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THE EFFECT OF GENDER ON PUNISHMENT TYPE AND INFLECTION IN IRAN'S PENAL SYSTEM

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ABSTRACT

Gender is not essentially a factor bringing about difference in punishment but there are differences discerned in this regard in Islam's legal system hence the current regulations of Islamic Republic of Iran. These distinctions can be summarized in three sets: difference in the type and amount of punishment, difference in exemption of punishment and difference in the enforcement of punishment. In criminal titles, there are identified crimes that are specific to a certain gender and the men and women do not enjoy similar status in terms of the age of criminal liability in such a way that the women's criminal liability begins in an earlier age than the men's. As for atonement and acceptance of atonement payment for another person, the conditions are not equal and the women cannot be considered as individuals responsible for the others' atonement. In regard of mitigation and intensification of the punishment, the gender plays a considerable role and the punishment mitigation cases of each have been clearly specified in comparison to another. Crime substantiation and punishment infliction are topics wherein being a woman or man is not devoid of effect. The present study uses library method to collect the data. In this research, the legal articles in which such terms as "men" and "women" have been used and the differences that have been created in terms of granting right and obligation and exertion and enforcement of punishments and the methods of crime substantiation, have been identified, extracted and classified so that misperceptions regarding the natural superiority of men over women can be corrected by informing the reader about the existent trivial differences in criminal issues that are to be envisaged normal considering the inherent and psychological conditions. It has also been found out in the present study that the legislator has been lenient in prescribing punishments for women, in some of the cases, and for men, in some other cases.

Keywords: Penal Laws, Gender, Punishment

INTRODUCTION

There are different regulations in Iran's penal laws in respect to women and men. As the gender differences can be seen in the discussion on the proofs of substantiating a crime, article 160 of Islamic penal code of law stipulates that "the crime substantiation proofs are as follows: confession, statement under oath, murder testimony and swear as specified in the legal rules and as held by the judge. In legislator's idea, men are not superior to women and not even the women over men rather the difference lies in an undeniable reality stemming from the existential, physical and dispositional and psychological nature of the men and women.

Iran's penal regulations predicted the positive discrimination in regard of punishment for the first time in article 46 of the general punishment laws, passed in 1925 (Yazdiyan Ja'afari, 2009). Women are inclined towards performing crimes in a degree lesser than the men for three reasons. One reason is the secretion of testosterone hormone in men. The second reason

is the cultural context and system of the women who feel that doing such a thing as a crime blemishes the prestige of a lady. On the contrary, the men readily exhibit highly risky behaviors. The third reason is the physical limitations making the women less inclined towards perpetration of crimes (Momtazi, 2008).

An exact investigation of these differences can reveal if they are of positive discrimination type, so-called as protective discriminations, or possibly of the negative discrimination type, in some cases, and contradictory to the equality principle of men and women's human dignity (Yazdian Ja'afari, 2009).

If committed a crime and sentenced to a definite punishment, the women, like men, should sustain the punishment of their action with no hesitation and in adherence to the quality specified in the verdict and law. But, when it comes to enforcement, legislator, considering the existence of certain features and characteristics and special conditions in women in regard of some punishments, might realize that the punishment can be deferred or the quality of inflicting some punishments should be different for women as compared to men.

The crime perpetrations by men and women differ in nature. For example, such a crime as abortion is somehow specific to women. There are crimes that are exclusively pertinent to a certain gender and the men and women do not enjoy identical statuses in terms of criminal liability age in such a way that the women's criminal liability begins in an age earlier than the men. As for the mitigation and intensification of punishment, the effect of gender is considerable and the punishment mitigation cases have all been specified each in comparison to the other. Women's testimony is unacceptable in some cases and the women do not play a role in murder testimonies unless they are plaintiffs or defendants of a lawsuit. Gender does not play a part in confession and judge's knowledge and this is clearly understood from the articles of Islamic penal code of law.

Based thereon, the present study investigates the effects of gender in Iran's civil law via referring and observing the rules and regulations and it was figured out that the legislator has stipulated certain provisions considering the gender differences and distinctions.

Study Objective:

The present study tries identifying, extracting and classifying the legal articles wherein such words as men and women have been used and differences have been granted in the creation of rights, obligations as well as in enforcement of the punishments and method of crime substantiation so that the reader could be informed of the existence of trivial differences and distinctions in criminal matters that seem to be ordinary according to the inherent and psychological conditions and nature and, by doing so, the misinterpretations and misunderstandings regarding the men's natural superiority over women could be corrected. It will also be demonstrated that legislator grants punishment mitigations to and leniently treats women in contrast to the opposite sex in some of the cases and does the same in some of the other cases in favor of men.

Study Literature:

Exploration of Criminological Gender Approach:

The history of the criminological studies is indicative of the lack of gender separation in regard of criminality until before 1960, except in a few cases. The women's absence from the criminological statistics and analyses has been substantially the product of a mindset existent in respect to women and their characteristic. Due to the same reason, they were deemed as



inferiors, unvalued and lower than men and they were not given a stance in discussions pertaining to transgression (Rostami Tabrizi, 2009).

As for the elaboration of the women's role in delinquency, there are specifically two theories: the first holds that the women adapt themselves more easily to the environment and environmental conditions for their biological, psychological and social attributes hence they mostly do not dare to oppose to the social rules hence break a law. The other one states that women perpetrate crimes in a rate lesser than men. However, the patriarchal and gender-oriented system does not pay attention to the women's transgressions and fails taking them into account in criminal analysis (Rostami Tabrizi, 2009).

Following the investigation of the women and men's sociability course, John Hegen figures out that women welcome risking lesser than men and criminality is accompanied by a more negative load in women than in men and, finally, that the women are less likely to participate in deviant behaviors than men (Momtaz, 2008).

The findings signify that the minor boys of whom complaints have been made are three times larger in number than minor girls. The most important crimes committed by girls are sex transgressions and house truancy whereas the most important crimes committed by boys are burglary, battery and property damage (Gholami, 2008).

The studies conducted on female felonies and victims and experiences gained about the convicted women as compared to the similar researches on their male counterparts are well indicative of the grounds of feministic criminology criticism in its real sense in respect to the idea that empirical feminism cannot be realized as feminism rather it should be considered as a means thereof because the observation of the experiences and realities concerning women and criminal phenomena (offence and deviation) by the empirical feminism has not been based on value and critical judgement rather these experiences made the feminism take a route to reach its real meaning, i.e. critical feminism (Gholami, 2008).

Smart believes that traditional criminology has not offered proper recommendations in regard of crimes by women; in fact, the traditional criminology is laid on masculine prejudgments in such a way that the inventors and the subjects of it are all men. In the present author's mind, one extraordinarily important aspect of the girl's sociability is the limitations imposed on their freedom of action and coming and going (Jarbani, 2010).

Some feminists are of the belief that the patriarchal relations, the role women play in the family, the penal system's attitudes towards women and the way it treats them and the dual control and supervision that the gender system imposes on the women are all the causes of law avoidance by a great many of the women. They conclude that the women are less likely to commit crimes in respect to men and the crimes women perpetrate are lighter than the ones done by men (Mo'azzami).

Women-Specific Crimes:

There are subjects criminalized in Iran's substantive regulations subject to female gender and the women have been required to avoid committing them. The titles discussed according to the quality and the method of perpetration and the characteristics of the crime are in such a way that they are not envisaged to be committed by men. These crimes are as explained below:

1) Lesbianism:

If a woman rubs her vagina to that of another unmarried woman, she, a Muslim or a Kaffir, should be laced a hundred whips. Some jurisprudents have stated that the same



verdict holds also for a married woman (feme covert) but there is another group that opines the stoning of the married woman (Gorji, 2002). Other jurists define lesbianism as hugging by two women for satisfaction of carnal needs through having the reproductive organs contacted (Validi, 2001).

Article 238 of the Islamic penal code of law stipulates that lesbianism is a female person's placement of her reproductive organ on the reproductive organ of another person of the same sex (Goldouziyan, 2013).

2) Sexuality of Two Women:

Article 237 of the Islamic penal code of law specifies that "a male person's sexuality in affairs other than sodomy and flirting, including in intercrural sex and kissing out of lustfulness, causes lacing in a range from 31 to 74 whips of the type of degree six Ta'azir punishments.

Note 1: the same punishment is also applicable to the female humans.

Note 2: the verdict of the article does not incorporate the cases that canonically require Hadd punishment.

3) Engagement of a Married or a Waiting Woman with Another Person:

In Islamic laws and Iran's laws, men have not been prohibited from polygamy and they can marry to other women under certain conditions but a woman does not have such a right; a woman in her waiting period or permanently married to a person cannot engage with another man and this is mostly for such a reason as the prevention of generation crossover and also for other reasons latent in the canonical verdicts.

Marriage is either permanent or temporary and marriage type does not have any effect on the actualization of this crime and the term "waiting time" used in this article is manifold and encompasses all types of waiting times such as divorcement, marriage revocation, death, concessional quit or term expiration and doubtful intercourse (Goldouziyan, 2013, 594).

Men Specific Crimes:

1) Sodomy:

In Islamic jurisprudence and law, sodomy is considered as a dead sin and it will be followed by otherworldly chastisement. Jurisprudents know sodomy as two men's copulation; by sodomy, the intercourse by two men is intended whether glans penis passes beyond the anus or not (Gorji, 2002, 42). In such a deviation, the pervert only satisfies his sexual desires through intercourse and sexual contacts with persons of his own sex (Validi, 2001, 68).

2) Intercrural Sex:

Article 236 of the Islamic penal code of law states in regard of intercrural sex that doer and the object of such an action should be laced a hundred whips and there is no difference in this respect between married and unmarried and forcible or otherwise.

3) Desertion of Alimony Payment:

From the perspective of Islam, supplying the budget of the family, including the personal expenses of the woman, is the duty of man. Women have no responsibility in this regard in such a way that a woman having a large deal of wealth several times that of her husband is not required to share the expenses and supply the family budget. A wife's supplying of such a budget, in terms of the money she wishes to spend and in



terms of the work she wishes to perform, is voluntarily and dependent on the will and volition of her (Motahhari, 1980).

4) **Engagement with a Married or a Waiting Woman:**

If a man marries to a woman while knowing and being aware of the forbiddance of the action and having full knowledge of the fact that the woman has a husband or in her waiting period for another man, i.e. if the man expresses his intention via speaking words revealing his internal tendencies and the woman agrees to it, then the type of marriage, temporary or permanent, has no effect on the actualization of such a crime (Goldouziyan, 2013, 594).

Difference in the Type and Amount of Punishment Specified for Men and Women:

The gender differences of punishment specification can be categorized in three sets in an investigation of the existent regulations:

- 1) Difference in punishment type and amount
- 2) Difference in punishment exemption
- 3) Difference in punishment enforcement

An exact examination of these differences indicates whether all these punishments are of positive discrimination, to wit the so-called protective, type or some of them are possibly of the negative discrimination type hence in opposite to the equality principle of the man and woman human dignity (Yazdiyan Ja'afari, 2009, 82).

Difference in Punishment Type and Amount:

These cases embrace differences in some types of Hadd punishments for fornication, homosexuality, pimping and apostasy.

1) **Difference in Fornication Hadd Punishment:**

Rape:

In punishing the rape perpetration, paragraph D of article 224 of the Islamic penal code of law has only specified death penalty for the male fornicator.

Fornication with One's Step-Mother:

If a man fornicates with the wife of his father, he will be sentenced to execution corresponding to Paragraph B of article 224 of Islamic penal code of law. Now, if the reverse of this action occurs, meaning that if a woman gets involved in fornication with her step-father, it has to be considered as an example of a simple fornication with the silence of the law (in case it is found devoid of other intensifying qualities).

Fornication with Minors:

According to article 228 of the Islamic penal code of law, in case of fornication with congenital relatives and married persons, the punishment is a hundred whips in case that the male fornicator is an adult and the female fornicator is immature. This way, the special situation (immaturity) of the victim, in regard of an female fornicator, is a punishment mitigating factor but, conversely, not only the punishment of an male fornicator is not mitigated but it might also be more intensified (Mowlaverdi, 2008).

Adultery:

Article 229 of the Islamic penal code of law stipulates that a man having a permanent wife can be laced a hundred whips, shaving of head hair and banishment for a period of a year if he performs adultery with another woman before copulation with his wife. The opposite concept of the article is that the married woman should not be sentenced



to such a punishment and she is only to be laced a hundred whips as ordained for simple fornication. Hence, the punishment for adulterers is more intense than that specified for adulteresses.

2) Differences in Homosexuality:

The homosexual men (sodomites) are sentenced to death penalty and the lesbians are laced a hundred whips according to article 234 of the Islamic penal code of law.

3) Difference in Pimping:

Article 243 of Islamic penal code of law specifies more severe punishments for male pimps than female ones and the former, besides being laced, can be banished for a period no more than a year.

Difference in Punishment Exemption:

1) Father and Punishment Exemption:

Exemption examples in regard of Ta'azir and Hadd retaliation punishments are:

- 1-1) Father and Grandfather's exemption from false accusation of child adultery or sodomy (note to the article 260 of the Islamic penal code of law)
- 1-2) Father's exemption from robbing a child (Paragraph C of article 268 of the Islamic penal code of law)
- 1-3) Father or grandfather's exemption from retaliation for murdering or injuring a child (article 301 of the Islamic penal code of law)
- 1-4) Father's exemption from Ta'azir punishment for engaging in usurious transactions with the child (note 3 to article 595 of the Islamic penal code of law)

The difference in exemption is for the reason in cases of solely economic topics such as robbery that the verdict enactment philosophy lies in the doubt that, in fact, the child's properties have stemmed from the father's contributions because the latter is obliged to pay allowance to the former (Mir Muhammad Sadeghi, 1995).

2) Husband and Punishment Exemption:

2-1) Retaliation Exemption:

According to article 630 of the Islamic penal code of law, a husband is granted exemptions in regard of the murdering, injuring and battery of a wife living with him but the women have not been given such an exemption in similar situations. It seems that the difference lies in the foundation of such an exemption (Mehrpour, 1996).

2-2) Exemption from False Accusation of Sodomy or Adultery Hadd Punishments:

Paragraph D of article 261 of the Islamic penal code of law, enacted in 2013, pertains to the time that the husband is ready to get involved in cursing sessions. Cursing is a sort of conjugal anathema procedure exercised by courts in which the couples present their proofs of adultery or sodomy accusation as well as documents of denying the attribution of a child born during their common life (Ja'afari Langarudi, 1984).

The opposite to this issue cannot be proposed in regard of the wife because a man's goal in holding anathema procedure is denial of the child born during his common life with a woman but such a claim is totally revoked in regard of a woman.



Difference in Punishment Infliction:

Deferral of Punishment:

There are barriers in Iran's penal law that provide for postponement of the enforcement of a punishment. These barriers are shared by both men and women and they are either temporary like during the sickness or permanent like when a person dies. The cases identified specifically belonging to the women are as explained below:

1) **Pregnancy Days:**

At the time of punishment infliction, if a convict announces that she is pregnant, the law enforcing authority gathers requires her to submit her proofs and asks the forensic medicine division to come up with a specialized statement and, in case of the absence of forensic medicine division, a trusted physician is introduced to perform the tests and express a final statement following the veracity of which the punishment is postponed.

2) **Postpartum Period:**

Another case that provides for deferring of the enforcement of some punishments is a woman's being in early days after giving birth to a child and it has also been specified in the law and procedures. Postpartum period has not been defined and specified by legislator but it has been described in jurisprudence. Postpartum period (equivalent in Arabic to Nafaas) is the time that a woman instantly sees blood going out of her body upon partial or complete fetus expulsion.

3) **Menstruation:**

Menstruation causes delay in the enforcement of some punishments in respect to women. In case that the judge, to enforce the verdict and punishment, finds out one way or another of a woman's being in her menstruation period, he will ask for the forensic medicine division or a trusted physician's idea and if it is declared that the woman is in her menstruation period, the punishment would be postponed to the elimination of barrier. Menstruation is a barrier to the infliction of both Hadd and Ta'azir punishment (article 501 of civil procedure).

4) **During Breastfeeding Period:**

Article 100 of the Islamic penal code of law states that a punishment is to be postponed when an infant or child is in her breastfeeding period and it is also confirmed by the forensic medicine division or a trusted physician that the infliction of punishment to the mother might harm the health of the child due to the cessation in breastfeeding following which the judge issuing the sentence or the attorney general executing the order should also affirm the postponement of punishment.

Punishment Enforcement Method:

Explanations had been given regarding the difference in lacing the men and women in the former Islamic penal code of law within the format of articles 100, 102 and 176. For example, it was stated in articles 100 and 176 of the Islamic penal code of law that lacing should be done in standing position for men and in sitting position for women. Moreover, men are laced while wearing a cloth only over their sex organs and the women are laced in cloth wrapped around their bodies.

The term "stoning" was kept in Islamic penal code of law, passed in 2013, based on Guardians Council ordinance but the punishment for adulterer and adulteress was made convertible to death penalty (Mehrkhaneh, 2013).



Corresponding to the law, if a man commits a crime on the self of a woman or a body organ of her, the avengers of blood or the victim, herself, can enforce their retaliation right only in case that they pay half of the atonement money payable to the man.

The Effect of Gender on Criminal Liability Age:

A child is exempted from criminal and penal liability as far as s/he is not reached the stipulated age hence s/he cannot be punished before reaching the specified age (Najafi Tavana, 2003). The maturity age is determined by reference to the civil law, note 1 to the article 1210 amended in 11/14/1991, stipulating that “the boys reach maturity at full 15, lunar system, and the girls reach maturity at full 9, lunar system” and as it can be seen there is a difference between boys and girls in terms of age.

The Effect of Gender in the Extent of Criminal Liability:

1) The Effect of Gender in Regard of Kinfolk:

Article 468 of the law stipulates that “kinfolk encompasses father, boy, the close male maternal or paternal relatives by the order of their entitlement to inheritance as well as all of the others who share a quotient of heritage left by a person. All of these individuals are equally obliged to pay atonement. It can be observed in this article that there is no mentioning of the female relatives hence only the male persons who are kinfolk of a minor or an insane person should shoulder the payment of atonement to the next of kin of a person slain by that minor or insane person.

2) the Effect of Gender on Amount of Atonement:

The atonement for the murdering of a woman is half of the atonement paid for a non-Muslim man and the type of murder does not make any difference according to the article text (Goldouziyan, 2013, 397). It is also stated in article 560 of the Islamic penal code of law that “the atonement for a woman and a man in regard of the body organ and interests can be reduced to a third of a complete atonement and the woman’s atonement is reduced to half in case of the man’s atonement becomes one third or more than a man’s atonement.

The atonement of a woman and a man is identical in battery and injury and when the amount of the atonement is increased to one third of a complete atonement, the man’s atonement becomes half of the man’s atonement and, as it can be seen, gender exerts an effect in the amount of the atonement and the men deserve more atonement than women (Amid).

3) The Effect of Gender on Crime Substantiation Proofs:

The gender difference does not play a role in regard of the judge’s knowledge. As for confession to crime and statement under oath, there is no difference between men and women. Thus, the existent gender difference in regard of crime substantiation proofs pertains to murder testimony and attestation (Akbari Barijani, 2017).

The present study considered two types of the aforesaid topics: A) a glance at the Islamic penal code of law regarding attestation reveals that women’s attestation is not credible regarding murder of the first degree and it does not matter if they bring testimony individually or if their testimonies are found attached to the attestations by others. In some of the cases, the women’s attestations can be accepted if added to the attestation by several men as stated in article 199 of the Islamic penal code of law that “the attestation by two men and four just women suffices the substantiation of



fornication deserving such punishments as Hadd lacing, shaving of head hair and/or banishment. In regard of punishments other than the ones mentioned above, there is a need for at least testimony by three men and two just women. It is also expressed in the beginning of article 199 of the Islamic penal code of law, passed in 2013, that “the minimum threshold for the substantiation of all of the punishments is testimony by two men” and, on the other hand, it is expressed in the end of the article that “crimes entitled to atonement payment can be proved by the attestation of a male witness and two female witnesses”. The article is in fact a substitution of articles 74 and 237 of the Islamic penal code of law, approved in 1991.

There are discrepancies in jurisprudence regarding the idea that whether a women can be asked to make statements under oath in such crimes as murder. It is generally held that a woman can be attested if she is a claimant or convict of the lawsuit and this same perspective has also been accepted according to the articles mentioned in the Islamic penal code of law (Ahmadi, 2013).

CONCLUSION:

Essentially, the rules and regulations of every nation are closely interconnected with the degree of civilization and social and cultural progresses of it. Thus, the rules and regulations, in general, and the deterring (penal) regulations, in specific, should especially incorporate individual members of the human society disregarding their religious, ethnic, political and gender tendencies.

In Iran’s penal laws, after the investigation and study of the penal regulations, particularly those related to atonement and retaliation payments that have been codified following the lead of Islamic laws, the legislator has enacted regulations subject to the effect of gender and in consideration of the men and women’s inherent and natural characteristics and it was made clear after identifying and recognizing them that the punishments have been specified differently in regard of men and women and there is no possibility of enforcing the same punitive social subject and reaction equally in respect to both of the genders.

The effects of gender and the differences between men and women upon the commencement of the criminal liability, full 9 years of age, lunar system for women and full 15 years of age, lunar system, for women, are considerable vividly discernable. Being a woman or a man makes difference in the intensification or alleviation of punishment because the legislator does not consider fixed Hadd punishments in such crimes as false accusation of a father or grandfather or a husband to the sodomy or fornication of a child or a dead wife under certain conditions. On the contrary, the punishment has been intensified for a mother or a wife’s accusation of sodomy or adultery of a child in case of which Hadd punishment is to be enforced.

Fathers and maternal forefathers are exempted from punishments in regard of their robbing or murdering of a child but punishments have been specified for mothers perpetrating the aforementioned crimes. In regard of some other crimes, the women have been exempted and sentenced to mitigated examples of punishments and, contrarily, the men’s punishment have been intensified such as in fornication with the wife of one’s father and the fornication of a non-Muslim with a Muslim woman in case of which the male fornicator is sentenced to death but the female fornicator is exempted from punishment.



It seems that the legislator has specified more intense and heavier punishments for men as compared to women. There is observed a clear difference in the method of enforcing and delaying punishment between men and women. The difference existent in some of the cases and subjects between men and women is not at all related to the human values and abilities and the legislator has never pointed to such an issue in any of the legal articles.

From the perspective of the legislator, men are not superior to women nor women over the men rather there are differences between the men and women in regard of their rights and duties and this should not be interpreted as gender difference and discrimination but as an undeniable reality originating from the existential, physical, dispositional and psychological nature of the men and women.

Recommendations:

- 1) In discussion on kinfolk, considering the society's condition and prevention of incarceration, the minor or insane person who has committed a crime is sentenced to atonement payment in cases other than pure fault such as in unintentional and semi-intentional physical injuries as well as harms resulting from lack of exercising due care when driving for which the liability can also be shouldered by the kinfolk if the perpetrator is found incapable of making the payment. Also, the affluent women, amongst the close relatives, are considered amongst the kinfolk when there is no male person in the family or when they are incapable of making the payment.
- 2) Fornication and sodomy are amongst the criminal titles deserving Hadd punishment. The methods of substantiating such crimes have been explicitly stipulated by the legislator but, due to certain expediencies, these crimes are proved and Hadd punishment is enforced only in a few cases.
- 3) The atonement paid for men and women is equal in case of a woman's being the head of the family and shouldering the supply of the family expenses.
- 4) The women with no effective criminal record in the past and the women watching over a family are sentenced to alternative penalties.
- 5) In regard of the claim justification, there is paid a considerable attention to the position and role of women in substantiation of a lawsuit because the today's women are keeping pace with men in all levels of the society.

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