



Research Paper

Reexamining the Relationship between "Custom" and "Shar'" in Justifying Child Punishment and Discipline: A Case Study of Paragraph T, Article 158 of the Islamic Penal Code

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Abstract

The inclusion of child discipline by parents and legal guardians in Paragraph T, Article 158 of the Islamic Penal Code, which despite fundamental differences, is mentioned in doctrine as a justifying factor for crime and in the recent statement of the legislator as a barrier to criminal responsibility, may not only expose the legislator to accusations of legalizing child abuse but could also lead to its reduction to a simple parental right by law enforcers and subjects. What is important in preventing such outcomes is the correct interpretation of the conditions that validate the legal character of this behavior. However, with the conditioning of child discipline justification to "conventional limits" (*hadd-e muta'āraf*) and "religious limits" (*hudūd-e sharʿī*), and the ambiguity in their relationship with each other, such interpretation is not easily possible. Therefore, adding the condition of religious limits to conventional limits in the Islamic Penal Code of 2013 has not only failed to reduce the ambiguity in the criteria for child discipline as a legal matter but has also made it more difficult for the judicial authority to distinguish by combining these two criteria. Consequently, this research, based on a descriptive-analytical method, by referencing the law's differential-protective approach in dealing with children, argues that the conventional limit of discipline, which has contextual and interpretable criteria, should be qualified by lenient readings of religious limits, which have determinable instances, so that the institution of child discipline and punishment in various laws aligns with the broader trend of legal protections for children.

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Extended Abstract

1- Introduction

The removal of criminal responsibility or justification of crime commission, as a legal matter, results in the elimination of punishment for behavior that would otherwise subject the perpetrator to criminal reactions in the absence of legal authorization. One such case is Paragraph T of Article 158 of the Islamic Penal Code, which does not consider the discipline of children by parents punishable if it is within conventional and religious limits (*hadd-e muta'āraf and hudūd-e shar'ī*). What is important in this legal provision, and in fact the basis for the emergence of such an institution, are the conditions that the legislator has established to avoid the occurrence of child abuse under the guise of law: discipline must be within conventional and religious limits. This combination of conventional and religious limits, which is the product of legal reforms in 2013, is a sign of the legislator's effort to protect children against unregulated actions by parents and legal guardians. However, whether this has been sufficient to achieve such a goal is the subject of the current research, which attempts to reveal the challenges facing this legal provision and provide solutions.

2- Method

This research, based on a descriptive-analytical method and using library and documentary sources and note-taking tools, examines the legislative developments after reviewing the aforementioned legal challenges. With an analytical approach, it seeks to answer the question of how to judge a case where behavior is permissible in custom (*'urf*) for the purpose of discipline (*ta'dīb*) and protection, but not so in religious law (*shar'*). The hypothesis is that in case of inconsistency between the two, the

customary permissibility should be presented to religious law, and if the behavior performed is outside the limits of discipline and protection from a religious perspective, it should be excluded from legal permissibility and the punisher should be punished according to the principle. In other words, the relationship between conventional limits and religious limits is one of specification (*takhsīs*), and the religious limits of discipline and protection provide greater protection for children against harmful behaviors from those who benefit from this lenient rule.

3-Result

Although "conventional and religious limits" are expected to be the legal criterion for determining the permissibility or impermissibility of parental actions, serving as the condition that secures children's rights behind closed doors, it has failed to accomplish this for reasons discussed in this analysis:

First, the lack of homogeneity in the components of this criterion as stated in Paragraph T of Article 158 of the Islamic Penal Code is its most significant vulnerability. The contextual nature and the possibility of presenting a wide range of examples that change according to cultural, social, and family conditions are the most important characteristics of the conventional limit, an example of which can be seen in Paragraph 5 of Article 1173 of the Civil Code. This is due to the extensive entry of custom into family law-related issues derived from civil law. However, when this criterion enters criminal law from civil law, a complex



issue arises due to differences in scope, subject, and purpose between these two branches, leaving children unprotected against extensive actions that could be considered child discipline in custom. Additionally, the criterion of religious limits, based on its narrative (*hadith*) sources, has specific determinable instances that cannot be extended to similar cases.

The second issue, which may stem from the first, is the apparent legal wording that necessitates the establishment of both conventional and religious limits, while in all cases this harmony is not possible and will lead to lack of criteria in diagnosis and lack of protection for children against arbitrary actions in practice.

This research, while examining the vulnerabilities of Paragraph T of Article 158 of the Islamic Penal Code, adopts the recent differential-protective approach that the legislator has taken in procedural and substantive laws regarding children and adolescents. It argues that in cases where it is not possible to combine these two criteria in determining the legality of parental actions, the religious criterion should be used as the standard. In this criterion, forceful treatment of children must have three identifiable components: the child's age, the subject of intervention, and the method of intervention.

In the first component, the age range for intervention is limited to a specific age, which, according to the examination of jurisprudential texts and various narrations (*hadiths*) as described in this research, varies between 7 to 9 years old. In some narrations, not reaching the age of puberty (*bulūgh*) is essentially a condition for discipline (*ta'dīb*). Therefore, in dealing forcefully with a child younger or older

than this age, one must refer to general rules, and this lenient criterion will not be applicable for the perpetrator. This age determination is the most important limitation that the conventional limit criterion lacks; where there is no customary consensus that a 5-year-old and a 10-year-old child are outside the subject of discipline and punishment.

The subject of intervention in jurisprudential sources is mentioned as the abandonment of an obligation (*al-wājib*) such as prayer, and not any other matter at the discretion of parents, while in the conventional limits criterion, the subject of intervention can be at least any legitimate matter. Another important point that emerged from the jurisprudential examination of the subject is the gradual nature of responsibility for the matter in which parents have the right to punish. Accordingly, the prerequisite for discipline for abandoning prayer is its prior teaching to the child at the age of seven by the parents, which itself is considered a kind of boundary setting in dealing with the child and reduces the likelihood of resorting to discipline.

Third is the method of intervention, which according to the religious criterion should not be in a state of anger and rage, and on the other hand, should not lead to physical harm to the child. The derivation of this matter from jurisprudence (*fiqh*) requires that parents of children restrain their destructive anger (*kazm al-ghayz*), and if they use discipline and punishment as a tool to suppress their anger, they will be excluded from the circle of lenient protection and will be responsible for their behavior according to general principles.



4- Conclusion

What is concluded from the research findings is that the religious limit, with its restrictive conditions, will govern the broad concept of conventional limits. In other cases of non-conformity between customary and religious criteria, the principle is that the disciplinarian does not benefit from the lenient institution of discipline and education, whether we consider it a justifying factor for crime or a factor removing criminal responsibility. Based on these three jurisprudential components affirming parents' right to discipline children, each part of which is important in describing the behavior of parents and can consider the mentioned behavior a criminal title or, conversely, a legitimate behavior, Paragraph T of Article 158 of the Islamic Penal Code can be rewritten as follows to protect children's rights: "... The commission of behavior that is considered a crime according to law is not punishable in the following cases: ... T: Actions of parents, legal guardians, and custodians of minors that are carried out for the purpose of discipline or protection, provided that these actions are within the conventional and religious limits of discipline and protection. The conventional limit of discipline and protection in the criteria of the child's age subject to discipline, the cause and method of discipline cannot be interpreted more broadly than its religious limits. Obviously, any action to protect a child with measures that are more lenient than religious limits will be customarily permissible."

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6- Authors' contribution

In this article, Mehrangiz Roustaie contributes as the corresponding author and Mohammad Kakavand as the second author.

7- Conflict of Interest

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