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Limits on the use of the right to discipline in criminal law (A comparative study)

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ABSTRACT

The reasons for permissibility provided in the Penal Code constitute an exception that exempts the offender from punishment but only under conditions and controls. Otherwise, the permissibility would cease and the act would become a criminal. The application of the reasons for permissibility contained in the legislation is the use of the right, which includes the right to discipline.

In this research, we will examine the limits of this right, which has been controversial among legislations. Thus, by examining this study we have found that this disagreement is the result of an inherent

disagreement among sharia scholars, which the law entrusted the details of this discipline to them without clear controls that the jurisprudence has tried to ensure.

Accordingly, it has been found that the limits of the use of the right to discipline need to be researched in individual legislation. Discipline in one State differs in another. It is a disciplinary action if specific national legislation permits it, another comes and not only criminalizes it but makes it an aggravating circumstance for the offender.

Introduction

The family is the first nucleus of society that reforms or corrupts society. Thus, the human being is being raised in this family, which guides him to the right planned path. Social necessity is that there is a need for this right which is the "right to discipline" exercised by one of its members against others to build the personality of the individual in the family, which helps the success of the family in society, is highly controversial. This right places a heavy responsibility on the person who owns this right, so that legislation, as well as jurisprudence, are almost completely divided into two opposing positions, one authorizing this right, and the other incriminating it and may even make it a hard-line position. Besides, among the two positions, some adopted the neutral position.

However, throughout this research, we will identify some of these legislations, besides, we will look at the limits of this right of discipline, to demonstrate which of these acts fall within the limits of discipline and which are not. Also, we will discuss the sources of this right and the reason for the disagreement among the legislations in determining those limits.

Therefore, the questions raised by the research are:

- What are the limits of discipline?
- What is the difference between disciplining the wife and disciplining the children?
- What are the consequences of deviating from the limits of discipline?
- What is the position of the legal legislation on discipline and deviation from the limits of discipline?
- What is the source of the disciplinary right adopted by the legislation?
- Has the legislation been adequate in capturing the details of the right to discipline?

To study the subject, we relied on the descriptive and analytical approach to the laws that referred to the right to discipline, and then the jurisprudence that analyzed them. Since we were reviewing a set of laws

from a group of different countries, we needed to research that the comparative method is part of our study.

The study started with a preface showing the definition of discipline linguistically and terminologically, followed by the wife's discipline in the first requirement, the discipline of children in a second requirement, while the third requirement deals with forms of breach of discipline and the effects of this right on the legal text.

Preface

The definition of the discipline

In language, literature is known with close definitions. Lisan al-Arab dictionary indicates that discipline is politeness with which a writer or person is characterized. It is called discipline because it teaches people to the praiseworthy, and forbids them from bad deeds. In Al-Wasit Dictionary: it means the goodness of morals and customs, and in Almaeani Aljamie dictionary: to discipline a child, i.e., guidance to the virtues of morals and good habits¹. In short, discipline in the language is a source of politeness, that is to say, guiding, punishing for misdeeds, which is the exercise of the soul and inducing it to favor morality.²

In the legal language, discipline is defined as³ "whatever has to do with the system of an organ, profession or institution, the power to punish its non-observance, the power of disciplinary authority to establish the rules of order, and the power to punish its non-observance." Terminologically, discipline means beating, violence and intimidation⁴, or it is an authority decided by the legislator for the husband over his disobedient wife, which is represented by specific means of discipline to educate and reform her. It is the right of the husband, according to which the Shariah permitted him to harm his wife by word or deed if she did not obey him in what Allah commanded of obedience to him⁵. We note that these last two idiomatic

¹ Lisan Al-Arab Dictionary, Al-Mu'aani Dictionary, and Al-Ma'ani Aljamiea available at the link: <https://www.almaany.com/ar/dict/ar-ar/literature>.

² Dr. Jalal El-Din Banga Ahmed, Haqu Tadib Alzawjat Walsighar Walsibyan, A Comparative Study, Journal of Justice, Issue 18, Year 8, Ministry of Justice, Sudan, 2006, p. 155.

³ Dr. Rudaina Muhammad Reda Majid Karbol, and Dr. Haidar Al-Kuraiti, Altaeasuf Fi 'listiemal Haqi Altaadib, Kufa Etiquette Journal, Volume 2, Issue 35, University of Kufa, Najaf Al-Ashraf, Iraq, 2018, p. 357.

⁴ Dr. Abdel Halim bin Meshri, Dawabit Tadib Alzawja Bayn Alshariea Walqanun, Published research in the Journal of the Legal Forum, Issue 6, Faculty of Law and Political Science, University of Mohamed Khider Biskra, Biskra, Algeria, 2009, p. 39.

⁵ Al-Arabi Majidi, Azariat Altaeasuf Fi 'listiemal Alhaq Wa'athariha Fi 'listiemal Fiqh Al'usra- A Comparative Study between Sharia and Law, Master's Thesis in Sharia and Law, Faculty of Fundamentals of Religion, University of Algiers, Khrouba, Algeria, 2002, p. 129.

definitions are limited to the definition of discipline on the husband and not others, that is, the definition did not take into account the discipline of children.

The first requirement: discipline the wife

After we have defined discipline linguistically, terminology and jurisprudence, it became clear that some emphasized the specificity of wife discipline. However, one of the previous definitions can be considered to define the discipline of the wife.

In this requirement, we try to understand the nature of disciplining the wife by delving into three sections, the first section deals with the basis from which this right came, the second section discusses the reasons and controls of this discipline, while we conclude with the forms and the penalty for violating this discipline.

Section one: the basis of disciplining the wife

The majority of Islamic jurisprudence has dealt with the search for the basis for disciplining the wife and referred it to the verse of disobedience through the adoption of Islamic law for this right of the husband⁶. Allah Almighty says: those [wives] from whom you fear arrogance - [first] advise them; [then if they persist], forsake them in bed; and [finally], strike them. But if they obey you [once more], seek no means against them. Indeed, Allah is ever Exalted and Grand⁷. Some of them added hadiths of the Prophet to the noble verse to support the basis of that discipline or to research the details of the meaning of disobedience⁸, another aspect of jurisprudence is that the noble verse gives men two rights, namely guardianship of women in the first part, and discipline in the second part of the verse⁹, All these trends of jurisprudence go back to confirm that the noble verse came to assess the interest of the family and then the interest of society through reforming the wife and giving priority to the right of discipline over other rights specified by law.

⁶ Dr. Sabah Sami Daoud, Tadib Alzawja Bayn Al'iibahat Waltajrim, Research published in the Journal of Legal Sciences, Volume 25, Issue 2, College of Law, University of Baghdad, Baghdad, Iraq, 2010, pg. 248, and Omar Fakhri Abdul Razzaq Al-Hadithi, Criminalizing the abuse of the right as a reason for its permissibility, PhD thesis, College of Law, University of Baghdad, 2005, p. 82.

⁷ Surat An-Nisa, Verse 34.

⁸ Dr. Jalal al-Din Banaga Ahmed, previous reference, p. 158, and Samia Abdul Razzaq Khalaf, previous reference, p. 55.

⁹ Sanusi Ali, The field of abuse in family rights between expansion and restriction in the light of jurisprudence and provisions of Islamic legislation and jurisprudence, PhD thesis, Faculty of Law and Political Science, University of Djilali Liabis, Sidi Bel Abbas, Algeria, 2019, pp. 224 and p. 234.

Although Islamic Sharia is a source of law and therefore provides a basis for the right to discipline, the fact is that penal legislation explicitly provides for this right in some of them directly and in others by reference to the provisions of Islamic law. That is why legislation has not been equally consistent with the exercise of this right. Some jurisprudence argues that Arab laws have been divided into three directions in the provision of this right. The first is the explicit provision of the right of the husband to discipline his wife in the application of the right. The second is a general provision for the use of the right when it is decided by the Islamic sharia without mentioning examples of such applications, while the third trend was to list examples of applications in the use of the right without mentioning the discipline of the wife, the latter led some scholars not to recognize the right of the husband to discipline his wife, although another trend has been found in the possibility of recognizing it by relying on other provisions which suggest that the right to discipline can be allowed by recognizing that an act committed in the exercise of a right without abuse is not an offense¹⁰. Among the laws that explicitly mentioned this text, meaning that they are within the first direction, we find them in: Iraqi (Article 41/1), and the laws that did not enumerate the applications and mentioned the absolute text for the use of a right determined by Sharia, which is the second trend in laws: Egyptian (Article 60), Libyan (Article 69)¹¹, the Kuwaiti (Article 29)¹², the Bahraini (Article 16)¹³, the third trend, which excluded the right to discipline the wife within the applications, is found in the laws: Lebanese (Article 186), Syrian (Article 185), Jordanian (Article 62), Qatari (Article 47), Omani (Article 44), and Emirati (Article 53).¹⁴

¹⁰ Sabah Sami Daoud, the previous reference, from p. 248 to 250.

¹¹ Article 69 of the law does not explicitly refer to Islamic law, as it states: "There is no crime if the act occurs in the exercise of a right or the performance of a duty imposed by law or imposed by a legitimate order issued by the public authority, and if a crime occurs in implementation of that order." Therefore, it may not be correct to include the Libyan law in this direction, but we found in the text of the article some confusion and complexity, and we decided to go along with the source.

¹² It is noted in the text of Article 29 of the Kuwaiti Penal Code that it mentioned the use of the right of discipline in general and added to it the obligation to adhere to the seriousness and the intent directed to discipline. The text of the article was: "There is no crime if the act is committed in the use of the right to discipline by a person who is authorized by law to have this right, provided that he adheres to its limits and directs his intention to mere politeness."

¹³ Article 16 stipulates: "There is no crime if the act takes place in the use of a right established by law or custom." It is noticeable that the article did not refer to Islamic law, but rather to custom, and this is a matter that is greatly exaggerated in our estimation. It may be custom that allows beatings to an extent beyond discipline, which does not comply with the conditions laid down by Sharia.

¹⁴ The UAE legislator before the amendment under Federal Law No. (7) of 2016 is included in the first trend that expressly stipulates the right to discipline the wife, but through the aforementioned amendment he replaced the phrase "using a right established by law" with "Using a right established by virtue of the provisions of Islamic Sharia or the law", with the exclusion of the first application, which was in the text: "1. The husband's discipline of his wife and the discipline of the fathers and the like for minor children within the limits of what is legally prescribed."

In our view, there is a fourth trend that cannot be considered among any of the three previous trends, namely, that it has not referred to the use of the right to discipline, nor has it referred to the use of the right permitted by Sharia law, or example in Arab law: Yemeni¹⁵, Algerian¹⁶, and Sudanese law, and perhaps all the laws of foreign and non-Islamic countries can be included in this direction. However, jurisprudence in the Arab countries, in particular, referred to the right of discipline by returning to the texts of civil laws once and noting that the right to discipline was implicit rather than explicitly mentioned in those texts¹⁷. It is well known that the criminal legislation of Islamic States has now allowed the wife to be disciplined explicitly or not. This has been the source and basis of the Islamic sharia, as affirmed by both the jurisprudence and the judiciary of those States¹⁸, which have failed to make explicit reference to the application of the right of discipline or the use of the right established under Islamic law.

Following the latest amendment of the United Arab Emirates Penal Code in 2016, the Iraqi legislature became the only legislator to have the wife disciplined explicitly¹⁹ today in Arab legislation, a position that deserves to be identified and addressed.

It should be noted that the French legal system permitted in the past the right of the husband to discipline his wife based on a conception of civil jurisprudence of the marital relationship and the right of the husband in this relationship. The judiciary and jurisprudence had a supportive position, but the judiciary and jurisprudence changed this position and moved away from this approach, the husband's right to discipline because the rules of etiquette prevailing in French society no longer considered the husband the head of the family. Consequently, the husband's right to discipline was withdrawn. The matter is almost consistent within the framework of the rules of English law because the old judicial precedents were conflicting in determining the husband's right to discipline or not. However, the new trends of the English system do not recognize this right today, and the English society or its system no longer considers a

¹⁵ The text of Article 26 of the law states, "There is no crime if the act occurs in the use of a right established by law, or in fulfillment of a duty imposed by law, or in the use of an authority conferred upon it."

¹⁶ Article 39 of the Algerian law states: "There is no crime: 1. If the act was ordered or authorized by the law, ..", and part of the Algerian jurisprudence explains that the phrase "authorized by the law" has scope for one of the applications of the use of the right i.e. discipline The wife, because the reasons for permissibility are not confined to legislation, but extend to Islamic law and custom. Discipline is a necessary means to exercise the right decided by the legislator for the husband. See: Dr. Abdel Halim Ben Meshri, previous reference, p. 39, and Dalal Warda, *The Effect of Family Relationship in the Application of Criminal Law - A Comparative Study*, PhD thesis in Private Law, Faculty of Law and Political Science, University of Abu Bakr Belkaid, Tlemcen, Algeria, 2016, p. 119.

¹⁷ Dr. Jalal Al-Din Banga Ahmed, previous reference, p. 168.

¹⁸ Dalal Warda, previous reference, p. 119.

¹⁹ We would like to point out here that the wife was exempted in the Kurdistan region from Article (41) under Law No. (7) of 2001 issued on 30/6/2001.

difference in social status between spouses and its place has been replaced by the adoption of the right to equality between them.²⁰

Section two: Reasons and controls for disciplining the wife

After we learned that discipline means threats, beatings, and violence, it must be noted that this right cannot be exercised by the husband except in special circumstances and under special controls, all so that the right has its limits, which prevent the husband from encroaching on it. These reasons and controls have often been silenced by punitive legislation, leaving them to jurisprudence, which has mostly been derived from Islamic law and custom, as well as from jurisprudence.

Accordingly, the search is divided into two paragraphs, dealing first with the reasons for the wife's discipline and second with the controls (conditions) of the wife's discipline.

First: The reasons for disciplining the wife²¹

Looking for the reasons for the wife's discipline means answering an important question: When can the husband perform the act of disciplining the wife? As for the examination of jurisprudence, one answer is that a husband may discipline his wife if she disobeys him²². Some have expressed it as committing disobedience for which there is no prescribed punishment²³, others said that the verse of disobedience expressed disobedience with the word Nushuz.²⁴

Nushuz is defined in language as something up normal which has risen and appeared from the ground, it is said that the woman has Nushuz, that is, she has disobeyed and hated her husband, and she is the one

²⁰ Essam Ahmed Mohamed, *The General Theory of the Right to Body Safety - A Comparative Study in Criminal Law*, PhD thesis, Faculty of Law, Cairo University, Cairo, Egypt, 1988, p. 875.

²¹ Researchers dealt with this subject under the title "The scope of the use of the right to discipline" is seen in: Sanusi Ali, the previous reference, p. 238, and Omar Fakhri Abdul Razzaq Al-Hadithi, the previous reference, p. 84, and others have expressed it under the title "The obligation to discipline the wife," see: Abdel Halim bin Mashri, previous reference, p. 43.

²² Fathallah Aktham Hamdallah Tofaha, *Hakm Tadib Alzawjat Bialdarb Fi Alfiqh Al'islami Almuqarani*, Research published in King Saud University Journal, Educational Sciences and Islamic Studies, Volume 16, Number 2, King Saud University, Saudi Arabia, Riyadh, 2004, p. 1146 Sanusi Ali, the previous reference, p. 238, and Sabah Sami Daoud, the previous reference, p. 252.

²³ See: Dr. Ali Hussein Al-Khalaf, and Dr. Sultan Abdul Qader Al-Shawi, *Almabadi Aleama Fi Qanun Aleuqubat, Al-Aatek for the Book Industry*, Cairo, Egypt, without a year of printing, p. 261, and Qais Latif violin Kajman Al-Tamimi, *Explanation of the Iraqi Penal Code with its public and private sections and its amendments*, Al-Aatek Company for the Book Industry, new revised edition, Beirut, Lebanon, 2019, p. 140.

²⁴ Abdel Halim bin Mashri, the previous reference, p. 43.

who has deviated from the obligatory obedience of her husband, or who has left the marital home without a legitimate justification²⁵. As for the jurisprudence of Islamic law, they have not settled on a definition, some have expanded and others have confined. It was said that it is the woman's disobedience in what Allah commanded her to obey him in²⁶. It was said that the wife would deviate from due obedience, preventing him from enjoying, abandoning the rights of Allah Almighty, such as washing janaabah and fasting Ramadan.²⁷

Thus, although there is an agreement among the jurists about the husband's right to discipline, the dispute begins among the jurists themselves about disobedience in the command of Allah, such as abandoning prayer, fasting, or Hajj. The Hanafis, the Malikis, and the Shafi'is do not allow the husband to be disciplined for violating Allah's command, while the Hanbalis, the Malikis, the Shafi'is, and the Hanafi give the right of the husband to discipline for violating Allah's command.²⁸

Disobedience is divided by the jurists into three forms: disobedience with words, disobedience with action, and disobedience with words and deed together. Disobedience by saying that the wife reprimands her husband in words as if she raises her voice, insulting, cursing, slandering, and confronting him after she was addressing him with gentle and beautiful words. Disobedience by action, which means that the wife violates her husband's command when she must obey him, such as calling her to bed and she refuses, or to go out without his permission, or to refrain from moving with him to a dwelling, or refraining from doing housework²⁹, or allowing others to enter the marital home without his permission³⁰. Disobedience in word and deed means that the wife combines what has preceded defiance of speech and action.³¹

Sharia scholars also did not agree on the husband's right to beat and discipline the wife from the first disobedience of the wife. So they were divided into two teams, the first team said that the husband could beat his wife from the first disobedience. The second denied him that right and said that beating could

²⁵ It was mentioned in Al-Muheet Dictionary, Al-Ma'ani Al-Jami', and Lisan Al-Arab: <https://www.almaany.com/ar/dict/ar-ar/Nushuz/>

²⁶ Dr. Abdul Halim bin Mashri, previous reference, p. 43.

²⁷ Khaled Bin Faleh Al-Otaibi, Tadib Alzawjat Bialdarb Fi Alsharieat Walqanun Watatbiqatih Fi Alqada' Alkuaytii, research published in the Journal of Arab Studies, Volume 5, Number 21, Faculty of Dar Al Uloom, Minya University, Minya, Egypt, 2010, p. 2208.

²⁸ Dr. Abdul Halim bin Mashri, previous reference, p. 43.

²⁹ Dr. Sabah Sami Daoud, previous reference, p. 254, Fathallah Aktham Hamdallah Tofaha, previous reference, p. 1146.

³⁰ Al-Arabi Majidi, previous reference, p. 134.

³¹ Khalid bin Faleh Al-Otaibi, previous reference, p. 2208.

only be done after she repeated and insisted on it³². It was said about the reason for this disagreement that the jurists understood each of them separately for the verse of disobedience because the punishments to which the verse referred are exhortation, desertion, and beatings. So the reason for their disagreement was to make these punishments or not.³³

Moreover, it is not permissible for disobedience to be a crime for which a prescribed penalty is stated, nor should this disobedience be referred to the imam - unless the judge authorizes the husband to discipline her³⁴. It is self-evident that the wife's violation of what the husband has commanded which had a violation of Allah's law, it is not permissible for the husband to discipline his wife such as commanding her to stop praying, stealing, or not fasting, as there is no obedience in disobedience to the Creator.

Second: Wife discipline controls³⁵

The right of discipline that the legislator gave to the husband and referred its details to the Sharia requires adherence to a set of controls, and breaching them negates that right from the husband, and these controls are:

1. Disciplinary description

The right to discipline the wife is recognized solely by the husband. The right cannot be exercised either by the husband's parents or by the wife's parents, or even by the suitor³⁶. There is no representation on the part of the husband in this right, but if someone disciplines the wife with the consent of the husband, the perpetrator shall be punished with the punishment of the aggressor against the wife, and the husband shall be punished as a partner, and this right shall be established and removed with the demise of the marital relationship³⁷. If the marital relationship ends, the man has no right to discipline his former wife.

³² Dr. Sabah Sami Daoud, previous reference, p. 258, Dr. Jalal al-Din Banga Ahmed, previous reference, p. 162.

³³ Fathallah Aktham Hamdallah Tofaha, previous reference, p. 1141.

³⁴ Dr. Abdul Halim bin Mashri, previous reference, p. 44, and Omar Fakhri Abdul Razzaq al-Hadithi, previous reference, p. 84.

³⁵ The reasons for disciplining the wife can be considered as one of the controls or conditions. Observing these reasons is obligatory otherwise one of their conditions is negated. However, we preferred to separate the reasons from the controls due to the importance and diversity of each of them separately.

³⁶ Dr. Scheherazade Bustella, *Tadib Alzawja Fi Alfiqh Al'iislaamii Bayn Al'iibahat Waltajrim*, research published in the *Journal of Judicial Jurisprudence*, Volume 8, Number 13, University of Mohamed Khider, Faculty of Law and Political Science, Biskra, Algeria, 2016, p. 223.

³⁷ Sanusi Ali, previous reference, p. 237, and Dr. Abdel Halim bin Mashri, previous reference, p. 43.

2. Disciplinary methods

Previously, we have mentioned disciplinary methods, besides, we explained that there was a disagreement among sharia scholars about the possibility of starting with beating, or take into account the sequence of what was mentioned in the verse of Al-Nushuz. The majority of the jurisprudential opinion tended to take into account the sequence, so it is not permissible for the husband to resort to beating except after the failure of attempts to discipline by preaching first and then by desertion second³⁸. This is the view of Imam Malik, Abu Hanifa, and the Shi'a Imam, who say that beating is not for the first disobedience, but by repeating and insisting on it. The most correct opinion is Shafi'i and Ahmad doctrines, which states that the husband has the right to beat his wife, whether or not his wife repeated the disobedience, and whether it was preceded by exhortation and abandonment or not. The argument for this is that the conjunction in the noble verse came for the plural, not the arrangement³⁹. The Emirati judiciary has a commendable position on the necessity of observing gradualism, as by permitting the right of discipline by the husband to the disobedient wife gradually, starting with preaching, then desertion in the dormitory, and finally the beating but is not severe or disgraceful⁴⁰. In the first method, which is exhortation and guidance, it must be with soft words, that is, good advice, and not to hurt the wife's feelings or show the desire for domination and revenge on her. Insulting and cursing are not permissible, because that act represents psychological wounds on the wife that may never heal⁴¹. This is what the United Nations considered one of the most severe types of violence, and the Algerian legislator had in this regard the introduction of an article under the amendment of the Penal Code in Article 266 bis regarding the victim wife when her dignity is affected by offensive words. This text is specific to the wife, but if the offensive talk is about others, the article is not applied, but the general rules are applied according to articles 297, 298, and 299 of the Algerian Penal Code⁴². As for the third method, which is abandonment, different opinions have been mentioned, including the abandonment of the marital mattress for no more than four months, or abandon speaking with the wife for a period not exceeding three days, and the fact that it was said to vary

³⁸ Dr. Abdul Halim bin Mashri, previous reference, p. 44.

³⁹ Sanusi Ali, previous reference, pp. 240 and 241.

⁴⁰ Appeal No. 40 of Judicial Year 23 dated 10/20/2001 - Technical Office 23 No. Part 2, pg. 725, available on the Eastern Laws Network: <https://www.eastlaws.com/>

⁴¹ It was stated in a decision of the Iraqi Court of Cassation: "Insulting, cursing, and slandering are not among the matters that fall within the limits of the husband's discipline of his wife, which are covered by Article 41 penalties, and the husband is punished for that under Article 434 penalties," Decision No. 115/discriminatory/74, on 6/11/11. 1974, Judicial Bulletin No. 1, the fifth year, p. 408, published in: Ibrahim Al-Mashahi, Legal Principles in the Judiciary of the Court of Cassation - Criminal Division, Al-Jahiz Press, Baghdad, Iraq, 1990, p. 228.

⁴² Amna Tazir, Himayat Alzawjat Min Jamie 'Ashkal Aleunf Ealaa Daw' Altaedil Aljadid Liqanun Aleuqubat, research published in the Journal of Legal and Political Sciences, Volume 10, Number 1, University of Martyr Hama Lakhdar, El Wadi, Algeria, 2019, p. 318.

according to the nature and morality of the women. The issue is related to the wife's desire and inclination for the marital bed.⁴³

The husband must take care of the woman's situation. Some women are suited to intimidation and warning, and a good sign is sufficient for them, and among them are those who are suited to deprivation. The husband must be an expert in his wife's condition and know her affairs, so he starts with the easiest treatment, and if it doesn't work, he moves to the most difficult method⁴⁴. That is a beating in which it is said that the beating is lawful, but the husband has to take care of the timing and manner⁴⁵. This is the order in which the majority of researchers on wife discipline have advocated.

3. Degree of harm

When the husband resorts to the most severe method of beating, he must take into account that the beating is not severe (exasperated), and the Egyptian judiciary has interpreted non-severe beatings as one that leaves no trace in the body⁴⁶ or simple abrasions. A fortiori does not lead to permanent disability or death, otherwise, the husband will be held accountable for the crime of beating that leads to death⁴⁷. This position is found in the Iraqi judiciary, which forbids the infliction of injury, fracture, and harm to the body of women. Iraqi judiciary considered it severe beat as stated in a case in the Court of Cassation: (The fall of the wife to the ground as a result of the husband pushing her and inflicting damage on her goes beyond the limits of the husband's rights to discipline his wife)⁴⁸. Thus, the husband must avoid hitting on the face, head, chest, throat, vulva, abdomen, which inflict shame and ugliness on the wife. As for the parts that he is allowed to hit, they are the shoulders, the hands, the back, the legs, the feet, and the places of the flesh such as the thighs, because those places are safe from damage and destruction⁴⁹.

⁴³ Ali Babiker Yassin, *Haqu Tadib Alzawjat Fi Alfiqh Al'islami Wal'iisraf Waltajawuz Fih*, Research published in the *Annals of Sharia Journal*, No. 5, University of the Holy Qur'an and Islamic Sciences, Omdurman, Sudan, 2016, pp. 288 - p. 290.

⁴⁴ Fathallah Aktham Hamdallah Tofaha, previous reference, p. 1153.

⁴⁵ Dr. Scheherazade Bustella, previous reference, p. 225.

⁴⁶ It was stated in the ruling of the Egyptian Court of Cassation: ("But it is not permissible for him in the first place to hit her in an obscene manner –the obscene beating was found to affect the body and change the color of the body." 55, quoted from Khalid bin Faleh Al-Otaibi, previous reference, p. 2225.

⁴⁷ Dalal Warda, previous reference, p. 121.

⁴⁸ Resolution No. 1022 / Discriminatory / 1973 on 12/3/1973, quoted from: Dr. Talal Abdul Hussein Badran, *The Impact of Marital Relationship in the Iraqi Penal Code*, research published in the *Journal of Legal Sciences*, No. 1, College of Law, University of Baghdad, Baghdad Iraq, 2018, p. 215.

⁴⁹ Khalid bin Faleh Al-Otaibi, previous reference, p. 2224.

As for machine or hand-beatings, there are also two opinions in Sharia jurisprudence. The first is that beating is not permissible with a whip or a stick, while the other goes to their permissibility⁵⁰. Legal scholars tend to support the opinion to beat with the hand only, because the use of a machine, whether it is a stick or a whip, is intended for severe beatings⁵¹. Using the foot to hit is considered kicking, not hitting or slapping⁵². This is what the Court of Cassation of Iraq has referred to after the act committed by the husband of a crime of aggression which imposes a penalty on the perpetrator, in accordance with article 415 of the Iraqi Penal Code, for the humiliation and contempt of the wife⁵³. Thus, it is not the exercise of the right of the husband to discipline his wife in accordance with article 41 of the Penal Code.

4. Interest

In an opinion in jurisprudence, the disciplining of the wife by the husband must return an interest that represents the motive behind this discipline, and the interest must be legitimate, and this interest may be existing or potential, and the potential interest is that which is based on the protection of a legal position and compensation for the damage he sustained. Therefore, resorting to discipline represents the protection of the right that the husband has over the wife, as in the wife's abuse of the husband by words, or the failure to carry out her duties, where the interest here is the result of the wife's act. As for the potential interest, it is the one that precedes the disobedience when the husband thinks that the interest may occur in the future. Thus, the purpose of discipline is to prevent possible harm from being done to the right by the wife⁵⁴. It must be pointed out that the discipline must thus take into account the degree of interest.

5. Purpose and good faith

This restriction is that the husband's recourse to discipline should be to the end for which the discipline was initiated, which is to repair the status of the wife, not revenge or abuse. Therefore, the husband may not hide under the idea of discipline a criminal intent or deserve the punishment of the law for that, because then he will be ill-intended⁵⁵. This is the same whether he intended to harm the wife, take revenge, or

⁵⁰ Khalid bin Faleh Al-Otaibi, previous reference, p. 2223.

⁵¹ The Iraqi Court of Cassation has a decision to convict the husband of premeditated murder, who hit his wife with a wooden hammer on the head in one blow, which led to her death, justifying its opinion that the criminal intent is an internal matter that the accused indicated by using a heavy machine that could cause death, Resolution No. 1927 / Felonies / 74, in 12/5/1973, Judicial Bulletin, Fourth Issue, Fourth Year, pg. 468, published in: Ibrahim Al-Mashadi, Legal Principles, previous reference, p. 219.

⁵² Dr. Sabah Sami Daoud, the previous reference, pp. 265 and 266.

⁵³ Decision No. 216 / Second General Assembly / 1976 on December 25, 1976, Collection of Judicial Judgments, No. 3, No. 7, 1976, p. 326 and 327, referred to by: Dr. Sabah Sami Daoud, previous reference, p. 266.

⁵⁴ Sanusi Ali, previous reference, pp. 237 and 238.

⁵⁵ Jalal al-Din Banga, previous reference, p. 166, and Sanusi Ali, previous reference, p. 240

make the wife commit a sin⁵⁶. Before its amendment and the repeal of the paragraph on wife discipline, the United Arab Emirates legislation included the words "if the act occurs in good faith," which we do not find explicit in article 41 of the Iraqi Penal Code, even though legal scholars consider it a presumption for those who exercise this right and decide it subject to the discretion of the court.⁵⁷

The reasons, controls, or conditions for the husband's recourse to the discipline of his wife are stated, and the loss of any of these grounds and conditions prevents the husband from realizing his right. Indeed, he is guilty of a punishable offense in accordance with the law after the Sharia has established the conditions to be followed in order to establish this right.

The second requirement

Disciplining minor children

The right to the discipline of minor children is different from the right to discipline of the wife in many respects, whether who has the right to discipline, the reasons for its existence, and even the position of positive legal legislation. In contrast to the right to discipline the wife, which was the only Iraqi legislator to mention the right in direct form, we find the right to discipline children mentioned in several Arab legislations.

To examine the details of the subject and determine its limits, we examine it through two sections, first looking at the basis of this right and then, second, its causes and controls.

Section one: the basis of the right to discipline minor children

Parents must educate their children and bring them up properly through supervision and upbringing, which is beneficial to the family, starting with the child and his or her family, as is the benefit to society. Otherwise, poor education is detrimental to society through the danger posed by the poor education of that child, whether it is the risk of doing what must be left behind by the child or leaving what must be done⁵⁸. Education has forms that start with teaching by speaking, urging the child to do the right thing, and ending with beating or harming, which is what concerns us to look for its limits. However, we search for the basis in this right by searching for the right in Islamic law first, and secondly in positive law.

⁵⁶ Dr. Talal Abdul Hussein Al-Badran, Athar Alealaqat Alzawjiat Fi Qanun Aleuqubat Aleiraqii, research published in the Journal of Legal Sciences, No. 1, College of Law, University of Baghdad, Baghdad, Iraq, 2018, p. 216.

⁵⁷ Dr. Sabah Sami Daoud, the previous reference, pp. 269 and 270.

⁵⁸ Dr. Rudaina Muhammad Reda Majid Karbol, and Dr. Haidar Al-Karaiti, Altaeasuf Fi 'Ilistiemal Haq Altaadib, Kufa Etiquette Journal, Volume 2, Issue 35, University of Kufa, Najaf Al-Ashraf, Iraq, 2018, p. 370.

First: Islamic Sharia

Some found the basis of the right to discipline in the Holy Koran by saying⁵⁹: “O you who have believed, protect yourselves and your families from a Fire whose fuel is people and stones, over which are [appointed] angels, harsh and severe; they do not disobey Allah in what He commands them but do what they are commanded.” In the Sunnah, the Messenger of God (peace be upon him) said: “It is better for a man to discipline his son than to give a saa’ charity.” And said: “Command your children to pray when they become seven years old, and beat them for it (prayer) when they become ten years old; and arrange their beds (to sleep) separately.” This last saying contains a time interval between preaching, instructing, and beating⁶⁰ as if the Prophet (peace be upon him) forbade beating a child until the age of ten.

Sharia jurists see that disciplining children is a form of punishment, which is the discipline for disobedience and there is no punishment or expiation for it. The punishment was a subject of dispute. According to Abu Hanifa and Al-Shafi’i, the punishment is thirty-nine lashes, and according to Ahmad bin Hanbal, it is not more than ten lashes, besides, there is another narration that he should not be punished and Malik also confirms that.⁶¹

Second: positive law

Some laws contain references to the explicit right to discipline of minor children, such as Iraq (article 41.1) and Kuwait (article 29)⁶², Omani (Article 44/a), Jordanian (Article 62/2/a), Syrian (Article 185/2), and Lebanese (Article 186/1). The other direction of legislation was that the reference to the right to discipline was not explicit, but rather through a doctrinal analysis of the provisions of the legal article that referred to the use of the right⁶³. As in the laws: UAE (Article 53/1)⁶⁴, the Egyptian (Article 60), the

⁵⁹ Surat Al-Tahrim, verse 6.

⁶⁰ Fakhat Abdel Aziz, Tadib Altifl Bayn Al'iibaha Waltajrim, Al-Mizan Magazine, Volume 2, Number 2, Institute of Law and Political Science, University Center Saleh Ahmed, Naama, Algeria, 2017, p. 306.

⁶¹ Dr. Jalal Al-Din Banga Ahmed, previous reference, pp. 170 and 171.

⁶² The article stipulated: “There is no crime if the act takes place in the use of the right to discipline by a person who is entitled to this right by law, provided that he adheres to its limits and directs his intention to mere politeness.” That is, the text referred to politeness and did not indicate the children or the wife, and therefore it is possible to consider the direction of the Kuwaiti legislator to have taken a middle position between the explicit and the non-explicit reference by referring to the right to use the right.

⁶³ Dalia Majzoub Ibrahim Ali, Mawanie Almaswuliat Aljinayiya, A Comparative Study, Master's Thesis, College of Graduate Studies and Scientific Research, Shendi University, Shendi, Sudan, p. 22.

⁶⁴ The Emirati legislator had amended the explicit reference to disciplining the wife and children through Federal Law No. 7 of 2016.

Algerian (Article 39/1)⁶⁵, Sudanese (Article 11), Bahraini (Article 16), Qatari (Article 47), and Yemeni (Article 26/6).

The French jurisprudence considered the right to discipline children as one of the elements of the family authority exercised by the head of the family over his children based on the general customary rules. The English system also recognized the case law of the right of parents, especially the father, to care, control, and supervision, if necessary to correct their behavior, but required that the beating be reasonable. Moreover, the English legislator also established a law called the Young Children Act that puts the interest of the young in Article 44 at the center of the court, which does not rule out the removal of the young from his environment and his isolation in ensuring his education and training⁶⁶.

The position of the Iraqi legislator has been criticized in part by way of equality in article 41 of the Penal Code of the wife with a minor child in the text of one article and treating the woman as a minor because it is not permissible to measure the non-identical⁶⁷. Along with us, we are inclined by this justified criticism of their asymmetry. It should be noted that other States have not recognized this right in absolute terms. Rather, they regard the discipline of children by parents as an offense punishable by law and may amount to the placement of children in a social welfare home because the parents or one of them is not worthy of the care and upbringing of the minor. Naturally, this position was objected to by another aspect of jurisprudence, especially Arab and Islamic jurisprudence⁶⁸. However, the reality in the European States, in general, tends not to allow boys to be disciplined by beating without exception.

Section two: Reasons and controls for disciplining children

Just as there are grounds and discipline for the wife disciplining, here are grounds and controls in the discipline of children that must be observed. Otherwise, the act was taken out of the concept of permissibility and considered a crime. Thus, we address the reasons first, then discipline controls second, each in the paragraph.

⁶⁵ Part of the jurisprudence between the amended Article 269 of the Algerian Penal Code, which referred to this right through an exception with regard to light beatings. See: Fakhat Abdel Aziz, previous reference, p. 307.

⁶⁶ Dalal Warda, previous reference, pp. 311 and 312.

⁶⁷ Omar Fakhri Abdul Razzaq Al-Hadithi, the previous reference, p. 90, Dr. Rudaina Muhammad Reda Majid Karbol, Dr. Haider Al-Karaiti, the reference reference, pg. 370, and Samia Abdul Razzaq Khalaf, the previous reference, pg. 57.

⁶⁸ Jalal al-Din Banga Ahmed, previous reference, p. 177.

First: The reasons for disciplining minor children

There is a difference in the reason for disciplining the children from the reasons for the disciplining of the wife. The discipline of the wife, as we have experienced, is often related to the wife's disobedience, which does not exist in the case of the children's discipline. Disciplining children is linked to a reason, which is the goal of discipline represented in reforming them and disciplining their condition. The child is the only person who needs to be brought up and raised physically, psychologically, and socially⁶⁹. Thus, it is not permissible to consider discipline as a reason for permissibility if the intention is revenge or calls for disobedience⁷⁰. If the motive was revenge or incitement, then the perpetrator is subject to punishment⁷¹. It is, therefore, to be imagined that the rule of discipline is that a young person must violate one of the general duties that require him, as a human being, to assume legally the duties to Allah and society, and the special duties that he must as a young man obey his parents and respect for his family and its traditions.⁷²

Discipline must also be for a sin committed by the minor, and not for a sin he is afraid to do in the future, and this was confirmed by the UAE Supreme Court in the merits of a case where it was stipulated⁷³: “Whether it was decided that the father has the right to discipline his young children who are under the age of puberty, on condition that it be for the sin of his minor act, not for a sin he is afraid to commit,....”

Second: Controls for disciplining minor children

Some controls or conditions must be observed to be within the framework of permissibility and the use of the right. Otherwise, the act deviates from being a right recognized by the law and therefore goes out of the circle of permissibility, and the perpetrator after that act has committed a crime according to the circumstance and the work, and the presence of the reason for discipline does not, in turn, deviate from these controls, and the other controls are:

⁶⁹ Fakhath Abdel Aziz, previous reference, p. 309.

⁷⁰ Omar Fakhri Abdul Razzaq Al-Hadithi, the previous reference, p. 95.

⁷¹ Dr. Hamid Al-Saadi, Explanation of the New Penal Code, Part - Comparative Analytical Study, Part One - General provisions, Al-Maaref Press, Baghdad, Iraq, 1970, p. 329.

⁷² Fakhath Abdel Aziz, the previous reference, p. 309.

⁷³ Appeal No. 615 of 2010 Judicial, Criminal Department, 09/19/2010, Technical Office 4, Part No. 3, pg. 838, available on the Eastern Laws Network: <https://www.eastlaws.com/>

1. Disciplinary description

The legislation establishes the right to discipline the father and then the mother⁷⁴. However, the legislation did not agree on the permissibility of discipline, as the Iraqi law explicitly acknowledged that the right is determined for parents, guardians, teachers, and grandfather, the guardian of the minor and the teacher of the craft⁷⁵ after obtaining the permission of the father or the guardians as well as the uncle and the brother. There is an opinion that this right has been expanded by positive laws at the expense of what was stated in Islamic Sharia, which recognized the right for the father, and then the guardian⁷⁶. Sudanese jurisprudence agrees to that direction⁷⁷, in addition to the Algerian jurisprudence⁷⁸. This is clear from the provisions of the law in the phrase “disciplining parents and those in their status for minor children” in the Omani law (Article 44/a), while the text of the Syrian legislature was limited to parents and teachers (Article 185/2/a), which is the direction of the Lebanese legislator (Article 186 /1).

This position is contradicted by the Lebanese legislature, which allows only parents the right to discipline. In the absence of the father and mother, the Jordanian jurisprudence supports the possibility of exercising this right by the guardian, this is because the goal is to educate and raise the child and take care of his affairs when the child is unable to do so because of his young age⁷⁹.

As for the age of a minor child who deserves to be disciplined, he has not reached the age of majority and has not been freed from guardianship over the self⁸⁰, Islamic law has established that a young child reaching the age of seven is qualified to distinguish, although there is a difference between the criterion of the age of discrimination, it may be temporal or objective represented in the ability to distinguish between good and evil⁸¹, if he is younger, there is no need to discipline him.⁸²

⁷⁴ There is an opinion in Islamic jurisprudence that the mother’s right to education is not in dispute. As for discipline, there is more than one opinion. Look at: Dr. Jamal Ibrahim Al-Haidari, Al-Wafi, previous reference, pg. 648.

⁷⁵ Dr. Jamal Ibrahim Al-Haidari, Al-Wafi Fi Alqism Aleami Min Qanun Aleuqubat, Al-Sanhoury Library, Beirut, Lebanon, 2017, p. 648.

⁷⁶ Omar Abd al-Razzaq Fahri al-Hadithi, the previous reference, p. 92.

⁷⁷ Dalia Majzoub Ibrahim Ali, previous reference, p. 22, and Jalal El-Din Banga Ahmed, previous reference, p. 171, and in a judicial application in Sudan it was stated that “the uncle in the position of the father has disciplinary authority over his nephew,” the Government of Sudan / against / the Secretary Kajo Humaid 1973, p. 386, quoted from Jalal al-Din Banga Ahmed, previous reference, p. 180.

⁷⁸ Fakhat Abdel Aziz, previous reference, p. 308.

⁷⁹ Dr. Abdul Rahman Tawfiq Ahmed, Explanation of the General Penal Code, House of Culture for Publishing and Distribution, Amman, Jordan, 2012, p. 304.

⁸⁰ Dr. Hamid Al-Saadi, Explanation of the New Penal Code, Part One, previous reference, p. 329.

⁸¹ Omar Abd al-Razzaq Fahri al-Hadithi, the previous reference, p. 93.

⁸² Dalal Warda, previous reference, p. 309.

2. Disciplinary methods

According to Islamic jurists, the permissible beating is by hand, and that it does not exceed three beats according to the opinion of the Shafi'is and Hanbalis, while the Shafi'is and Malikis allow increasing this number⁸³. Beating should be on parts of the body that are not dangerous, like the head, face, or heart, besides, these beats should not be severe that it leads to breaking the bone or splitting the skin, and it is not permissible to use a stick or whip⁸⁴ and discipline can be by preaching and instructing.⁸⁵

It is also possible to discipline by restricting movement in such a harmless way as to lock doors and place a guard⁸⁶. The Egyptian Court of Cassation has an opinion about placing restraints on the foot so that it prevents him from moving, as the court held that it is permissible as long as it does not cause harm and does not exceed the limits of discipline, and in another opinion, in another case, the perpetrator was punished because of the tight link, which led to complications in the foot⁸⁷.

3. Adhere to general custom

The words "as permitted by general custom" have been included in Iraqi, Jordanian and Syrian laws, while other laws have avoided them with the words "within the limits of what is legally established," as in Omani law. The legal scholars hold that general custom permits forms of discipline that do not reach the level of severe bodily harm and pain⁸⁸. Otherwise, criminal responsibility shall be realized and the penalty shall be imposed on the perpetrator.⁸⁹

In this view, we have a position that common custom is changing from place to place. That is why we in turn tend to avoid the term general custom and to be content with the limits of Sharia law and law to further guarantee the safety of the minor from the expected victimization by the parents or their replacement.

⁸³ Dalal Warda, previous reference, p. 310.

⁸⁴ Dr. Hamid Al-Saadi, Explanation of the New Penal Code, Part One, previous reference, p. 329, and Dalia Majzoub Ibrahim Ali, previous reference, p. 21 and 22.

⁸⁵ Fakhath Abdel Aziz, previous reference, p. 309.

⁸⁶ Omar Abd al-Razzaq Fahri al-Hadithi, the previous reference, p. 93.

⁸⁷ Two cases: Annulment of the session 4/1/1943, and cassation of 5/6/1933, quoted from: Omar Abdul-Razzaq Fahri Al-Hadithi, previous reference, p. 93.

⁸⁸ Dr. Abdul Rahman Tawfiq Ahmed, previous reference, p. 305.

⁸⁹ In an application of the Jordanian Court of Cassation, it was stated: "Using an iron tool to hit a boy on the head and break the bone of his skull is not one of the matters permitted by public custom." Cassation, Penalty 36/78, Journal of the Syndicate, 1978, p. 736, quoted from: Dr. Abdul Rahman Tawfiq Ahmed, previous reference, p. 305.

4. Purpose and good faith

The purpose of disciplining children must be directed towards the goal of their upbringing, disciplining and correcting them, and that the purpose of this discipline should not be revenge, humiliation, or any other purpose. It is not considered a right for the offender if he wants to force a minor child to beg, for example, or to perform actions that are contrary to morals.⁹⁰

The third requirement

Forms and the penalty for breach of discipline

We have addressed the grounds and controls of discipline, through which we have identified the limits of the use of the right to discipline of a minor wife and children, i.e. in the absence of any of the grounds or controls mentioned, we will be outside the limits of discipline, i.e. beyond the limits of the use of this right, which has been established by several penal legislations.

After we have clarified that, we are trying here to identify the forms of this transgression, to show its degree, and to address it in a first paragraph. Then we stand in a second paragraph on the penalty for breaching the transgression. Through it, the nature of the effects of this right for the husband, the father, or others who have the right to discipline becomes clear, and we consider it the opinion of the comparative punitive legislation.

Section one

Forms of breaching the disciplinary right

The commentators of the law, when referring to discipline, go to the forms of violating this right to two forms, namely, the abuse of the right to discipline and the violation of the right to discipline⁹¹, as follows:

First: transgression of the right to discipline

⁹⁰ Dr. Abdul Rahman Tawfiq Ahmed, previous source, pp. 305 and 306.

⁹¹ Abuse is defined as: the use of the right for a purpose other than for the purpose for which it was granted, or with the intent to harm others, and abuse is: the use of more force than necessary or deviation from the appropriate, or deviation of the right from its limits, whether intentionally or accidentally. There is great detail between the similarities and differences between them, which were dealt with by civil law jurists, looking at: Fathi Al-Derini, *The Theory of Abuse of Right in Islamic Jurisprudence*, Fourth Edition, Al-Resala Foundation for Printing, Publishing and Distribution, Beirut, Lebanon, 1988, p. 45 and beyond.

Transgression of the offender, whether the husband or the father, in using the right to discipline is achieved by violating the material and objective conditions of this right, while retaining the necessity condition fulfilled⁹². In other words, the husband will violate the above-mentioned discipline of the wife of the attribute, the means, degree of harm, the interest, or violating one of the causes of disobedience that calls for discipline. However, the desired purpose of discipline is available to the husband, that is, he is not in bad faith.

Transgression, as it can be imagined in beating, can be imagined in preaching and desertion, as if the husband uses defamation and insults instead of preaching, or leaves the wife for a period that does not agree with what is permissible by Sharia, which is four months⁹³. Desertion also means the abandonment of speaking with the wife for a period not exceeding three days⁹⁴. The transgression can be shown in two forms, it is either a deliberate or unintentional transgression. The first is the husband's knowledge that he exceeds his limits set in the law and his desire to reach the result of reforming the wife's condition through disciplining her. Unintentional abuse is a violation of the duties of caution imposed by the law on the husband without intending to do so. In other words, the offender perceives that when exercising the right to discipline he has complied with the necessary conditions of controls and a reason for resorting to exercising his right to discipline⁹⁵.

Second: the arbitrariness of the right to discipline

In contrast to the transgression of the right to discipline, the arbitrariness of the right to discipline is achieved by taking into account the reasons for discipline mentioned with the controls, that is, the objective conditions for exercising the right to discipline. However, the husband in abuse is bad faith through a goal that is beyond the reform of the wife or the upbringing of the child. Thus, the case of arbitrariness in the use of the right to discipline can be expressed as the use of the right of discipline by the perpetrator assigned to him in the law or Sharia as a means to achieve an illegal end, such as a desire for revenge, humiliation, or harm to the wife⁹⁶ or child.

⁹² Dr. Sabah Sami Daoud, previous reference, p. 273.

⁹³ Dr. Rudaina Muhammad Reda Majid Karbol, Dr. Haider Al-Karaiti, previous reference, p. 374

⁹⁴ Ali Babiker Yassin, the previous reference, p. 290.

⁹⁵ Dr. Sabah Sami Daoud referred to two examples in two decisions of the Iraqi Court of Cassation: Resolution 501 of 11/5/1976, and Resolution 35 of 7/4/1973, where the first considered severe beatings that leave an impact on the wife as an example of willful abuse. As for the second, it is neglect and carelessness on the part of the husband as an example of unintentional transgression, and we agree with Dr. Sami's opinion in that they are two examples of intentional and unintentional transgression. See: Dr. Sabah Sami Daoud, previous reference, p. 274.

⁹⁶ Dr. Sabah Sami Daoud, previous reference, p. 276.

As we imagined the possibility of transgression in the discipline in preaching and desertion, they can be arbitrary as the person who abandoned his wife for no reason to harm her or force her to commit an unlawful act⁹⁷.

In reviewing the above, we return to the view that transgression overlaps significantly with arbitrariness, to the extent that they cannot be separated. If the transgression of discipline is conceivable, intentionally or unintentionally, unlike the only intentional arbitrariness⁹⁸. This in itself is a point of convergence between the two images on the one hand, and it is not an effect on the other, as will be seen when we discuss the effect of this transgression in the next paragraph by examining the punishment imposed on the husband when he is overruled or abused in the use of the right of discipline.

Section two: **Penalty for breaching** the right to discipline

Previously, we discussed the two forms of the breach, which are: transgression and arbitrariness, both mean dropping some of the controls or conditions that are obligatory on the husband when exercising the right to discipline, then, we ask about the penalty imposed on the husband, the father or others who have the right to discipline for the breach, Did the husband, after such a breach, deserve the penalty? Or does permissibility have a role in that? Is the intentional form of the breach equal to the unintentional? The answer is simply that the husband's liability arises from this breach, and there is no effect of permissibility by defaulting one of the conditions of the right and makes the text subject to criminal responsibility⁹⁹, and we discuss the explanation of that responsibility by examining the husband's responsibility in Islamic law, and then in positive law again.

First: Responsibility in Islamic Sharia

⁹⁷ This example was brought by Dr. Sabah Sami Daoud, but we do not fully agree with him in that because abandonment without a reason or to force her to do an illegal act means, as a result, that the condition of grounds for discipline is not fulfilled. Thus, we return to transgression in the use of the right and not arbitrariness in the use of the right, despite the illegitimate purpose of the husband. See: Dr. Sabah Sami Daoud, previous reference, p. 278.

⁹⁸ Some spoke about the forms of arbitrariness that it was intentional and unintentional, that is, they called it arbitrarily and meant by it a transgression as we explained here, and this means return to the basic idea which is to search for what is outside the limits without taking the ideas of abuse and arbitrariness, see: Dr. Rudaina Muhammad Reda Majid Karbol, Dr. Haider Al-Kuraiti, previous reference, p. 373.

⁹⁹ Khalid bin Faleh Al-Otaibi, previous reference, p. 2234.

The jurisprudence of Islamic law states that the husband's responsibility arises in ensuring the wife's rights when the husband exceeds the right to discipline from what is legitimate, because what is meant by this right is discipline, not destruction or damage, and this is what was agreed upon by the Hanafi, Maliki, Shafi'i, Hanbali and Zahiriyya jurists. If damage to the wife occurred despite the husband's commitment to the conditions of discipline recommended by Sharia, then there are two opinions. The first is that the husband must care for the wife when she is severely harmed, and this is the view of the Hanafis and Shafi'is. The second opinion states that the husband should not guarantee the wife because there is no transgression according to their opinion, this is the saying of the Hanbalis, the Zahiriyyah, and the Maliki¹⁰⁰. This last picture is difficult to be fulfilled as the husband's observance of the conditions cannot lead to the harm of the wife. Furthermore, talking about damage means discipline by beating, which in turn means the husband's passing through the stages of preaching and abandonment.

Second: Responsibility in positive law

A breach of the right to discipline entails responsibility and is liable to punishment under the positive laws. As long as the perpetrator is not authorized by law, his act is not considered to be grounds for permissibility as stated in a ruling of the Kuwait Court of Cassation¹⁰¹. The penalty can be in three forms: The punitive penalty, the civil penalty, and the wife's right to request separation. In the criminal part, we find that the court on more than one occasion does not consider the right of discipline even as an excuse for mitigating punishment, as in the direction of the Court of Cassation in Iraq to convict the husband for the crime of murder under the provisions of Article 410 of the Iraqi Penal Code following the death of his wife after being beaten under the pretext of discipline by the husband¹⁰². It is the tendency of the Court of Cassation in Egypt to convict the husband of the provisions of Article 242 of the Penal Code of the deliberately obscene beating of the wife and deviating from the disciplinary provisions contained in Article 209 of the Personal Status Law¹⁰³.

¹⁰⁰ Dr. Abdul Halim bin Mishri, previous reference, p. 45, and Khaled bin Faleh Al-Otaibi, previous reference, p. 2235.

¹⁰¹ It states: "The right to discipline as one of the reasons for permissibility is not available to the accused as long as he is not one of those authorized by law to discipline the victim," Appeal 120/2004, Penal Session November 22, 2005, published in the legal principles decided by the Court of Cassation during forty years, issued by Technical Office, Ministry of Justice, Kuwait, 2016, p. 38.

¹⁰² Court of Cassation Decision No. 11/ Extended Rabaa, 2000, on 30/4/2000, unpublished decision, quoted from: Dr. Sabah Sami Daoud, previous source, p. 280.

¹⁰³ Annulment of December 18, year 33, Set of Legal Rules, Part 3, 1975, p. 355, quoted from: Dr. Sabah Sami Daoud, previous reference, p. 280.

In general, the Arab laws did not give an explicit provision for the punishment of the perpetrator if it resulted in a disciplinary effect when the husband exceeded his limits. Yemeni law is unique in Article (30) of this by making transgression in permissibility a penalty by describing the crime as an unintentional crime¹⁰⁴. Otherwise, the judge will have the role of giving the sentence according to the general rules, taking advantage of moving between the minimum and maximum limit for each penalty.

Some foreign laws, on the other hand, almost find the opposite: they do not recognize the right to discipline in the beginning and considered it as violence against women in general, and some kind of punishable domestic violence¹⁰⁵. The Turkish Criminal Code, for example, provides in article 96 that anyone who causes another person to suffer because of his or her actions shall be punished by imprisonment for two to five years. However, if the aggrieved person is a husband, father, mother, son, or pregnant woman, the penalty is increased from three to eight years.

This trend is not confined to the national laws of States but is an international one. Perhaps many States have enacted laws against domestic violence, having had to do so by signing these conventions. Some of these laws are The Domestic Violence Act of South Africa 1993, The Domestic Violence Act of Malaysia 1994, entered into force on January 14, 1998, Law No. 1674 relating to Domestic Violence in Bolivia of December 15, 1995, Act of Violence against Women in Ecuador in the year 1995, the Family Protection Act issued in Britain in 1996, the Violence Against Women Act in the United States of 1994¹⁰⁶, and in Jordan, the Protection from Domestic Violence Act No. 15 of 2017.

Iraq's Domestic Violence Bill has been pending since 2019, while the Kurdistan Parliament has passed Act No. 8 of 2011 entitled the Law against Domestic Violence in the Kurdistan Region of Iraq¹⁰⁷. Having seen these laws, they were enacted after 1993, the year of the Declaration on the Elimination of Violence against Women, issued by the United Nations General Assembly in December of this year. This is the most important international document on violence against women, and one of the international conventions is the Council of Europe Convention on the Prevention of Violence against Women and

¹⁰⁴ Master's thesis "The Theory of Abuse in the Use of the Right and its Impact on the Jurisprudence of the Family" by the Arab researcher Majidi, that Article 279 of the Algerian Penal Code considered the beating of the husband a mitigating circumstance. However, we cannot agree with this view, since this article was an exception in the case of flagrante delicto, and therefore cannot be generalized to the case of discipline. See the aforementioned letter, previous reference, p. 139.

¹⁰⁵ Dr. Sabah Sami Daoud, previous reference, p. 285.

¹⁰⁶ Dr. Sabah Sami Daoud, the previous reference, p. 287.

¹⁰⁷ This law was approved by the regular session of the Kurdistan Parliament No. (28), which was held on 06/21/2011.

Domestic Violence, known as the Istanbul Convention of 2011¹⁰⁸. Nevertheless, the subject of violence against women was prioritized in both the 1948 Universal Declaration of Human Rights and the International Covenants on Civil and Political Rights and economic, social, and cultural rights¹⁰⁹.

Conclusion

After considering the right to discipline as an application for the use of the right, we came up with a set of conclusions, recommendations, which will be pointed out as follows:

First: results

- While the right to discipline has been provided for in various degrees by legislation, Arab legislation has not been elaborated but left it to Islamic Sharia scholars once, and to custom. The Islamic sharia has different views, this has had an impact on the exercise of the right and its subsequent legal integrity, which in turn has led to difficulties in searching for the limits of the right because each team has a different point of view. The matter becomes more complicated when talking about custom as a source of the right to discipline. As far as jurisprudence is concerned, many scholars have denied the right to discipline, particularly in Western or non-Islamic countries.
- While discipline permits beatings in some of its forms in our Arab legislation, it has limits that make it a punishable offense, but otherwise in other States, since beating by the father or husband is an aggravating circumstance under which the father or husband is held accountable with a more severe punishment than the ordinary individual who hits a stranger.
- The right to discipline can be divided into three forms, depending on who disciplines and to whom, and these forms are represented in the husband's discipline towards his wife, the father's discipline on his children, and the craft's teacher's discipline on his students. The latter is almost not applied in foreign legislation.

¹⁰⁸ Turkey announced its withdrawal from the agreement on March 20, 2021, and this had the effect of internal and external protests against this decision. See: <https://www.aa.com.tr/en/turkey/turkey-withdraws-from-istanbul-convention/2182168>
<https://www.diplomatie.gouv.fr/en/country-files/turkey/news/article/turkey-withdrawal-from-the-istanbul-convention-20-mar-2021>
<https://www.bbc.com/news/world-europe-56467689>

¹⁰⁹ Review in detail the articles on violence against women these agreements in: Nevin Samir Suleiman Al-Amir, Penal Protection for Women against Violence in Jordanian Legislation, Master's Thesis, Department of Public Law, Faculty of Law, Middle East University, Amman, Jordan, 2019, p. 66.

- The discipline of the wife differs from the discipline of the children at the very important point that the discipline of the wife must take into account the arrangement of preaching, abandonment, and beating, unlike the discipline of the children, where, for example, abandonment is inconceivable.
- As far as we are aware, the Iraqi Criminal Code is the only law today that explicitly provides for wife discipline in the first paragraph of the article (41) of the Iraqi Penal Code No. (111) of 1969, After the UAE legislator amended its law by repealing the previous provision referring to the discipline of minor children in Federal Act No. 7 of 2016, Iraq became the only State that retained this right in such a frank manner, knowing that Kurdistan itself excluded the wife from the provision of article by Act No. 7 of 2001 on Kurdistan territory alone.
- The scope of the wife's discipline, i.e. the justified reasons for giving this right to the husband according to Islamic law scholars, does not go beyond the wife's rebellion, which some called the wife's disobedience. However, the dispute arose between them about the disobedience itself, so some of them went to the view that the wife is considered a disobedient when she violates the order of her husband only not Allah's commands, such as prayer, fasting, and pilgrimage, and others considered violating Allah's commands as a reason for the husband to exercise his right to discipline.
- Another dispute between scholars was that a wife could be beaten on a disciplinary basis after the first disobedience, or that the husband had to take into account the order in which he preached first, abandoned second and beaten third. The reason for this disagreement was a different understanding by scholars of the three punishments. The group advocating the possibility of beating from the first time argued that the penalties were census rather than ranking, while the other group understood them to be ranking, not just census.

Second: Recommendations

- We call on the Iraqi legislator to reconsider the provision for the discipline of the wife explicitly in article 41, paragraph 1, of the Iraqi Penal Code. The Iraqi legislator today represents a single trend in the legislation of the Arab States, at the very least, which has failed to heed the amendment of this text, which the different countries of the world have adopted differently. Besides, the aforementioned article also went on to say "within the limits of what is prescribed by Sharia, law or custom." That is, the existence of the term "customary" in this formulation opens the door wide for the husband to harm his wife under the pretext of custom. We know that many places in Iraq live in dark ages to humiliate women in general and the wife in particular. This provision is to

give legal authorization to these internationally criminal acts and, above all, psychologically and logically.

- Since there was a disagreement among Sharia jurists themselves about the wife's disobedience related to Allah's commands, as well as the dispute over the possibility of the husband resorting to beatings, without preaching or desertion. From our point of view, we see that the law takes what is in the interest of the wife, because disobedience to Allah's commands by the wife expands the husband's ability to discipline her, and thus beat her, thus, abusing her. Unlike if we keep the limits of discipline as narrow as possible. The statement indicated in observing the order in the punishments of the verse of disobedience, so preaching and desertion is easier and less painful and has an impact on the wife than beating. Also, adopting what is easier, and narrowing the scope of discipline and beating does not contradict the opinion of the two parties, whether it is expanded or narrowed for this right since the one who supported expanding the scope of discipline originally calls himself to leave beating as a matter of priority.

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