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THE PRINCIPLE OF EQUITY IN THE DISTRIBUTION OF WATER  
RESOURCES ACCORDING ON THE CONSTITUTION OF THE  
REPUBLIC OF IRAQ OF 2005

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**Abdul Hassan Dowaij Khafif, Prof. Dr. Walid Khashan Zghair. The Principle of Equity in The Distribution of Water Resources According on The Constitution of The Republic of Iraq Of 2005, -- Palarch's Journal of Archaeology of Egypt/Egyptology 18(9). 1618-1631. ISSN 1567-214x**

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### ABSTRACT

One can hardly think of a principle comparable to the principle of justice in its importance to the human being, as it is the source from which all human principles derive their value, and as long as this principle has been the focus of philosophical theories along the historical process of humanity, the Constitution of the Republic of Iraq has adopted this principle in the distribution of water resources within the state. And we tried as much as we could in this research to derive from the principle of justice a set of disciplined criteria to guide the Iraqi legislator in the event of his intention to enact a law on the distribution of water resources that the constitution wanted; Because the principle of justice is a variable principle in terms of time and place and cannot be imagined without its tools that lead to it. The study concluded a set of criteria that we suggested to the legislator to adopt in the Water Resources Distribution Law.

### INTRODUCTION

Legal rules are always governed by constitutional controls that represent the restrictions set by the constitution, and these controls constitute guarantees that would strike a balance between conflicting rights and interests, which are the rights of the state on the one hand, and the rights of individuals on the other hand.

And that the rules for the distribution of water resources, like the rest of the legal rules, are governed by constitutional principles that constitute for them controls that may not be crossed in the legislation. him in the judiciary and abolished.

These principles are diverse and comes in the forefront of them the principle of justice, which came to reduce the severity and strictness of publicity and high abstraction that the legal rules bear to give them something of mercy and at the same time represents a cry for help for the legislator whenever the legislative atmosphere overwhelms him, and when we talk about the principle of justice in this research is not Because it is intended by itself, but rather as it relates to the rules for distributing water resources in Iraq, whose importance appears at the present time in light of the increasing demand for water, which is accompanied by a decline in the quantities supplied. The research was divided into two branches, as follows:

The first Section: the concept of the principle of justice

The second Section: How to apply the principle of justice to the rules for distributing water resources.

### *First Section*

#### *The Concept of The Principle of Justice*

The concept of justice is an old feeling in the human being that accompanied his life, and it does not matter whether this feeling is innate or acquired, the important thing is that it is a feeling, as in every time and place individuals have an idea of what is considered just or unjust behavior, and this idea may change and vary However, the feeling of it always remains latent in the human psyche, so we find this feeling in all times and in all civilizations, no matter how different they are, and in all human beings, no matter how diverse their cultures and social groups are .1 ) .

And that since man is found in a society that includes him with other members of his species, and he seeks justice in the relations that arise between him and them ;Therefore, it does not seem strange that the idea of justice has been attached to the law since its existence, and with the progress of human society, the law did not stop its role, which is sufficient to indicate the limits of the individual and what he has and what he owes, seeking in this to achieve justice among people, so that there is no favoritism for one person over another or a sect. over others in order to achieve a balance in the interests of society and equality between them in burdens and benefits .(2 ) .

Now when we talk about justice, we mean justice in its relative sense, not absolute ;Because absolute justice is the business of God alone.

And it is very difficult to find a comprehensive definition of the meaning of justice, because it is an idea with a relative concept, developed and different according to time and place, and varies according to the differences in ideas and values prevailing in society (3 ) , and this is what the Egyptian Supreme Constitutional Court ruled in a decision that stated, "...justice seeks, in its content, to express the prevailing social values in a particular society..." (4 ) , and the court also considers in another decision of it (5 ) , that justice does not mean something steadily fixed, but that its meanings and goals vary according

to the standards and levels of social conscience, and that the perception of those values is not subjective, especially since there is a conflict between theoretical assumptions and the practical requirements of justice.

Although there is no comprehensive definition preventing the idea of justice, some attempts have been made to define the general framework for the rules of justice, and they are defined as "the principles revealed by a sound mind, inspired by conscience, and guided by correct consideration, acumen and good taste" (6) , and there are of known as "one of the virtues which aims to give everyone his rights, and that each person what is the duty of it, and then even all the people to get their rights, and provided that everyone is equal to claim their rights as well as equal in its performance " (7) .

It seems to us that no matter how hard the jurists try to give a definition that fulfills the elements of the idea of justice, their effort must be flawed .Because it is difficult to give it a comprehensive definition because it is an idea that changes across time and place, just as it is not possible to give it a precluding definition ;Because there are many concepts that are mixed with it, such as justice and equality, so it seems to us that the idea of justice is difficult to define, and its concept can only be touched through a detailed explanation.

Justice always side by side with the law, and plays a major role in addressing legislative shortcomings, as well as having a significant impact on the judiciary because of its moral strength derived from the transcendence of its principles .8 ) , the legislator is the guardian of the public good, the watcher on achieving justice, and the one who takes the hand of society on the path of progress and reform, and in this case, he must be inspired by the rules of justice, and draw from them his rulings, as long as these rules target the good of society and the superiority of social organization, and whenever In the path of saturation with the spirit of fairness, the legislator has traveled a further step in the texts he formulates, the closer he approaches his law to the level of perfection (9) .

And that in the absence of a legal text, the judge must refer to the rules of justice to base his judgment on them .10 ) , whenever the law allows him to do so, otherwise he is considered a denial of justice, and the legislator has permitted this in some laws (11) , thus cutting off the judge's way of refraining from issuing a ruling in a case before him on the pretext of lacking official sources of law, by obligating him to refer to the rules of justice, and although these rules are not clear in meaning or clear landmarks, the judge must To strive in his opinion to resolve the issue considered by him in accordance with what is required by the sense of fairness in determining justice among people.

And if the role of the rules of justice is in the field of private law, then it is not hidden from the role played by the rules of justice in the field of public law, both international and internal, in the field of international law, the principles of justice are among the sources of assistance to it, as Article (38) of the statute of the Court of Justice has divided international sources of international law have two types of sources: original sources, and auxiliary sources. As for

the original sources, they include international treaties, international custom and general principles of law. The aforementioned article stipulates that the court can - when the original sources mentioned are not available - refer to court rulings and doctrines. Senior authors in public law from different nations, as means that help to define legal rules as well as refer to the principles of justice and equity when the conflicting parties agree to this, as this article stipulates that “the aforementioned text does not entail any violation of the court’s authority to adjudicate in the case in accordance with the principles of justice and equity when approved by the parties to the case ” (12).

As for the field of internal public law, it is known that administrative law is a judicial law, and the stepson of the French Council of State, and the administrative judge may find himself in front of many disputes in which he does not find a text governing the conflict, so his role appears in creating the judicial rule that governs the conflict, in which he is considered a perpetrator For the crime of denial of justice, that is, the task of the judge is to say the word of the law, whether it is found in a text or not. The legislator has remained silent about this, so here it is true for the judge to say his word guided by the general principles that deal with the silence and ambiguity of texts, and fill the lack of codification (13), and he has to be aware of the objective considerations that affect his society without basing his judgment on his own ideas, and for that to depend on the general principles of the rules of justice (13 )14 ).

The truth is that the impact of the rules of justice in the field of justice has the upper hand in the development of the law. The judiciary has worked through jurisprudence to avoid the shortcomings of the legislation and fill its shortcomings by deciding a number of theories and just rulings, such as the theory of abuse of right, the theory of emergency conditions, the principle of liability, the principle of guarantee and provisions of tort responsibility. Based on an imposed error and the provisions of literary, artistic and industrial property, as well as the principle of stability of legal conditions and the principle of acquired rights (15).

### ***The Second Section:***

#### ***How To Apply the Principle of Justice to The Rules for Distributing Water Resources in Iraq?***

The Constitution of the Republic of Iraq for the year 2005 referred to the equitable distribution of water resources in more than one of its texts, as it stated within the exclusive powers of the federal authority that it should “plan policies related to water resources from outside Iraq, and ensure the levels of water flow to it and its equitable distribution within Iraq...” (16), and mentioned in the joint terms of reference the following: “Designing and regulating the internal water resources policy in a manner that ensures a fair distribution...” (17).

Thus, the Constitution of the Republic of Iraq of 2005 has explicitly adopted the principle of justice in the distribution of water resources. It seems to us that this direction of the Constitution is not surprising. Because he adopted the principle of justice in more than one of its places, explicitly or implicitly, in the preamble to the constitution he explicitly referred to the adoption of the method of equitable distribution of wealth, as he stated that “everyone has the right to be treated fairly in judicial and administrative procedures” (18), and that the rules of social justice are observed in the relationship between workers and employers (19), also made the fair compensation of the conditions of expropriation for public benefit (20).

There are many references to the applications of the principle of justice from a hidden party in the texts of the constitution, such as the principle of equal opportunities, the principle of equality and others (21).

And since the principle of justice, which the Constitution of the Republic of Iraq of 2005 referred to the distribution of water resources on it, is a broad principle that almost covers most human actions, so here we must set a disciplined set of criteria that can guide the legislator in case he wants to enact a law that adopts the distribution of water resources, and that Determining these criteria does not seem easy; Because issues related to water resources are among the most complex issues in the Iraqi state.

And that this issue of setting standards raises for us a fundamental question about which of the standards of justice can be applied? If we know that this principle - the principle of justice - is variable in terms of time, place, and interest, in other words, how can we control the rules for distributing water resources according to the principle of justice, and it is a carrier of many aspects and takes several forms, all of which indicate it?

The principle of justice is a theoretical principle and is not considered a concept without the means that indicate it, and among the applied means that have been elected for this research and indicate the principle of justice and at the same time are standards through which justice is achieved the two principles of equality and proportionality.

These criteria are fair criteria, but certainly there is a disparity between them if they are applied to various topics, so there is a differentiation between them if they are applied to water resources different from those that are classified as other wealth, or if they are applied to a subject other than distribution, so we have to study Each of these fair criteria separately to see which of them is more suitable to apply it to the distribution of water resources.

But before studying these criteria, we have to clarify an important topic, which is to determine the type of needs of water resources to be distributed, for human needs for water resources are diverse and numerous and differ for several considerations, including the necessity and the required quantity. When distributing water resources, these needs must be taken into account, and far from going into the details of this topic, the human needs for water resources are divided into two parts: they are continuous needs, and non-

continuous needs.

As for the first, it is the human need to drink, or what is called the right of the lip (22), as well as his need for some continuous industries. As for the discontinuous or intermittent needs of water resources, they are manifested in the human need to irrigate crops in order to ensure food security. It seems to us that the continuing needs are prior to others, based on their being more necessary than others.

Returning to the beginning, let us take the principle of equality as a means of achieving justice; Let us derive from it disciplined criteria that govern the rules for distributing water resources, in accordance with the provisions of the Constitution.

The principle of equality is one of the pillars of the legal state, assuming that the rule of law does not prevail unless it is applied to equality, and accordingly, the adoption of the principle of equality does not need an explicit text in the law as it is an assumed part of the legal system in the legal state, and therefore it enjoys the constitutional value whether it was expressly stated (23) or implicitly extracted from the articles of the constitution that embrace the democratic system and the principle of the rule of law (24) .

The constitutional value of the principle of equality is not limited to the rights and freedoms that are protected by the constitution, but also to all rights guaranteed by the legislator to citizens within the limits of his discretion (25).

The Supreme Constitutional Court in Egypt also ruled that the principle of equality before the law took precedence in the section on freedoms and public rights in the constitution, as the basis of justice, freedom and social peace, and in an assessment that its goal is to preserve the rights and freedoms of citizens in the face of forms of discrimination that undermine them or restrict their practice (26) , and this is what the Iraqi constitutional legislator went to in the Constitution of the Republic of Iraq for the year 2005, which made the principle of equality a forefront of the rights and freedoms section of it (27) .

The equality intended in constitutions is not arithmetical equality, but rather it is the equality against which the legislator, and for the requirements of the public interest, has the right to set objective conditions by which the legal positions in which individuals are equal before the law are determined (28).

Several jurisprudential conventions have emerged to express the principle of equality, as some have argued that legal equality has three meanings, the first meaning is equality before the law, the second meaning is equality within the law, and the third meaning is equality by law (29).

With regard to the first meaning, which is equality before the law, or what is called civil equality, it is an expression of the common meaning targeted by the French Revolution, and with it I want to put an end to the deep inequality between citizens before the law, and it means that the law must be applied in the same way to everyone, regardless of their levels describing that the law,

with its general and abstract rules, applies to everyone without exception (30).

As for the meaning of equality within the law, or what is called *de facto* equality, it means that the law must be just, in other words, it decides the same treatment of the same legal centers, while it decides the different treatment of different legal centers, and he expressed this by saying that the idea of equality is achieved by difference, What is required is that equality is achieved when the legislator sets distinct rules for each group of citizens who fall under different legal positions, all this bearing in mind that the desired equality is not arithmetical equality - as mentioned - (31) .

As for the meaning of equality by law, it means the possibility of determining one treatment for different centers, and vice versa, if an objective, logical reason so requires (32).

It seems that these three meanings are mutually supportive and complementary to each other, and thus give an integrated content of equality represented by three pillars that come in succession, which is the equality of all in legal treatment without being purely arithmetical equality with the possibility of discrimination in treatment if required by an objective and logical reason.

Based on the foregoing and returning to the rules for distributing water resources based on the principle of equality and in order to achieve the principle of justice, it seems to us that the three mutually supportive meanings that were mentioned, if they are applied to the rules for distributing water resources, will at the same time give us three mutually supportive criteria that we can also rely on. On them we are in the process of enacting rules for the distribution of water resources.

Venstkhals of the meaning of the first and is the principle of equality before the law standard we can call -If greenlit us Altmah- standard per capita, meaning that each individual Iraqis share an equal of available water resources, and this standard has advantages and the disadvantages and advantages that is easy to understand and can be applied Once easily know the number of individuals who live in a single administrative unit or one region, Fbalomkan provide them with water resources that are equal to the total portions of individuals living out, and it has its advantages also be closer to the logic of absolute justice.

One of its shortcomings is that it cannot be relied upon as a single criterion for determining the rules for distributing water resources ;Because it contradicts an important constitutional principle branching from justice, which is the principle of utility, as the application of the criterion of one per capita share as a single criterion does not, therefore, lead to the achievement of the maximum benefit.

However, this does not prevent the use of this criterion in part, as the human needs for water resources - as mentioned - are divided into two parts, they are continuous needs throughout the year and non-continuous needs, i.e. seasonal, and it seems to us that this criterion is very suitable to achieve the principle of

equality before the law ( civil equality) and thus fairness in the distribution of water resources, if applied to man's continuing needs for water resources such as drinking and some industries ;Because it is not fair in anything to differentiate between humans in their urgent and necessary needs for water resources, so it requires the work of this criterion.

As for the second meaning, which is equality within the law, which means achieving justice through the same treatment of the same legal centers, and the different treatment of different legal centers, this meaning also we can feel through it a ruling criterion for the distribution of water resources.

But here the question arises: How are the legal centers determined in terms of similarity and difference?

It seems that legal centers in terms of similarity and difference can only be determined according to objective conditions that are closely related to the provisions that establish rights and obligations, and what is meant by legal centers here are the parties to the legal relationship that defines rights and obligations, they are not the same or differ except according to objective conditions that depend on the nature of those rights and obligations.

In the field of water resource distribution rules, the legal position of the farmer who owns the agricultural field differs from the legal position of the employee in the state departments. This is in contrast to the legal status of the employee, who needs water resources in a steady, not seasonal, form.

However, this difference of legal centers is limited only to the legal relationship that it formed, which is the rules for distributing water resources, as it is possible that the owners of these centers - the farmer and the employee - in a legal relationship other than the rules for distributing water resources, such as enjoying the right to litigation or the right to vote and others of rights (33).

It seems to us through this that we can deduce a criterion that defines the rules for distributing water resources from the meaning of equality within the law. We can call it - if we are permitted to do so - the criterion of a person's legal status, or the criterion of legal positions.

If the legal positions of people are the same, they are treated the same in the rules of distribution of water resources, but if their legal positions differ, there will be a disparity among them in the distribution of those resources.

It seems to us that this criterion gives us a justification for the uneven distribution of water resources in the non-continuous human needs for water, which constitute about 90% of the total available water resources (34).

With regard to the third meaning of equality, which is equality by law, which means achieving justice through the possibility of deciding one treatment for different legal centers, or deciding a different treatment for similar legal centers, if required by an objective and logical reason. It seems that this meaning of the meanings of equality can derive from it a criterion for the



distribution of water resources, which we call - if we are permitted to do so - the criterion of need.

What is meant by this criterion is that if there are objective and logical reasons, then we can, on the basis of these reasons, differentiate in the distribution of water resources between identical legal centers, or equalize between different legal centers, according to the need, as there may be two similar legal centers, but their need for water resources is different., This criterion justifies us differentiation in giving them different water rations according to the need.

For example, the farmer who owns one dunum of agricultural land, his need for water is less than the farmer who owns more than one dunam, as well as the farmer who specializes in the cultivation of a water-consuming crop - such as the rye crop - his need for water is greater than the need of the farmer who grows crops that consume less water.

Thus, it seems to us the possibility of deriving three governing criteria from the principle of equality and compatible with the spirit of justice, and can guide them in formulating the rules for distributing water resources. The first criterion is the criterion of per capita share derived from equality before the law, and the second criterion is the criterion of the legal status of persons, derived from equality Within the law, the third criterion is the criterion of need, which is drawn from equality by law.

Now let us take the other principle, which is the principle of proportionality as a means of achieving justice and make it a criterion governing the rules for distributing water resources. The idea of proportionality is one of the requirements of justice, and its first appearance was in the field of criminal law, as the philosophers of this law reached (35), in the field of punishment, to the idea that the punishment is proportional to the crime committed, and over time the concept of this idea has evolved to include various branches of international law ( 35 )36 ) , of which the internal, public and private him ( 37 )

What concerns us from studying the idea of proportionality in this respect is proportionality within the scope of legislation; Because we need to set standards that govern the rules for distributing water resources, to help the legislator while he is in the process of enacting laws, that his legislations go hand in hand with the principle of justice.

What is meant by proportionality within the scope of the legislation is the relationship between the reason for the legislation and its place, in other words, the extent of compatibility and rapprochement between the actual and legal situation that made the competent authority think about issuing a specific legislation to organize and rule this situation and between the place and location of the legislation itself, i.e., the legal effect to be achieved by issuing the legislation (38).

Or it is the reasonableness and logicity of the link between the means of legislation and the public interest, as it plays a critical normative role in determining the balance between rights and duties on the one hand, and between them and the public interest on the other hand (39).

The principle of proportionality in the field of constitutional law has a specificity that distinguishes it from proportionality in the rest of the branches of law, as proportionality within the scope of constitutional law takes two dimensions: the first dimension relates to proportionality within the legislation, and it is between the reason for the legislation and its place, and the other dimension relates to the level of constitutionality, i.e. compatibility between the legislative text among the rights and freedoms of individuals (40 )

And that the proportionality within the legislation means the relationship between the reason for the legislation and its place. Legislation is the competence, form, location, reason, end, and every corner of it has a defect related to it, if it is available, it violates the constitutionality of the legislation (41).

Thus, it seems that when Parliament sets out to enact a specific law, it starts because of it and then moves to the place, thus reaching the goal of legislation, and this means that there is a close relationship between these pillars, as there must be a realistic or legal situation that embodies the reason on which it is based. Legislation, and this situation is what prompts Parliament to interfere with its legislation for this law, in order to create a legal effect that represents the subject of legislation, in pursuit of the public interest, which is the goal of what the law aspires to.

In the field of water resource distribution, if Parliament wants to issue legislation in this regard, it must initially rely on a text in the constitution that allows it to issue such legislation, and that this text represents the legal status of the reason, and it is available, as the Constitution of the Republic of Iraq stipulates that the distribution of water resources is regulated by law (42).

In addition, there must be a realistic situation that motivates Parliament to move in enacting this law, and this situation is always available; This is due to the necessity of human water resources and his constant need for them, which requires organizing their distribution to be within the reach of everyone and to satisfy their water needs (43).

It is noted that the proportionality within the legislation in the scope of the distribution of water resources does not find a wide place for it, as is the case in the criminal law (44), the cases of incompatibility of cause and place can only be imagined within a narrow scope, so this dimension of proportionality does not have the same degree as the second dimension, which is proportionality at the level of constitutionality.

What is meant by proportionality at the level of constitutionalism is that the constitution expresses the values that protect the public interest, through its

texts that regulate the duties and powers of the state, and in return for the protection of the public interest, the constitution also protects rights and freedoms. Considerable social interest: "legislative texts are not formulated in a vacuum, and it is not permissible to extract them from their reality, and they are determined by taking into account the intended interest. Then this social interest becomes a final goal for each legislative text, a framework for defining its meaning, and a home to ensure the organic unity of the texts regulated by the legislative action, in a way that eliminates the contradiction between its parts, and ensures the connection, integration and interdependence of its provisions among them, so that all of them are directed to the same destination that the legislator sought from behind. its report" (45).

Here, the principle of proportionality plays a role as a tool for reconciling the law established by the legislative authority to regulate a specific subject, and the rights and freedoms of individuals that are expressly stipulated in the texts of the Constitution, or have been implicitly referred to among its texts.

In other words, the role of members of the legislature who practice their function in a democratic way by enacting laws is to practice them in order to achieve the public interest, and the requirements of the public interest often clash with the rights and freedoms of individuals.

Thus, the principle of proportionality at the level of constitutionality plays a major role in the rules for distributing water resources, as it constitutes the control for them.

From the foregoing, it seems to us that the principle of justice can be deduced from it several criteria that govern the rules for the distribution of water resources. Through equality before the law, we were able to derive the criterion of one per capita share, and from equality within the law we derived the criterion of legal centers, but from equality before the law, we have drawn the criterion of need, as well as the criterion of proportionality in legislation, which is one of the requirements of justice.

## **CONCLUSION**

After we finished our research is marked by the principle of justice, the distribution of water resources in the light of the Constitution of the Republic of Iraq in 2005, will show the most important results of it, to put forward the best proposals.

## **RESULTS**

1- We found through the research that the principle of justice is an important constitutional principle espoused by the Iraqi legislator in the Constitution of the Republic of Iraq for the year 2005 regarding the distribution of water resources.

2- We found through the research that the principle of justice is a theoretical principle and is not considered a concept without the means that indicate it .Because the rules of justice in and of themselves are not clear meaning or clear landmarks.

3- We found that the principle of equality branching from the principle of

justice has produced for us three legal standards that can govern the rules for the distribution of water resources and these standards are: the standard of per capita share derived from equality before the law, the standard of legal centers derived from equality within the law, and the standard of need extracted from equality by law.

4-We found that proportionality at the level of constitutionality, which is one of the requirements of justice, plays a major role in the rules for distributing water resources, as it constitutes the control for them. eliminate and abolish it.

### **SUGGESTIONS**

We suggest to the Iraqi legislator to comply with the requirements of the Constitution of the Republic of Iraq for the year 2005 in its articles (110/eighth) and (114/seventh) and to enact a law for the distribution of water resources within Iraq, taking into account the legal standards produced by this research and branching from the principle of justice that the said constitution wanted.

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