

Criminal Protection of the Family in the Iraqi Legislation

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Abstract

The protection of the family is the basic principle for building a strong society and family protection policy is one of the most significant among the responsibilities of legislations. The current paper reviews the protection of family according to Iraqi legislation and discusses various types of crimes involving children or families according to Iraqi law. In this article doctrinal legal research was adopted and it assessed sources from both primary and secondary data.

The research concludes that Iraqi legislation provides correct protection through a number of legal texts organizing the crimes against family. However, it has failed to achieve full criminal protection for the family. There are both theoretical weakness of law and the routine abuse against family in daily practice. The present paper aims to fill a critical gap in our understanding regarding deficient area in Iraqi law while dealing with the rights of members of family and proposes further work to be done so that Iraqi legislator can provide full criminal protection for family.

Keywords: Criminal law; family in international treaties; Iraqi legislation; rights of family; family protection.

I. Introduction

Stable communities are often built on strong family foundations and surrounded by legislations to protect all members of the family, and through this the safety, well-being and strength of the family are achieved and this in turn is the basic principle for building a strong society. What follows is that the protection of family as the cornerstone of protection of society must be one of the most significant among the responsibilities of governments.

The categories of relationships and recognizing other issues such as family rights and methods for its protection or actions of violence have been covered by states' legislations. In considering this, the Iraqi legislator in the context of potential family-violence enacts various legal rules and legislations in particular the Personal Status Law, the provisions of marriage, divorce,

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alimony, and other issues. The Iraqi Penal Code is keen to protect the family through a number of texts and articles that are enacted in the context of responding to family violence. However, in this regard, as yet the Iraqi legislator has not passed a specific law according which protection the family from violence could be recognized, and it must be noted here for comparison that a number of legislations have enacted special laws for this purpose.²

The present research seeks to review the protection of family according to Iraqi legislation in the current Iraqi laws such as: the Iraqi Penal Code No. 111 of 1969, and the Iraqi Personal Status Law No. 188 of 1959.

The study aims to shed light on wrongdoings according which the Iraqi legislator might consider a person committed these actions as criminal committed offence against family, and aims also to displaying the punishments that have been stipulated by Iraqi legislator against offences of family violence.

The statement of the research: there is widespread belief in Iraq that the criminal justice system in Iraq properly protects family and efficiently provides guarantees against actions of violence and family crimes. The current research intends to test the correctness of mentioned belief by exploring Iraqi law with an open mind; without setting out to prove that the legal system in Iraq has failed to fully protect the family institution. Nonetheless, the research leads the author to the clear conclusion that the Iraqi legislator did neglect to criminate certain acts that can be considered as a crime towards the family, and the research found considerable shortcomings that will be later examined in the study.

Methodology: doctrinal legal research has been adopted in the conducted of this research, and both primary and secondary data sources which were drawn from scholarly works and previous publications were assessed. The present study to achieve its aims adopts the standard legal analyses of the related laws and also takes advantage of experience of other foreign laws that their provisions are by their nature consistent with Iraqi legal system around the world with relevance to the protection of family.

II. Criminalization of neglect of family

Since the family as already has been mentioned that is one of the most significant bases of the society, the protection of family is among the most important responsibilities of the authorities, and this establishes legal rules according which specific individuals in the society are responsible for particular individuals. It is logically follows that negligence against family should be fully criminalized. It is negative crime, in which the perpetrator abstains from carrying out an activities required by the law accordingly: fathers or wives abandon and forsake family and moving out of the marital home without reasonable grounds or justification reveals that the crime of leaving the matrimonial house and

² For example: The Jordanian Family Violence Protection Law No. (15) of 2017.

desertion would be committed as a result of evading their duties.³ Likewise, it is the father's duty to pay attention and look after his a pregnant wife and neglecting a pregnant wife has to be criminalized.

In this context that, Iraqi law does not fully achieve the desired end, that is, a husband or wife should support their families and charged with that responsibility. Neither Iraqi Penal Code nor the Personal Status Law criminalize neglecting a pregnant wife, i.e. if the husband intentionally abandons or forsakes her without legitimate excuse and neglects his pregnant wife, the Iraqi legislator would not punish him. By the same token, Iraqi law does not criminalize leaving the matrimonial house.

Iraqi legislator therefore must fill such legislative gap and be on the same line with other legislations. For example, the Algerian Penal Code Article 330/1 states that abandonment of family and children shall be punished with imprisonment from two months to a year and a fine as those cases where the father or mother abandons the family home without serious cause for more than two months, or fails to perform all or a portion of his or her moral or material duties resulting from parental authority or legal guardianship. The time limit of two months may be interrupted only by a return to the home that implies the willingness to take up family life again definitively.⁴

By the same token, the Algerian Penal Code Article 333/2 states that a husband who intentionally abandons his wife for a period exceeding two months, knowing that she is pregnant, without serious reason shall be punished with imprisonment from two months to a year and a fine.⁵

In Iraq, it should be observed that in spite of each culture is deferent from other in amount of care that should be given to the family, there is universal trend according which an acceptable limit of tolerance is given to the acts of neglect of family and hence it is a case of accusations and allegations, must be punished in light of the facts and circumstances of every case and in light of amount to cruelty.

III. Criminalization of nonpaying the alimony

Among the most important pillars of protection family is the right of the wife and the child to alimony, as an effect of the marriage contract. It is can be defined as a mount of fund and expenses that a person pays to his dependents, i.e. the legally authorized to support them. It includes everything that the wife and children need in order to survive in relation to clothes, food, nursing and other services. In the event that this obligation is breached, it would negatively affect the family relationship, and hence being offence under the rules of law.

In accordance with Iraqi law, it is the father's duty to pay the alimony and breaching this duty is deemed an offense that penalty set for it. The offence is prescribed within the framework of the Iraqi penal code in Article 384 which defines its pillars and conditions, and the penalty set for it.

³ Belhadj Alarbi, Marriage provisions under the law of the first part, Part1, House of Culture Publishing and Distribution, Algeria 2012, p. 521.

⁴ The Algerian Penal Code, No (66-155) of 1966, Article (330/1).

⁵ The Algerian Penal Code, Ibid, Article (330/2); For more details see: Muhammad Bin Warth, (2006) Memorandum in the Algerian Law - Private Section - Al Jazira, Dar Houmah for Printing, Publishing and Distribution, 3rd edition, p. 13.

In the view of the Iraqi legislator, it is the responsibility of the husbands to spend on their wives who have no responsibility in this matter. It seems that, Iraqi law in this matter is in line with the scholars of Islam who are agreed that the husband to provide for the wife even if she might be wealthy and has ability to provide for herself because it is not necessary that she support herself since it is obligatory for husbands to spend on her.

IV. Sex outside marriage and discrimination against women

Iraqi legislator provides for a prison term of between 3 months to 5 years for a married person who has sexual intercourse with a person other than his or her spouse. Iraqi law also provides the victim with other legal remedies such as compensation and can pursue divorce. The Iraqi Status Law according to article 40 considers adultery a reason for requesting divorce and the rhythm of separation between the spouses. The offender so as to be prosecuted is assumed be aware of the marriage unless he can prove that he was not capable of being aware of it.

However, it is problematic that Iraqi law has discrimination against women because in case of a married man has sexual intercourse outside marital home with a woman other than his wife, are not guilty of adultery. Otherwise, if the wife commits adultery she can be prosecuted regardless of the place of act's occurrence whether the commission of the offence takes place inside or outside marital home. Accordingly, article 377 of the Iraqi penal Code states that: "(1) an adulteress and the man with whom she commits adultery are punishable by presentment. The offender is assumed be aware of the marriage unless he can prove that he was not capable of being aware of it. (2) The same penalty applies if the husband commits adultery in the marital home."

In view of the present authors if women are to be what we believe equal partners and deserve equal protection the legislator has no reason not to amend the mentioned provisions and there are no logical reasons that can justify such shortcomings and that discrimination against women in law and practice should be utterly eliminated.

In a similar vein, unfortunate fact is that the existing provisions in article 409 of Iraqi penal code allow mitigation to reduce sentences for a person who kills or injures his wife surprised in the act of adultery under the claim or allege of protecting the honor of family. Iraqi law should protect women against discrimination on the basis of gender and hence in order to deter the offences in the name of honour in Iraq such provisions should be removed, and it is expedient that this excuse under so-called honor crimes be removed from the man and punished for a murder without a mitigating excuse.

V. Criminalizing forcing in marriage

Marriage is considered in the law as one of the basic freedoms that every citizen should enjoy. Therefore, it is one of the rights related to the personality, and therefore the law must guarantee to individuals the freedom of marriage and all citizens should have such right without there being obstacles derived from the color, language, race of individuals.

At the same time, as the law guarantees freedom of marriage, it must guarantee individuals freedom to not marry, so it is not permissible to compel marriage. Ensuring that is not limited to the invalidity of this type of marriage, but also extends to the imposition of criminal protection as well by making the person who caused this contract to commit a crime punishable by law and whoever commits it.

The crime of coercion on marriage is organized by Iraqi legislator under provisions of Article (Seven) of the amended Iraqi Personal Status law which states that: “no relative or non-relative has the right to force marriage on any person, whether male or female, without their consent.... Where there has been a forced marriage, either a specialized “personal status” court or the victim must refer the case to criminal justice authorities....the contract of a forced marriage is considered void if the marriage is not yet consummated.”⁶

The law also sets the penalty for the offence of the coercion on marriage stating that (b) any person who violates the provisions of paragraph (a) of this Article shall be punished by imprisonment for a period of no less than two years and not exceeding five years if he is a kin who is close to the first degree, but if the violator is a kin is less than first degree to the victim, the penalty shall be imprisonment for a period of no less than three years or imprisonment for a period not more than ten years.

In the view of the present author, an action of forcing marriage is not only a sort of violence against women but also is considered covered rape. Hence, the existing problem is that the texts of mentioned provisions of the Iraqi Personal Status law implies lenient sanctions in comparison with intensity of committed crime and such sanction may have little deterrent value.

Also another case of concern is that the mentioned provisioned of the Personal Status Law do not indicate the methods of coercion by which the offence of forcing marriage can take place. Similarly, the forms of consent that are deemed invalid as a result of occurring under duress are not defined. Therefore, it can be claimed that the Iraqi law is unclear and does not fully account for the means by which women are forced into marriages. This is to say that in order for the issue of forced marriage to be addressed more broadly both the ways of forcing marriage and types of invalid consent need to be fully revealed and named.

And what makes the situation worse is that in this regard, there are few efforts made by Iraqi authorities that would make the obligations under Iraqi law enforceable. In this respect, Huda Ahmed, has stated that "The various parties of the government and parliament hold different views on women's rights, and many are firmly attached to traditional views that oppose the empowerment of women. Even if some factions support women's rights to a certain degree, they are often unable or unwilling to assert their views and antagonize those who differ".⁷

⁶ The Iraqi Personal Status Law No. 188 of 1959, Article 7.

⁷ Huda Ahmed, *Women's Rights in the Middle East and North Africa*, ed. Sanja Kelly and Julia Breslin (New York, NY: Freedom House; Lanham, MD: Rowman & Littlefield, 2010, *Iraq*, at 5.

As a result, even though the forcing marriage is prohibited under Iraqi law, Iraq is still struggling with protection the rights of women and girls against forcing marriage that continues as the traditional social phenomenon particularly in rural areas. It is important to support this argument by mentioning that over the last years, reliable reports from national and international resources still reveal serious concerns about such phenomenon and violence against women in general.⁸

VI. Criminalizing marital rape

The crime of rape according to the Iraqi law since forced sexual intercourse with a woman not the perpetrator's wife is one of the its notable elements, occurs only outside of marriage. Therefore, forced sexual intercourse with wife is neither a sexual offence nor domestic violence. As a result, it is problematic that in Iraq law the act of sexual intercourse with one's spouse is explicitly exempted even if the act takes place with non-consent of the spouse. Otherwise, marriage is not considered a defense to a charge of rape in plenty of statutory provisions which expressly criminalize such act in their rape provisions across the world such as in German and France.

The belief is that marital rape conflicts with the overall concept of human rights universality; however, it has been suggested that the opposition of Iraqi law to such belief is based simply on the fact that such legislative trend according which a spouse can be charged with the rape of their other spouse is Western-oriented; in other words, the objections of Iraqi legislator may stem from the belief that the Iraqi legislator, in this matter is in line with the scholars of Islam who are agreed that without a valid reason the sex cannot be withhold by wives who should obey their husbands to have sexual intercourse and a spouse cannot be charged with the rape of their other spouse.⁹ However, this trend can raise concerns about disparity between the Iraqi legal system and international standards of human rights.¹⁰ The fact is that provisions of Iraq law such as the penal code are still the one that were during

⁸ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, 2011-2018); Human Rights Council, Report of Working Group on the Universal Periodic Review Regarding Iraq, submitted to the United Nations General Assembly, Report of the twenty-eighth session of the Human Rights Council A/ HRC/28/14, 12 December 2014 para 127, 82-89; The Reports of Iraqi High Commission of Human Rights (Iraq, Bagdad 2014-2019); Organization for Women's Freedom in Iraq, Seeking Accountability and Demanding Change: A Report on Women's Rights Violations in Iraq, Submission to the U.N. Human Rights Comm. in Response to the Fifth Periodic Report of the Republic of Iraq 19-23, 29 (2015); Puttick, Ceasefire Ctre. for Civilian Rights & Minority Rights Group Int'l, No Place to Turn, at 18, 28-29; U.S. Dep't of State, Iraq 2016 Human Rights Report, at 56.

⁸ Muh Endriyo Susila, Islamic Perspective on Marital Rape, Journal of Media Hukum, Vol 20, No 2 Desember 2013, at 318; Ibn Majah, Book of Marriage (Kitab al-Nikah), Chapter of Good Cohabitation (Bab Hasan al-Muashrah) (1978), Albany 284.

⁹ Declaration on the Elimination of Violence against Women Proclaimed by General Assembly resolution 48/104 of 20 December 1993, Article 2 states that "Violence against women shall be understood to encompass, but not be limited to, the following: (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation"; See also, Article 5 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) is an international treaty adopted in 1979 by the United Nations General Assembly; High Commissioner for Human Rights Navi Pillay in 2012 stated that: "Violations of women's human rights are often linked to

the past totalitarian Saddam regime which are necessary to be under a holistic vision of reform in the period following the removing of the regime.

In view of the above, it is suggested that such rules that deal with marital rape would be well if analyzed and reconsidered in the light of rules of the international human rights law that would allow marital rape to be prosecuted in contrast with a statutory exemption under which marital rape is no prosecutable offence.

The situation in Iraq is exacerbated by the social attitudes and customary law that considers the act of marital rape is not crime. It is evident that in the rare cases the Iraqi society responds to such sort of violence and a culture of the wife's subordination to her husband continues to exist in wide-ranging. It seems that wives do not reveal marital rape until after a long period, when they feel that they can no longer tolerate psychological or physical harm.¹¹ Such social attitudes give exclusive control of marital property to the husband and normalizing sexual violence against wives within marriage.

In the view of the United Nations, even with all the concern that have been observed through reviewing the record of human rights regarding violence against wives and females such violence still continues to exist.¹² It seems that in spite of there are reliable reports that have repeatedly alleged considerable concern about violence against wives inside families there is lack of accountability in daily practice of criminal justice system which facilitates the abusive practices.¹³

In light of these considerations, the removing current statutory exemption by Iraqi legislator for the purpose of implicitly including marital rape would helpfully participate in moving protection of family rights in Iraq forward further and further to be in line with international human rights standards. Furthermore, it has been already referred to the problem of mainstream culture within Iraqi society and rooted gender inequality culture which increase ill treatment against rights of females and wives. Thusly, since the pressing of criminal procedures against all sorts of violence and provisions of punishment in general relies on violations being reported, it is further recommended that the Iraqi legal system must raise across the society in various ways the general awareness both of rights of protection women and international human rights standards.

In conclusion, Iraqi law fails to recognize rape in marriage as an offence, and this means that the fundamental right of a wife to control her own bodily integrity is being denied. It also means that

their sexuality and reproductive role. (...) In many countries, married women may not refuse to have sexual relations with their husbands, and often have no say in whether they use contraception. (...) Ensuring that women have full autonomy over their bodies is the first crucial step towards achieving substantive equality between women and men. Personal issues—such as when, how and with whom they choose to have sex, and when, how and with whom they choose to have children—are at the heart of living a life in dignity." This statement is mentioned by Helen Kanzira, Valuing, Women as Autonomous Beings: Women's Sexual and Reproductive Health Rights, Lecture by Ms Navi Pillay United Nations High Commissioner for Human Rights, University Of Pretoria - Centre For Human Rights, published by united nations human rights office of the higher commissioners, Pretoria, 2012.

¹⁰ Aya Nabeel, Marital Rape, report issued by a Network of Media Reporters for Arab Investigative Journalism (ARIJ), at <<<https://arij.net/report>>> accessed 15/1/2020.

¹¹The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), note (7); Human Rights Council, Report of Working Group on the Universal Periodic Review Regarding Iraq, submitted to the United Nations General Assembly, note (7), para 127, 82-89.

¹³The Reports of Iraqi High Commission of Human Rights, note (7).

many offenders got away with rape, and thus the Iraqi legislator needs to reconsider the crime of rape, as required by international standards, so that the ambit of criminalization includes marital rape. Such amendment in the penal code will send right signal that marital rape violates a range of fundamental human rights, support the number of victims who decide on pressing charges, and will ensure sexual offenses are rightly penalized.

VII. Child marriage

According to previous researches, early marriage is most common in Iraq; the estimated range of women who have been married under the age 18 years approximately reaches 19%.¹⁴ Consequently, rights of twenty percent of Iraqi girls who are married before the age of 18 years, are negatively affected by phenomenon of child marriage. The phenomenon of child marriage takes global dimension and a number of international legal instruments consider this critical issue, such as the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention on the Rights of Child (1989); and the 1995 Beijing Platform for Action. These international treaties identify various issues such as consent to Marriage, Minimum Age of Marriage, and Registration of Marriage ...etc. regarding Iraq it has been indicated that generally the marriage before the age of puberty is often informally take place outside the competent court.¹⁵

It has been suggested that, the practice of a family's decision to marry off a child often belongs to the traditional social and cultural standards that are enshrined wide part of Iraqi community, especially in rural areas. This type of marriage is often accompanied by a lack of consent from the side of girls in real daily practice.

Under Iraqi law even if the legal age of marriage is 18 year and that is in line with international standards of legal age of marriage,¹⁶ the marriage before the puberty is allowed if combined with the consent of the guardian and approval of a judge of personal status court.¹⁷ For the purpose of these provisions are fathers, a guardian is the father or paternal grandfather. This means that, under the currently applicable law, the Personal Status Law No. 188 of 1959, children of 15 years of age can get married in Iraq.¹⁸ It logically follows that failure to comply with Iraqi obligations under international human right law, particularly the UN convention on the rights of the child, to which Iraq is a state party.¹⁹

¹⁴Dr. Faisal El-Kak, (2014), Document Advocating against Teenage Marriage, Beirut, Lebanon, p.10; The United Nations Population Found Representative at Child Marriage Stakeholder Meeting, 7th December 2015, Erbil- KR.

¹⁴ The United Nations Population Found Representative, Child Marriage in Kurdistan region – Iraq, UNFPA Iraq: Main Office: UN Compound- Baghdad/Iraq (2016), p 3.

¹⁶ The Personal Status Law in Iraq No. 188 of 1959/article 7.

¹⁷ The Personal Status Law in Iraq No. 188 of 1959/article 8 states: “the judge can authorize the marriage of a 15-year old person if the judge determines the marriage is an urgent necessity. Giving such authorization is also conditional upon the attainment of legal puberty and physical ability which is left at the discretion of the judge and testimony of parents.”

¹⁸ Ibid.

¹⁹ Iraq ratified the UN convention on the rights of the child in 1994.

The treaty makes clear that a child is as being under 18 years and this simply requires standardizing the legal age of marriage in Iraqi law to comply with international standards in order to protect child against violence. In this regard, it can be claimed that the attempt to standardize the legal age of marriage in Iraqi law to be in line with international standards is adversely reflected by provisions of the Iraqi permanent constitution which have direct negative consequences on the issue of marriage before the age of puberty and facilitate its abusive practices.

The constitution states that "Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs or choices"²⁰ This provisions give room for specific legislations by sect or by religious group in the Iraqi Council of Representatives.²¹ The result of this, as good example is that the members of Iraqi parliament previously sought to pass the draft proposed amendments to the Personal Status Law that was so-called the Ja'afari Personal Status Law that would allow for the marriage of child girls as young as nine-years old. The proposed amendments to the Personal Status Law received wide criticisms from the United Nations and human rights groups which clearly resulted being withdrawn before the vote. It has been stated that "the boys and girls in Iraq are now at risk of being deprived of their childhood ...and the government of Iraq must take all necessary actions to protect every child by preventing the adoption of policies that can harm children."²²

VIII. Conclusion

It is difficult to imagine existing of welfare of society without legal protection for family. Likewise, legislator is obliged to provide adequate legal protection in this respect. The present paper was undertaken to test the correctness of the proposition that criminal justice system in Iraq properly protects family and efficiently provides guarantees against actions of violence and family crimes. The final judgment of the research is that Iraqi legislator has failed to achieve full criminal protection for the family. Present study showed a set of acts that violet rights of family stipulated in the Personal Status Law, such as the lack of paying the alimony, leave the marital home, or neglect the pregnant woman, and referring to the Iraqi Penal Code, which does not include all these acts within the scope of criminalization and punishment. The study proposes a comprehensive revision of the Iraqi law on criminal protection of family as crucial step for the Iraqi legislation to ensure the implementation of obligations under international treaties and best practices from other countries.

The fact is that in Iraq even if as have been seen above there are a number of legal texts organizing the crimes against family, unfortunately, to date, the draft anti-domestic violence law has not yet been promulgated. To this end, in the view of the present paper, since such acts of violence are applicable within the family, it would be much better in case of allocating these offences in the specific law addressing wrongdoings against family that could be called as the law of domestic violence or law

²⁰ The Iraqi permanent constitution (2005)/article 41.

²¹ The United Nations Population Found Representative, note (14), at 5.

²² Karen McVeigh, Catastrophic' Iraq law could legalise marriage for children as young as nine, the Guardian Tue 14 Nov 2017, at: <<<https://www.theguardian.com/global-development> >> accessed 7/10/2019.

of protection family. Alternatively reforms may take the form of an amendment to the current relevant legal provisions.

Such proposed reforms should cover wide range of violent acts against family and new offences should inserted in particularly marital rape that should be subject to an adequate punishment and addressing the loopholes and gaps in the existing Iraqi penal code is essential in order to deter violent acts from being frequently committed and that discrimination against women in law and practice should be utterly eliminated.

In addition, attempts to change public attitudes towards early marriage that is common in Iraq must be made and raising awareness about its human, social and economic gravity. Early marriage has to be fully prohibited since children involved are unable to give or withhold their consent. It is noticed that the intensity of punishments for offences against family have been reduced by legislator. As a result, such penalties should reflect the seriousness of forms of violence. Forms of violence can take place in different circumstances and settings and hence aggravating circumstances should be specifically listed to guide the sentencing discretion of competent courts.

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