qadir Ouda) <sup>(11)</sup>.

## 2) Types of Punishment and the Concept of Public Interest

In this request, I will discuss the types of both Sharia and statutory punishments, as well as the concept of public interest or what is known in statutory law as public order, which are reasons for imposing both Sharia and statutory punishments alike.

### 2-1) Types of Punishment

**A- In Islamic Sharia:** Sharia punishment falls into two categories: specified and unspecified, as stated in the Grand Rules of Al-Az Ibn Abd al-Salam: "As for deterrents, they are of two kinds: one of them deters from persisting in a present sin without any sin on the part of the doer; this is to push away existing corruption, and it falls away when the corruption erupts. The second kind deters from a past sin or a past corruption; it does not fall away except through compensation." (Al-Az ibn Abd al-Salam)<sup>(12)</sup> What is meant by falling away upon the eruption of corruption is the specified punishment, or what is known as the prescribed penalties, and what is meant by being susceptible to fall away when corruption erupts is the unspecified punishment, or what is known as discretionary punishment .

**Firstly: Definition of Specified Punishment(alhudud):** Scholars have provided various definitions to give a comprehensive definition preventing the specified punishment. However, they did not deviate from the framework of it being the specified and obligatory punishment for the right of God. Therefore, it can be said that the prescribed punishment is: "A specified punishment( Al-hudud) obligated by the right of God." (Zain al-Din bin Najim) (Abu Bakr Mas'ud ibn Ahmad al-Kasani)<sup>(13)</sup> . The term " Al-hudud " was used because it prevents the commission of atrocities , Preservation of the five necessities (Abu Bakr ibn al-Sayyid Muhammad Shatta al-Dimyati) (Ibrahim ibn Muhammad ibn Maflah al-Hanbali, 1400 AH)<sup>(14)</sup> .

The Sharī'ah-defined limits (ḥudūd) are characterized by the following: (Muhammad 'Ali ibn Husayn)<sup>(15)</sup>

- The ḥadd is legally prescribed; thus, those executing it are obliged to adhere strictly to what is stipulated by the Sharī'ah without addition or subtraction.
- The ḥudūd are obligatory in terms of enforcement and implementation by the leaders.
- Despite the principle of "different crimes entail different punishments," the Sharī'ah has equalized punishments for certain offenses, such as drinking a drop of wine versus drinking a jarful, or stealing a specific amount versus stealing multiples of it.
- The prescribed limits are only applicable to sins in Sharī'ah, and they signify atonement for the sin.
- The prescribed limits do not lapse under any circumstances if established by the Imam and proven by legal evidence. Even repentance does not affect the validity of the punishment, except for highway robbery and apostasy, as their prescribed limits are voided by repentance by consensus.
- The prescribed limits are not affected by the differences in the perpetrators; all criminals are treated equally. The discretion is only applicable in cases of highway robbery, where there is disagreement among scholars.
- The Sharī'ah-defined limits are repelled by doubts (Ibn 'Abidin)<sup>(16)</sup>, and their establishment requires affirmation or clear evidence.

**Secondly: Definition of Unprescribed Punishment or Ta'zīr:** The jurists have offered various definitions for ta'zīr, most of which are not comprehensive or conclusive, whether from earlier or later scholars. For this discussion, I have chosen the definition by the eminent scholar Al-Mālikī Ibn Farhūn, who said: "It is disciplinary correction and deterrence for sins not subject to prescribed limits or expiations." (Ibn Farhūn, Barhān al-Dīn Ibrāhīm)<sup>(17)</sup> He clarified In this definition, punishment by way of "ta'zir" is explained as a penalty for offenses falling below the threshold of prescribed limits. Its wisdom lies in discipline and rehabilitation.

The distinguishing features of "ta'zir" punishment are as follows (Ibn Ḥusayn, Muḥammad)<sup>(18)</sup>:

- "Ta'zir" is a punishment not specifically prescribed by Sharia law. There is consensus that no minimum limit is set, while there is disagreement regarding setting a maximum limit.
- It is not obligatory for rulers to implement "ta'zir" punishments. It is at the discretion of the ruler, who may choose to enforce or waive them based on considerations of public interest. It

is not limited to the ruler's authority; parents may impose it on their children, teachers on their students, and masters on their servants.

- It is a punishment varies depending on the offense, the perpetrator, and the circumstances. Punishment for honorable individuals differs from that for the lowly. Therefore, "ta'zir" punishment varies with the different actors, actions, times, and places.

It can be imposed for misconduct or actions not considered sins, such as disciplining children and animals. It does not imply expiation for sins. Hence, "ta'zir" serves the public interest, which is the subject of this research.

- "Ta'zir" encompasses both the right of Allah and the right of the slave. Therefore, "ta'zir" punishment can be dropped upon repentance if it pertains to the right of Allah, even if it has reached the ruler. Additionally, clemency and intercession are permissible.

- It is not affected by doubt; it is established and verified.

### **B) In Positive Law:**

The Algerian Penal Code, like other statutory laws, is divided into two sections:

- **General section:** This section includes general theoretical rules applicable to all criminals and crimes equally. It defines the concept of crime in terms of its nature and elements, and identifies the types of punishments and measures.

- Encounter, and examine the justifications and obstacles of punishment and the enforcement of criminal law in terms of time, place, and individuals. Accordingly, this section's characteristics distinguish it by abstraction and comprehensiveness, as its provisions are general and apply to all crimes regardless of their magnitudes.

- **The Special Section:** It includes the texts that elucidate each punishable act, such as betrayal, forgery, or murder... They aim to specify each of these crimes individually, defining them and outlining their elements that distinguish them from other crimes, as well as explaining the circumstances associated with those actions. Consequently, they increase or decrease in severity, then subsequently determine the prescribed penalties for each<sup>(19)</sup> .

### **2-2) The Concept of Public Interest(almaslahat aleama):**

To further enrich this research and convey its intended information to the reader, it is necessary to continue clarifying some concepts related to the research in a close connection. Therefore, it is essential to clarify the concept of public interest from linguistic, terminological, legal, and legal perspectives<sup>(20)</sup> .

### **Firstly: Defining Public Interest Linguistically and Terminologically:**

Public interest is a compound term consisting of two words: "interest" and "public". Therefore, it is necessary to define each term separately:

**1/ Linguistic Definition of Interest:** It is benefit and against harm (Al-Fayoumi, A. bin M.) (Al-Razi, M. bin A. B.)<sup>(21)</sup>, whether general or specific, whether worldly or otherworldly, material or moral, international or global:

- Specific: Like the judgment to dissolve the marriage of a missing spouse judicially.
- Otherworldly: Like the devotion of a devout person to worship.
- Worldly: Like the autopsy of a murdered body to prove or disprove the crime of a suspect.
- Material: Such as benefiting from the proceeds of a solidarity company.
- Moral: Like the psychological comfort of returning to one's homeland after security is restored.
- International: Such as pricing of essential commodities during a blockade.
- Universal: Like the formation of international organizations and bodies (Dr. Anwar Abu Bakr Kareem Amin Al-Jaff, 2014)<sup>(22)</sup>.

**2/ Definition of Interest among Jurists of sharia :** Jurists have defined it with various verbal expressions but unified meanings, including:

- Imam Al-Ghazali's Definition: "It is essentially about bringing benefit or repelling harm." He further clarified that according to him, the criterion of interest is suitability to the Sharia's objective of preserving the five essentials. Anything that jeopardizes these essentials is harmful and repelling it is in the interest (Imam Abu Hamid Al-Ghazali)<sup>(23)</sup>. So, according to Imam Al-Ghazali, interest is achieved by preserving the five essentials.
- Imam Al-Shatibi's Definition: "Interests are what contribute to the establishment of human life, the completeness of his livelihood, and the attainment of what his physical and intellectual qualities absolutely require, so that he becomes comfortable in every aspect." (Al-Shatibi, Imam)<sup>(24)</sup> According to Al-Shatibi, interest is achieved by its suitability to the Sharia's objective.

From this, we conclude that interest is: "Every intended benefit that is legislated by the Sharia for individuals to preserve their religion, selves, intellects, progeny, and wealth, or that is suitable to its objective according to specific conditions." (Borkab, Muhammad Ahmed)<sup>(25)</sup>

**3/ Definition of General( aleama ):** It is a qualifying attribute for embracing interest for all that is beneficial to it among individuals. It contrasts with the specific, meaning that it does not exclusively benefit specific individuals in society or a particular individual (Al-Jaff, Kareem Amin p. 18)<sup>(26)</sup> .

**4) The public interest( almaslahat aleamm ), linguistically compound,** entails sacrificing individual benefit in favor of the community or abolishing it altogether. Thus, it becomes evident that "the public interest" is a compound adjective with its own specific concept, which will be explained later<sup>(27)</sup> .

### **Secondly: the intended meaning of public interest in Islamic law**

The public interest, in reality, is one of the branches of the public interest; where the transmitted interest was divided considering its general benefit into two parts (Al-Wakeel, Mohammed, 1997)<sup>(28)</sup> : private interest and public interest. Imam Al-Ghazali, may God have mercy on him, divided it in his book "The Healing of the Heart" where he said: "The interest is divided into another division in addition to its ranks in clarity and secrecy: its peak is what pertains to the public interest in the rights of all creation, including what pertains to the interest of the majority, and including what pertains to the interest of a specific person in a specific incident." (Abu Hamid Muhammad ibn Muhammad Al-Ghazali, 1390 AH - 1981 AD)<sup>(29)</sup>

- Therefore, the public interest, in this regard, is: "What contains the interests of the nation negatively or positively, and the legislator remained silent about it." The jurists considered it legal evidence with its conditions in contemporary issues (Kareem Amin Al-Jaaf)<sup>(30)</sup> .

- There is another type of public interest which is: "Halting what lacks evidence due to the benefit it brings to the general public or the majority." An example of this is the action of Umar, may God be pleased with him, during his caliphate when he enforced a single pronouncement of divorce<sup>(31)</sup> .

- Both definitions can be combined to achieve a comprehensive understanding of the public interest as a compound in Islamic law: "Halting what lacks legal evidence due to the benefits it brings to all people or the majority, and what contains the interests of the nation negatively or positively, and the legislator remained silent about it." An example of this is the judicial interest in killing the innovator who calls to his innovation if his harm outweighs the presumption of innocence, and this harm becomes total. Similarly, the judicial interest in killing the concealed heretic and not accepting his repentance after he becomes capable of repentance (Dr. Hussein Hamed Hassan, 1981)<sup>(32)</sup> .

### **Thirdly: The Concept of Public Interest in Positive Law**

In reality, there is no clear definition or concept of public interest in positive law, despite its consideration in many legislations and contexts. It seems that legal scholars have their own

terms to express public interest, such as "preservation of public order" and "public utility." However, the expression of public interest in law is more inclusive, encompassing the aforementioned terms.

Moreover, public interest is a dynamic concept in law, varying from time to time, from one political system to another, and from one set of circumstances to another. Therefore, one researcher attempted to establish determinants for public interest as follows (Dr. Ayman Bishri Ahmed Mohamed Jad Al-Haq, 10/22/2019)<sup>(33)</sup> :

1. Public interest represents common benefits shared among members of society.
2. Public interest aims to maximize benefits and minimize harm for the general population.
3. Public interest reflects the predominant interests of society and takes precedence over individual interests if they conflict.
4. Public interest is a flexible idea that changes from one society to another, governed by stable values and prevailing beliefs in that society.
5. The concept of public interest in positive law does not necessarily prioritize protecting religion as an ultimate societal interest; rather, it aims to prevent threats to security that may arise from encroaching upon it.

## **Chapter two: Punishment for Public Interest A Comparison Between Islamic Jurisprudence and Positive Law**

The general principle in Islamic jurisprudence is that punishment is only applied to wrongdoers, sinners, and those who violate the commands of Allah, whether the punishment is prescribed by law or delegated to the ruler. However, there is an exception to this principle concerning discretionary punitive measures entrusted to the judgment of the Imam. As mentioned earlier, these punishments are flexible, and the ruler has the authority to enforce or suspend them, even without sin or contravention, in accordance with the public interest (Ibn Abidin) (Ibn Farhun)<sup>(34)</sup> .

On the other hand, in statutory law, punishment is defined as "the infliction of pain on the offender as a consequence of his violation of the law's prohibition or command." (Jundi Abdul Malik)<sup>(35)</sup> This definition underscores that the pain experienced by the offender during punishment serves as a deterrent, preventing him from re-offending. Consequently, this achieves a special kind of protection and serves as a lesson to anyone tempted to transgress the law.

Venturing into and traversing the realm of criminality, the safeguarding of the public interest is ensured. By achieving both particular and general protection, the societal framework that guarantees the protection of communal interests is fortified<sup>(36)</sup> .

The rationale behind the establishment of penal laws, regardless of their nationality, is noble in appearance, yet the deficiency lies in the content of their provisions and their misapplication. In this regard, both Islamic and statutory criminal legislation share this nobility, yet they differ in essence. Without a deterrent legal framework, society lacks vitality,

and a law that is not upheld. It protects individuals as well as groups and safeguards the public interests of the state. However, the latter, public interests, are also exceptions to the general rule of punishment in statutory law and are not clearly defined in its texts, as previously stated in the conceptual study. Still, they are manifested in reality. How many punishments have been applied to individuals without violating the law or its ordinances, in order to protect the public interest or what is termed in legal language as safeguarding public order.

### **1) Punishment for Public Interest in Islamic Law**

As previously mentioned, punishment for public interest is exempted from the general rule of punishment. It is imposed without committing sins or violations. The actions falling under this exception cannot be predetermined or specified in advance because they are not prohibited in themselves but rather for their effects—that is, they are forbidden by description. Thus, if the description applies, they are prohibited by Sharia, and if it does not, they are permissible. The description that serves as a basis for punishment is harming public interest or what contemporary terminology refers to as disrupting public order. Therefore, in punishing for public interest, it is a prerequisite that the offender be attributed to one of two things (Abdul Qader Aouda, Vol. 1, p. 150. )<sup>(37)</sup> :

- That they committed an act that affects public interest or public order.
- That they are in a state that harms public interest or public order.

Thus, if a case is presented to the judiciary in which the accused is alleged to have committed an act that affects public interest or public order or is in a state that harms public interest or public order.

The general rule in the courts is that if what is attributed to the accused is proven to be true, the judge is not to acquit them. Instead, they are to punish them with a suitable punishment from among the prescribed penalties, even if what is attributed to the perpetrator was not inherently prohibited, and there is no punishment for it in itself<sup>(38)</sup> .

#### **- Some applications and evidence of the legitimacy of punishment for public interest:**

**A-** it is established that the Prophet Muhammad (peace and prayer be upon him) imprisoned a man accused of stealing a camel, and when it became clear later that he did not steal it, he released him (Kamal ibn al-Humam Vol. 5, p. 218., 1389 AH - 1970 AD)<sup>(39)</sup> .

The argument drawn from the Prophet's action is that imprisonment is a punitive punishment, and punishment is only warranted after the crime is proven with evidence. Thus, when the Prophet imprisoned the man based solely on accusation, it means that he punished him for the accusation only, and he authorized the punishment for anyone who finds themselves or is found in a situation of accusation, even if they did not commit a prohibited act. The punishment imposed by the Prophet in this case is justified by public interest, justifying the concern for public order. Leaving the accused person at large before investigating the allegations against them may lead to their escape or result in an erroneous judgment against them, or may lead to the non-implementation of the punishment after the

judgment. The basis of punishment is to protect public interest and maintain public order (Abdul Qadir Awda, Vol. 1, p. 150.)<sup>(40)</sup> .

**B-** consider what Umar ibn al-Khattab (may Allah be pleased with him) did to Nasr ibn Hajjaj, where Umar, while walking in Medina, overheard a woman saying, "Is there a way to wine?" or "Is there a way to Nasr ibn Hajjaj?" Umar then summoned Nasr ibn Hajjaj, found him to be a handsome young man, shaved his head, and banished him to Basra out of fear that women might be tempted by his beauty, even though he was not accused of committing any prohibited act (Farhun, Ibn Vol. 2, p. 296 & Ibn Abidin in his "Hashiyah", Vol. 6, p. 110.)<sup>(41)</sup> .

The argument drawn from Umar's action is that he imposed a punitive punishment on Nasr ibn Hajjaj because he perceived his presence in Medina as detrimental to the community's welfare, even though Nasr's beauty was what caused this situation, and even though Nasr did not intend to harm public interest or public order (Al-Tashrie Al-Jinayi Al'Islami , Vol. 1, p. 150)<sup>(42)</sup> .

**C-** Examples of punishment for the public interest include disciplining children for neglecting prayer and cleanliness, and disciplining them for actions considered crimes by Sharia, even though these actions are not considered crimes for undiscerning children because they are not accountable (al-Kasani , Vol. 7, p. 64 )<sup>(43)</sup>. Therefore, they are not punished with the prescribed penalties but are disciplined for the public interest (Al-Tashrie Al-Jinayi Al'Islami , Vol. 1, p. 151. )<sup>(44)</sup> .

**D-** Examples also include preventing the insane from interacting with people if their interaction poses harm to others and imprisoning those known for harming others, even if there is no specific evidence of a particular act.

The theory of punishment for the public interest is based on the general principles of Sharia, which dictate that private harm should be borne to prevent public harm, and that severe harm is alleviated by lesser harm<sup>(45)</sup> .

## **2) Punishment for the Public Interest in Positive Law**

As indicated earlier regarding the wisdom behind legislating statutory punishment, it aims to preserve public order or protect community interests, manifested in safeguarding the state and public property.

The state, as a fictional person, is protected by criminal law, which prohibits encroachment upon it, disclosure of its defensive or economic secrets, or involvement in rebellious movements against its authorities. Criminal law is an effective tool for the state to maintain public order and protect its constitution. Therefore, crimes such as abuse of power, misuse of authority, disobedience, escape, begging, vagrancy, impersonation of functions and titles, are

addressed in the Algerian Penal Code under its first chapter, covering all offenses related to public order (Lessons in Explaining the Algerian Penal Code - Special Section, 1989)<sup>(46)</sup> .

It is noteworthy that punishment for the preservation of public order and the protection of the public interest is a desired objective in both Islamic criminal law and Algerian positive law. The difference lies in the concept of public interest, which is a matter of consideration that may differ. Due to the difference in legislative perspective, what serves the public interest in Islamic criminal legislation may not necessarily align with Algerian legislation.

The concept of punishment for the public interest in Algerian legislation is evident, perhaps most clearly seen in the issue of pretrial detention of the accused. Despite the presumption of innocence until proven guilty, as established in the jurisprudence of criminal law (the presumption of the accused's innocence) and the principle (the accused is innocent until proven guilty), in some cases, the accused is detained as a precautionary measure.

Pretrial detention is an exceptional measure taken by the investigating judge for social protection, despite encroaching on individual freedom before conviction. It should be implemented after interrogating the accused and is aimed at dangerous criminals. The purposes of pretrial detention can be summarized as follows<sup>(47)</sup> :

- Partially satisfies the victim and society.
- Protects the accused from possible attacks by the victim or their relatives.
- Allows the accused to be within reach of the investigating judge for interrogation and confrontation at any time, preventing the accused from influencing witnesses or concealing crime evidence.
- Prevents the accused from fleeing.
- Prevents the recurrence of serious crimes, hence applied only to dangerous criminals.
- Facilitates psychological or medical treatment as part of social defense policy.

It is noteworthy that Algerian criminal legislation does not contradict Islamic criminal legislation in this regard. However, it's worth mentioning that Islamic law was ahead in establishing the principle of the accused's innocence before conviction and in implementing pretrial detention (for public interest), dating back centuries (since the revelation).

**Conclusion:** In conclusion, this research, by the grace of Allah, presents important scientific findings, summarized in the following points:

1. There is a moral agreement between the linguistic and religious concepts of punishment, as it entails severe consequences following the actions of the perpetrator.
2. Sharia jurists distinguish between punishment (‘uqūba) and penalty (‘iqāb), making punishment worldly and penalty otherworldly.
3. There is a convergence between Sharia and statutory punishment, as both are intended for deterrence, discipline, rehabilitation, and societal protection. However, the difference lies in their essence due to the variance in their sources.
4. The flexibility of public interest has an impact on defining its concept, as it cannot be confined to a specific definition, varying from one society and era to another.
5. Due to scholars' divergence on whether public interest serves as evidence for the formulation of legal rulings or merely a revealing factor, jurists have varied opinions on the nature, scope, and implications of public interest.
6. Punishment for public interest falls within the objectives of retributive punishment and is imposed without the perpetrator committing a sin or violation.
7. Positive law views public interest narrowly, focusing solely on materialistic and worldly considerations, neglecting religious interests. Islamic legislation, on the other hand, has a broader perspective on public interest, making punishment based on it more effective.

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