

Elements of Gender Justice Between Gender (Males and Females) in Criminal Law: (An Analytical Comparative Study)

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Abstract. Gender justice, like any other idea, requires certain elements that help it achieve its philosophical purpose behind its embodiment in the criminal rule and ensure the legitimacy of the legal treatment of those addressed by it. To ensure the logic of the difference in treatment between the two sexes at the substantive and procedural level, there must be a basis for this difference based on mentally and legally reasonable reasons to be accepted by the intended group. The balance between the duties and rights of men and women in the criminal field may be based on the element of interest, the latter of which determines the wording and legal characterization of the rule, addressing one gender but not the other or both, or it may be based on the element of proportionality or the element of merit, or both.

1. INTRODUCTION

Every legal idea has rooted that stem from it and a basis from which it derives its rulings. Therefore, there are elements from which justice has inspired its rulings in the criminal rule. The origin is the equality of women and men in humanity, as they enjoy the same nature and character, and they have similar and similar mental and intellectual abilities, so there is no difference between them on the human level. He created these two sexes for cosmic balance and specialized each of them with features and qualities that characterize them, and many of the justifications that underlie the idea of research emphasize the establishment of equality between them and make it one of their public and legal rights. Based on it, roles, functions and social responsibilities are distributed between them according to the realistic vision of man and life, as their functions differ according to the different situations and capabilities available in them, and that is why we find in some areas where women are similar to men in most legal, legal and social provisions and vary in other aspects according to their physical structure and condition in proportion to their spiritual and physical structure, especially since the role of women has become somewhat complex as a result of their exposure to many pressures, including the pressure of tradition and biological nature, so the form of criminal treatment between them depends on a number of elements on which equal justice is based. (Badr, Hanaa Abdul Hamid Ibrahim, 2009, p. 7, Boutbeh, Rumaysa, 2013, p. 15).

Gender issues occupy a growing importance in order to reach effective justice between them in terms of rights and obligations in the criminal field, as justice based on equality is a basic principle that requires belief in the rights of the mentioned group, their dignity and value, and equal rights between them because their protection is the protection of the entire society. This protection is the main pillar in building modern and democratic states, so we find that most criminal legislations have tended to establish certain pillars and foundations that show the balanced objective view of the criminal legislator when determining the right to life, equality, the right to freedom, personal security, privacy and other rights in contrast to the obligations of both sexes. (Azar, Adel, 1980, p. 55).

The definition of criminal treatment between the sexes may encounter some difficulties in its actual application, which shows the importance of clarifying the elements on which it is based, the areas of disparity or similarity, the extent of its effectiveness in achieving the desired balance, and its impact on societal stability. Therefore, the main research issues can be summarized as follows:

1. What are the most important legal elements on which gender justice is based to determine the criminal treatment between the sexes at the substantive and procedural levels?
2. The extent to which gender justice affects the nature and type of interests protected for both sexes?
3. The extent to which the content of these elements differs from some of the words that are similar to them in the terminology? The extent to which their content in the specific criminal text differs from the general criminal text in the same law based on the influence of gender justice?
4. What is the nature of the controls followed in determining each of these elements and what are their types in the context of gender justice?

In order to reach an accurate and sound analysis of the elements of gender justice in the criminal rule, it is imperative to follow the analytical and comparative approach to show their impact in providing the legislator with the general frameworks and principles that he adopts in drafting the criminal text and determining the appropriate criminal treatment.

2. THE INTEREST COMPONENT OF GENDER JUSTICE

The element of interest acquires a special subjectivity and importance in the criminal field that exceeds its realization in other fields due to the subjectivity of this field and the nature of the interests that it seeks to protect and its parties and its continuous effort to achieve balance when they conflict, and acquires the same importance in the field of justice as a legal fact embodied in the criminal rule. The behaviour of the two sexes is always determined by an end that aims to gain a benefit or pay a harm, so it will be the focus of the research idea because of its role in creating or conflicting interest, so the need arises then for a means of balancing them, so interest was and still is the basis of legislation on which the right is built in Islamic law and positive law, and it is the same for justice. (Mohammed, Zamanko Mahmoud Haji, 2021, p. 23).

Linguistically, interest is a word derived from the verb (salah), i.e., goodness, which is against corruption, as we say, the condition of so-and-so is correct, meaning that corruption is removed from him and the situation is straightened, (Ibn Mansour, Jamal al-Din, 1998, p. 348. As for the term interest, it is defined by the philosopher (Ahrang) as (that material and moral need that the legislator seeks to protect in order to satisfy someone's need), the material such as protecting the right to life and the integrity of the body and moral such as protecting the interest of honour, consideration and modesty is every human need that creates a need for legal regulation provided that it does not conflict with the purposes and decisions of the Sharia, (Al-Mahdawi, Ali Ahmed Saleh, 1996, p. 36).

While the Italian philosopher (Cesare Beccaria) defined it as (an idea based on the basis of public benefit as a basis for criminal legislation and that the idea of benefit is false when it takes into account private cautions before public cautions), and the most advanced station to indicate the meaning of the interest in the utilitarian trend is the theory (Roscobound), he believes that (social conditions that the law protects, which is not limited to material values but also includes moral values such as freedom of belief, dignity, honour and consideration). (Saleh, Hasnain Ibrahim, 1974, p240.)

In the criminal field, it is defined as (the need for the law to protect the right that is violated or threatened to be violated and the benefit that the plaintiff obtains by achieving this protection). It is noted from the mentioned definitions that the element of interest is the subject of the protection of the criminal rule, and the condition for the advancement of this interest in the right of its owner is the fulfilment of three considerations, namely the existence of a relationship linking the interest and benefit and an evaluation of the link between the interest and the human being, and the third consideration is that this evaluation or belief is protected by the legislator as a legal interest that represents a general social interest (Abdul Kazim, Zahraa Hatem, 2022, p. 9).

The interest constitutes the focus of the criminal treatment of both sexes and an element of its existence to enable it to perform its functional role in protecting the interests associated with both sexes, so its goal is based on protecting their social interests and their role in the societal balance, as it determines the nature of the interest associated with both sexes, either it is an interest centred on the man or woman themselves, which is called (individual self-interest) or the interest is seen as a different legal status occupied by the two sexes. Then it will cast the shadow of equality on the protection of legally recognized interests such as the right to the safety of their body, money, honour and consideration, which are the material and moral needs of both sexes, so there is no way to deny the importance of substantive equality in ensuring the achievement of appropriate treatment between the interests of both sexes at the criminal level. (Azar, Adel, 1972, p. 394).

The self-interest or benefit of both sexes is embodied, for example, in what the Iraqi legislator stipulates: "Anyone who has sexual intercourse with a female without her consent or sodomizes a male or female without his or her consent shall be punished with life or temporary imprisonment..." (Iraqi Penal Code, 1969, Article (393).

Corresponding to Article 267 of the Egyptian Penal Code.

Sexual freedom and bodily privacy is one of the rights and rights that are closely related to the sexes themselves, which creates a subjective interest realized as a result of the existence of the right, and from here it is clear that there is a relationship between interest and right, despite the different views on the meaning and existence of the right, the prevailing opinion is that of the Belgian jurist (Jean Daban), for him the idea of right means (a person's appropriation of a certain value that achieves him an interest worthy of legal protection), (Al-Najjar, Abdullah Mabrouk, 2001, pp. 19-37). In this way, the interest represents the object of this right and not the essence of the right, as sexual freedom represents a right that the female is entitled to and will constitute an interest that is the subject of criminal protection, as well as the male and his right to bodily privacy. (Saleh, Ayman Ali Al-Rauf, 2011, p. 21).

The Iraqi legislator stipulates that: "A mother who kills her newborn child in order to avoid dishonour shall be punished by imprisonment for a term not exceeding ten years or by imprisonment for a term not less than one year if she has conceived the child by incest." (Iraqi Penal Code, 1969, Article 407).

The social image of women in general and their honour and consideration in particular are the basis for the formulation of the mentioned text due to the realization of self-interest with a social aspect based on the idea of a right that affects the mother, namely the preservation of her reputation).

The social image of women in general and their honour and consideration in particular are the basis for the formulation of the mentioned text due to the realization of self-interest with a social aspect based on the idea of the right that the mother is influenced by, which is to preserve her reputation, as well as the case in considering the abortion of the woman herself to prevent shame as a judicial mitigating circumstance. (Iraqi Penal Code, Article (417/4).

Clear that the first signs of the impact of interest as an element of determining the treatment between the sexes on justice is in determining the type of image in which it will appear in some specific criminal rules, so justice is functionally characterized as the goal of the criminal rule, representing the philosophical dimension behind the formulation of the criminal text related to the sexes, the idea of interest will give this goal a special image in which it appears, which is the image of symmetry or proportionality in determining criminal treatment, so this treatment varies according to the type of interest whether it is individual or individual with a social aspect, and this effect shows the effective role of interest in the effectiveness of justice in the mentioned texts.

It is known that the life of the two sexes is based on the satisfaction of certain material or moral needs dictated by their instincts, the satisfaction of which is more than the requirements of preserving their humanity and ensuring proper living for them, and among the moral needs is the feeling of satisfaction and justice, so the goals of justice vary with the different human needs of the intended group and its realization of the benefit based on the rise of the worthwhile interest that will draw the precise limits controlling the textual range that contains the criminal treatment of the male or female sex and shows its truth and likelihood. (Abdulaziz, Hakimah, 2024, p. 40).

This interest requires legitimacy, as not everything that the two sexes consider to be their right will be the subject of the effectiveness of this justice and its endeavour to close the lid of balancing on it because it is not a means of matching their whims or requirements as much as it is a means of legal balancing. The legitimacy of this interest and the legislator's selection of it and making it the subject of legal regulation is related to the extent to which it responds to the need for justice for them and the extent to which it captures the conviction of the legislator in drafting the criminal text, these interests must not conflict with the purposes of Sharia, law and morality and do not include a preference for the interest of a particular gender over another because the function of the criminal text is to prevent the disturbance of the balance between interests. (Abdulkarim, Abdulrahman Ahmed Ibrahim, 2012, p. 357).

3. THE PROPORTIONALITY COMPONENT OF GENDER JUSTICE

For the purpose of giving every interest realized in both sexes their right to legal regulation in granting protection and imposing

responsibility, each interest must fulfill its duty without violating the interests of the other sex. Hence the need for the element of proportionality between interests that may conflict within the scope of the penal code and criminal procedures, which will be based on a set of criteria determined according to the legislator's thought. In a way that helps the latter in mitigating the severity of the conflict between the interests of the two sexes or reconciling them through methods that preserve them, as the criminal rule when drafted is restricted to a specific goal that is consistent with the social values that prevail in the life of the mentioned group, it is rare to find a criminal text devoid of a type of interest that is important, even if it is insignificant, as long as it ensures the advancement of justice in question. (Al-Jubouri, Mustafa Taha Jawad, 2020, p. 9).

The proportionality acquires double importance when approaching it from the angle of gender justice because its role is not limited to achieving formal parity between the two sexes, but requires the integration of the human and qualitative dimension in assessing interests and defining the crime, punishment and procedure, as it is not understood as a mathematical relationship, but works as a fair and in-depth evaluation mechanism for the actual situations of the mentioned category, as it requires achieving harmony between protecting their rights, freedoms, interests and obligations. So the legislator is obligated while drafting the specific criminal rule based on this element to provide adequate protection of interests in the role of balancing the benefit that accrues to the protected interest of a specific gender with the harm that affects the corresponding interest of the other gender in the aspects of protection, responsibility and permissibility, even if the criminal rules were enacted in order to protect the interests concerned, but they should not favor the protection of one interest at the expense of the other, so the field of proportionality is not limited to the proximity and compatibility between the cause and solution of the text, meaning the immediate effect it causes, but also includes proportionality between the distant legislative purpose of this text and its cause in the context of justice. (Abdul Qader, Jafar, 2023, p. 247).

Accordingly, proportionality means (a weighting mechanism between legal interests of equal rank that are simultaneously applicable but contradictory), (Al-Jubouri, Mustafa Taha Jawad, 2020, pp. 27-38). Or it is (the legal standard by which the legality of the criminal treatment that the legislator challenges in the field of exercising rights and freedoms and imposing obligations for both sexes can be assessed), as proportionality has become a legal tool and a methodological analytical framework used by both the legislator and the judge for the purpose of achieving the legitimacy of the criminal text, according to which the legal value of the interests of the two sexes is determined and the extent to which one of them can be weighted over the other or reconciled between them, it expresses a bond or relationship characterized by compatibility and balance between one interest and another within the social relations of the intended group. (Al-Barifkani, Delshad Abdul Rahman, 2016, p. 30).

Its importance lies in the fact that it is the catalyst for the effectiveness of the justice in question in achieving fairness by determining protection or responsibility in accordance with the human person, circumstances and social role, because if the criminal text neglects the proportionality between the rights and obligations of this category, this will lead to their loss of confidence and a sense of security and stability in favouring the interest of one over the other in the substantive or procedural field. (Mohamed, Zainab Sabri, 2021, p. 400).

It is noted that the idea of proportionality occupies a particularity in the qualitative field of the criminal text, as it is considered the legal criterion for determining the importance of the rights and interests realized by the male or female sex only and their value in the qualitative criminal rule and not the general interests as in the general criminal text, as the main focus of this determination lies in the interests and rights of the two sexes themselves, so maintaining proportionality between them is of high value, no less than maintaining proportionality between private interests and public interest. (Al-Darwish, Turkish hymn, 2023, p. 499).

Seeking to achieve proportionality between the rights and interests of the two sexes does not mean balance between them, due to the difference in the two meanings, and the idea of proportionality differs from the idea of appropriateness as well, as the appropriateness in general refers to the compatibility of the legal work with the conditions of time, place and considerations surrounding its issuance in all its aspects, as it represents the relationship between the legal work and the conditions of its issuance, while proportionality represents the relationship between the legal work and the principles and rules that govern it. Thus, the latter represents one aspect of appropriateness and appropriateness is broader in scope and concept than proportionality, and their relationship is the relationship of the part to the whole (Al-Barifkani, Delshad Abdul Rahman, 2016, p. 35, Al-Zahrani, Wael Saeed, 2021, p. 507).

Balance means balancing something with something, i.e., equating it in weight and balance. Balance refers to the creation of a third state between two existing states that appear as a compromise result between them because they are opposed to each other without cancelling any of the two interests or realized states and mitigating the intensity of the conflict between them, but the balance in proportionality means reconciling the conflicting interests of the two sexes without equality between them, i.e., converging as close as possible without creating a new third solution to bring about this proportionality. (Zainal, Ebrar Muhammad Hussein, 2014, pp. 102-115.)

In the field of the right to discipline the husband to his wife as a reason for permissibility, it is necessarily necessary to achieve a kind of proportionality between the advantages and interest for which this right was legitimized for the man and the potential harms that may result or arise from the act of discipline and the extent of its violation of the wife's right to physical integrity, as proportionality will give this case a kind of legality when weighing the interests and making them compatible with sound legal thought. There must be a balanced proportion between the philosophical and social thought and the legal thought that meets in this right, which contributes to ensuring the protection of the rights and freedoms of both sexes from violation and weighting. (Al-Akili, Saif Saleh Mahdi, 2013, p. 104).

At the level of criminalization and punishment, the role of the interest of the mother, on the basis of which her right to the life of her fetus and her right to give birth prevails, in punishing her for the crime of abortion and activating the mitigating penal circumstances against her (Iraqi Penal Code, Article 417/4).

The proportionality in this case between the crime and the punishment is based on the basis of protecting the mother, protecting her physical and mental health in the case of rape or adultery, and safeguarding her social outlook. (Al-Zubaidi, Muhammad Abbas Hamoudi, 2010, p. 270).

4. THE MERIT COMPONENT OF QUALITATIVE JUSTICE

The idea of entitlement comes as a compromise between the ideas of formal equality and differentiation between the rights and interests of the two sexes, as it mitigates the severity of the damage that may be caused by the mathematical equality between the mentioned category and protects against the differentiation of the interest of one sex over another in the criminal field, as the meaning of entitlement is to obtain what is due to him according to his gender, social role and different legal status, Entitlements are based on certain principles, including the principle of (rights) stemming from the deep feeling inherent in the individual that he

deserves the best in his life, whether in material or spiritual matters or in legal protection, which is itself based on the concepts of equality, so this feeling is not enough, but the legislator must understand and realize it when drafting the specific criminal text and raise the ceiling of ambition for both sexes with the entitlement that will be determined according to their different abilities and capabilities in certain areas of the criminal field. (Ben Hafou, Halima, 2009, p. 11).

The idea of entitlement includes a statement of values and interests worthy of legal regulation. In this framework, the legislator exercises his drafting function, as both sexes have interests worthy of attention and both are the focus of protection and responsibility that arise based on these values and interests due to their public and private social roles, and because the interests of the two sexes are different and conflicting, and because the interests of the two sexes are different and conflicting. The legislator must balance these interests and know their importance because the basic idea of justice is centred on evaluating interests, so he must be accurate in regulating them in a way that does not constitute a violation of the right or freedom of anyone, whether it is related to them subjectively, such as the protection of self and money, or a self-interest with a social aspect. (Abdel-Al, Tariq, 2023, p. 376).

The element of entitlement in the context of gender justice is of two types: legal entitlement and moral entitlement. The first means that the text explicitly determines who deserves punishment or acquittal at the substantive and procedural levels, regardless of their moral or humanitarian circumstances, such as the criminalization of theft, whether for sordid or honorable motives. Its characteristics are that it is based on a specific legal rule, applies equally (in theory) to everyone, and focuses mostly on the act committed rather than on its motives or the status of the perpetrator. In contrast, moral entitlement is what is imposed by moral and humanitarian principles, even if the law does not stipulate this or sometimes conflicts with it. Among its characteristics is that it is based on moral values and human conscience, considering personal and social motives and circumstances by giving more importance to the motive and human condition than to the act itself, such as stealing from a mother for the purpose of feeding her hungry children.

Therefore, these two types will contribute to the creation of a fair qualitative criminal text, which will achieve justice itself proportionally or symmetrically, unlike the general criminal text, which depends mainly on legal merit. (Abdel-Al, Tariq, 2023, p. 376).

It is noted that the idea in question is somewhat close to the idea of evaluation by the legislator and the merit of the interest in guiding the policy of the specific criminal text, and since it varies in importance, it may need less or more protection according to its value. (Younis, Abdul Hakim Dhanun, 2003, pp. 65-67).

Relying on the logical criterion followed in this evaluation, which is based on reasonable grounds and not on hypothetical bases, the interest or social value must be regulated according to these grounds that play a role in guiding the legislator's substantive or procedural policy and receive his attention in the criminal field by giving it a legal character to determine the similarity, disparity, or weighting of one over the other. (Al-Harbaiti, Amr Al-Sayed Mohammed, 2017, p. 20.) This is especially true when the need for a particular gender is greater than that of the other gender, but with the least amount of sacrifices and damage that may be inflicted on the other. (Fraser, Nancy, 2023, p. 492).

In sum, it can be said that entitlement means the hierarchy of interests, their evaluation, and the extent of their importance in achieving the philosophical purpose behind the qualitative criminal text. Whenever an interest of intrinsic value and importance arises in both sexes, it becomes a subject of legal regulation, so justice is at issue when determining the extent to which the interest deserves legal regulation, which is realized in the male sex and not the female or vice versa or both, in the sense that it will ensure the achievement of balance in legal treatment that will be based on legal criteria that ensure the achievement of the philosophical purpose of the qualitative criminal field (Bushua, Latifa, 2019, p. 136).

5. CONCLUSION

By delving into the content of the elements of gender justice in the criminal code, we found that there are several results, the most important of which are the following:

1. Gender justice in criminal law is based on three important elements: interest, proportionality, and merit.
2. Interest is the focus of criminal treatment for both genders and an important element for justice to fulfill its functional role in protecting gender-related interests based on maintaining their role in the societal balance.
3. Proportionality is the second element on which gender justice relies in achieving symmetrical or proportional equality in criminal treatment, which means weighing interests according to their value and importance.
4. Entitlement means an assessment and evaluation of the importance of the interests that qualitative justice seeks to protect, and it is of two types, a legal entitlement and a moral entitlement, which gives the qualitative criminal text drafting integrity, unlike the general criminal text that relies on legal entitlement only.

This study concludes with a set of carefully formulated recommendations, the core message of which can be summarized as follows:

1. In the context of gender justice, the criminal rule must consider the interests of both genders in a balanced manner. We propose that the legislator give priority in building specific criminal legal models to protect the most vulnerable and marginalized group, such as women or victims of sexual crimes.
2. We propose that the criminal legislator should determine protection and responsibility for both genders based on what they actually deserve according to the law and not based on their position in the gender pyramid (man/woman), so we propose eliminating the permissible reason granted to the husband to discipline his wife.
3. Since entitlement in the context of gender justice is both a legal entitlement and a moral entitlement, we suggest that the legislator extend the scope of criminal protection in texts that address females to actual or de facto females, i.e. transsexuals based on legal justify.

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