

Criminal Protection Objectivity of the Child's Right to Life and Physical and Psychological Safety

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Abstract—Nowadays, child affairs is a matter of both national and international interests. This issue is regarded a vital topic for various scientific fields across ages, and for all the communities without exception. However, the nature of child caring may vary due to the verities in science perspectives. So, considering child's affairs from different perspectives is helpful to have a complementary image about this matter. The purpose behind selecting this topic is to keep a balance between the victim on the one hand, and the guardian and the offender on the other hand, (i.e.) to avoid any kind of excessiveness either in the protection of the child and its rights not in the punishment of the offender. This is achieved through considering various legal materials in the Iraqi legislation and in the comparative legislations that are concerned with the child's issue and the extent to which the child makes use of these rights. The scope of this study involves the crimes that are considered as aggressions against the child's right to life, and the crimes that are dangerous to their physical and psychological safety. So, this study comprehensively considers the intentional murder of child, child murder to avoid disgrace, child kidnapping, child abandonment, physical abuse for the sake of punishment or not, child circumcision, verbal violence, and abstaining from leaving a child with a person who has the right of custody. This study ends with the most significant concluding points that have been derived throughout this study, which are: Unlike the Iraqi legislation, the Egyptian legislation defines the child in the Article 2 of the Child Law No. 12 of 1996 amended by the Law No. 126 of 2008 that the child is a person who does not exceed 18 years of age. Some legislation does not provide special criminal protection for child intentional murder, as in the Iraqi and the Egyptian legislation. However, some others have provided special criminal protection for a child, as in French and Syrian legislations. Child kidnapping is regarded as one of the most dangerous crimes that affects the child and the family as well, as it may expose the child's life to danger or to death. The most significant recommendations from the researcher are: The Iraqi legislation is recommended to take the necessary measures to establish a particular legislation for the child by including all the legal provisions that are associated with this weak creature, and make use of the Egyptian legislator's experience as a pioneer in this respect. Both the Iraqi legislation and the Egyptian legislation are recommended to enact special laws to protect a child from the crimes of intentional murder, as the crime of child murder is currently subjected to the same provisions consider for adult murder.

Keywords—Child abuse, juvenile, legislation, punishment and aggravation.

I. INTRODUCTION

THOSE who are interested in the situation of children and the way that they have been treated in the past are

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surprised due to the lower position that the child occupied in society and the ill-treatment that they had. Sometimes, newborns were killed at birth or they were bought or sold as if they were inanimate items. At that time it was the father's right to get rid of his children at any time and by any means. Moreover, female children were the most ill-fated and most at risk because females in general were considered just a means to give birth and take care of the domestic issues. In such a kind of circumstance, although female children were subjected to the worst kinds of exploitation and abuse, such treatments were not regarded as violent by the common sense of the time. The violence on female children's rights was not only restricted to their physical torture, but also extended to making them servants in homes, and forced labor in prostitute shops to satisfy the sexual desires of adults [8].

Civilized nations generally have realized the importance of children's affairs by conducting hundreds of international conferences to discuss the situation of children and recommend solutions to their problems. These efforts were more noticeably observed during the 20th century in a way that can be regarded as the golden century of the child, as the child could successfully draw the attention of activists and specialists in different scientific fields such as: the legal science, psychology, education, social and medical science [8]. This development in the child's affairs was a turning point in the child's life. Moreover, child affairs have been promoted at the international level with the foundation of the League of Nations in 1919, and namely when the League of Nations approved the Geneva Declaration of the Child's Rights in 1924. The approval of the UN Convention of the Child's Rights in 1989 is regarded as the most important attempt in the history of the child's issue, as child's rights started to being considered effectively [21].

Iraq has ratified the Geneva Declaration of the Child Rights through Law No. 3 of 1994 with the reservation of paragraph No. 1 of Article No. 14 of the Convention which is associated with the child's freedom of choice of his/her religion that came in parallel with Islamic countries that consider Islamic religion as the main source of legislation [12].

Despite all the great changes made by Iraq in its institution for the sake of the child's reserve, a significant proportion of children are still exposed to all the forms of ill-treatment and practices that degrade human dignity, such as physical and psychological abuse, kidnapping, and economic exploitation in their worst forms. Thus, the scope of this study is confined to a range of crimes that are considered as assaults on children's rights, and on their physical and psychological safety, including (deliberate killing of a child, child

kidnapping, physical abuse (whether for the purpose of imposing the discipline or intentionally, or as a consequence of circumcision), and verbal violence.

II. WHAT IS A CHILD?

There are several labels to call a human being in the first period of his/her age such as: child, kids, juvenile, little boy/girl, youngster, adolescent, underage, and many more, and all of which carry one meaning to indicate the early years of a human being [34]. The child is usually in need of constant support in all aspects of life as they are still in the process of growing physically and mentally [19].

In almost all of the Arab countries provisions, and in their courts, the Arabic concept (/hadath/ = underage) is probably the most prevalent one. However, there is a tendency by modern legislation towards the use of the term (/tifl/ = child) instead of the term underage for two reasons:

The first reason is that the concept (/hadath/ = underage), to many people in all the Arab communities, is linked to guilty children, so this perception towards the concept (/hadath/ = underage) is supposed to be changed, especially from the perspective of modern criminal policy, which focuses on those who are below the legal age. The second reason is that the special laws for children are no longer restricted to just consider children as criminals, but also to consider how they are treated socially, culturally, and in terms of health care [25].

There is no doubt that the definition of a child and the determination of the stages of childhood during the lifetime is one of the most important aspects that must be taken into account before examining any of the issues relating to child, especially if the issue is concerned with legal protection [5].

III. THE DEFINITION OF CHILD

Child is a non-mature person (mentally and physically) that lacks the ability to keep himself away from the harmful things and to make the right choice. This mental insufficiency in perception and choice is not resulted from a brain disease, but is associated with the weakness in the mental and physical abilities [14]. Moreover, the concept of the child in international laws and conventions, and also in legal and non-legal science, has been given various definitions [46].

Iraqi legislation uses several terms (such as, little boy/girl, child, underage, adolescent) to refer to the childhood age without identifying a certain age. [32].

Egyptian legislation has provided a definition of a child in the Child Act No. 12 of 1996, amended by Law No. 126 of 2008, in the second article to "those who are exactly below eighteen years of age".

It is clear from this definition that the legislation considers the child in terms of social and health care [29]. It is also the same philosophy that has been adopted by the United Nations Convention of the Child's Rights in 1989, which is stated in the first article of the Convention that a child is any human being below the age of eighteen years old which is regarded to be below the maturity in accordance with the applicable law to the child.

A. Definition of the Child's Age

The child's age is any age that requires observation during the application of the Penal Code on him [37]. Each country has the right to determine the child's age depending on that country circumstance [8]. However, the age of child should be indicated reasonably in accordance with the legal, economic, cultural, political and social status as well as by taking into account the facts of emotional, mental and intellectual maturity status [25].

B. Proof of Child's Age

Due to the importance of rating the age of the child in terms of legal effect [40], the text of the Iraqi legislation in the Article 4 of the Juvenile Welfare No. 76 of the 1983 Act provides that "the juvenile age is to be proved by an official document, but in the case of the formal document absence, or when the stated age is inconsistent with apparent status, the court should resort to medical examination to assess the age via scientific methods " [42].

IV. CRIMINAL PROTECTION OBJECTIVITY OF THE CHILD'S RIGHTS TO LIFE

There is no doubt that the human spiritual and physical entity is the most deserving elements to be protected from the perspective of law. Human being is the first cell of society, so there would be no chance to a society survival, if its members were allowed to violate the lives of each other's [1].

V. CHILD KILLING

Murder is the violation of the human rights of life, and all the rules that penalize the act of murder aim at protecting human existence to maintain this right [27]. Murder is the most sever crime against human in a way that it has been prohibited by all the monotheistic religions, and by all man-made laws without exception, because of its danger on the community [22]. Basically, every child has the inherent right to life (The Convention on the Rights of the Child (CRC), 1986: Article 6). Legislations aim at criminalizing killing to protect the human right to save a human life [27].

VI. THE LEGAL CONCEPT OF THE CRIME OF CHILD INTENTIONAL MURDER

Most of the criminal legislations have kept silent on the definition of intentional murder. However, the Algerian Penal Code of 1966 is among few legislations that defines intentional murder in Article 254 of the Penal Code as "the loss of the spirit of a living person" [20]; and also the French legislation defines intentional murder in the French Penal Code in Article No. 221 of 1992 as the "loss of the spirit that is involuntarily implemented".

With the reference to the Iraqi Penal Code No. 111 of 1969, it can be noticed that intentional murder is not defined, but it has just been referred to in Article 405 by stating that "if someone deliberately kills a person, the murderer must be sentenced by life imprisonment or temporary", and this text clarifies that the Iraqi Penal Code only states the nature of the

punishment without identifying the nature of the murder.

Criminal jurisprudence also provides many diverse definitions to deliberate murder [38], some jurists define deliberate murder as "the murder of a person by another one illicitly and iniquitously " [45], or it is defined as involuntary assault to someone's life by another [26]. The deliberate murder of a child covers "all the forms of killings that the child exposed to, except in the case when the mother kills her newborn baby to avoid disgrace" [34].

VII. PILLARS OF THE INTENTIONAL CRIME OF A CHILD KILLING

Deriving from the previous definitions which are stated in the first section concerning the deliberate murder in general, and the deliberate murder of a child in specific that the elements of the crime of murder are:

A. The Status of the Intentional Murder Crime

The position of intentional murder crime is a living human being that is probably a living child. Although these definitions make use of non-similar words and terms, they agree in that this crime is implemented on a living person [39]. It is an illegally implementation behavior against him/her where there is alive child, and results in intentionally murder of the child [4]. From the perspective of a court, human beings are considered equal whether he/she is a national or a foreigner, white or black, male or female, child or adult, or young, sick or healthy, an abandoned baby or not [45].

B. The Material Pillar

The material element includes criminal behavior, the result, and the causal relationship. It must be pointed out that killing could be implemented by a fatal instrument or by hand-held tool. It can be also performed by negative acts such as refusing to aid to save the life of a victim, which is regarded as abstention crime.

As the death of a child may result from the use of violence or from the intentional abstention to provide care, it can be also resulted from the consequence of carelessness by the parents or by the one who is in charge of providing care to the child. So, the accused person is not arrested as a murderer for a deliberate killing if he/she abstains to aid the victim, but as a murder of accidental killing. Thus, the accused person is punished for two crimes: the first is for the accidental killing, and the second is for abstaining to provide adequate assistance. However, it is the judge's responsibility to estimate whether the murder was intentional or not.

C. The Moral Element

The moral element involves criminal intent, in which whenever this intent exists and the murder was approved, the crime is regarded as an intentional killing [1]. In the case of intentional murder of a child, the killing intent must be observed on the murderer, and if the child was killed as a result of discipline administered by the parents, a guardian, or by the custodian of a child, in this case, the killer would be punished for the intentional murder because an abusive person is regarded as a person with a devil intent that intends to circumvent the

provisions and the laws to exploit legitimate means for illegal purposes. Therefore, the murderer should take responsibility and pay the price of his/her devil intent, rather than only for his/her abuse [51].

VIII. THE ATTITUDE OF COMPARATIVE LEGISLATIONS

The three trends of the comparative legislation can be distinguished in this regard.

First trend: Non-endorsement of a special criminal protection for the intentional murder of a child, this trend has been adopted by some of the legislations, including:

A. Iraqi Legislator

Iraqi legislator considers intentional murder of child as a danger on the stability and security of individuals [35]; therefore, in accordance to that, its punishment is stated in Article 405 of the Iraqi Penal Law No. 111 of 1969, which is life or temporary imprisonment, or it may extend to the death penalty if it is combined to one of the aggravated conditions that are identified by the legislation in Article 406 of the Iraqi Penal Code [16], [18].

The above texts clarifies that Iraqi legislation tends to non-endorsement of a special criminal protection for the intentional killing of a child, in a way that the child victim is not provided with a special criminal provisions both in terms of criminalization or punishment, as it subjected to the general rules of the intentional murder without making the character of the victim (child) as an aggravating circumstance for punishment.

B. Egyptian Legislator

The child victim is not provided with special criminal provisions neither in terms of criminalization nor punishment, as it subjected to the general rules in the crimes of the intentional murder as in the Articles (230 to 235) of the Penal Code. It is clear from these provisions that the Egyptian legislation aggravates punishment of the intentional murder crimes that are associated with the premeditation or with the use of toxic substances, without making child (the characteristics of the victim) as an aggravating punishment circumstance.

The Second Trend: It endorses the adoption of a special criminal protection for the intentional murder of a child which has been adopted by some of the legislations, such as:

C. The Attitude of the French Legislations

French legislation in its new Penal Code considers the crime of the intentional murder of child be subject to the same provisions as that the normal crime of murder. However, it considers the young age of the victim as an aggravating circumstance, and thus, the punishment will be aggravated, as stipulated in the Article (222-4) calling for life imprisonment for the killing of a child of less than 15 years old, instead of a prison for (30 years) that is set for the non-aggravated crime of intentional murder [54]. On the other hand, the French legislation has modified the Penal Code issued on the first of February 1994, by adding a new paragraph to Article (221-4)

by stating that if an intentional murder is implemented on a child younger than (15) years, and the murder co-occurred with rape and/or physical torture, the sentence is either (30) years of imprisonment or irreducible life imprisonment, which means that the sentenced murderer for a life imprisonment does not generally benefit from any measure to mitigate the punishment, including the conditional release until his death except in the case of remission from the president of the republic, or when a decision made by a committee of (5) consultants from the Court of Cassation after (30) years in accordance with certain procedures to end the implementation of the criminal resolution that is stated in the Article (722) of the French Code of Criminal procedure [49].

D. The Attitude of the Syrian Legislation

Syrian legislation regards the status of child as an aggravating condition that results in the sentencing of a murderer to life imprisonment if the victim is a child of less than 15 years of age at the time of the attack (Syrian Penal Code, 1949: Article 534). Moreover, if the murderer was the father or the grandfather for the murdered child would be sentenced to death.

IX. CONDITIONS OF PUNISHMENT AGGRAVATING

The condition of aggravating the punishment in the case of intentional murder of a child excludes the intentional murder of a child by the mother to avoid disgrace, as this case is subjected to special provisions [34]. Another condition is that such kinds of killings should not be implemented to save the mother's life except for healthy required cases and the condition for that the doer should be either a doctor or a midwife [34].

A. Justifications for the Adoption of Criminal Protection for the Intentional Murder of Child

Child's weakness in terms of physical and mental ability makes him an easy prey for those who wish to attack him unlike adults that they have ability to resist the assault, and probably his mental ability helps him to avoid falling into the trap of the offenders. It is evident that the existence of a deterrent makes offender hesitates to implement a crime against child. So, if the physical and mental ability of a mature function as a natural deterrence to prevent being offended, the aggravating punishment in return of child killing can compensate the deterrence that child lack in terms of physical and mental ability [32].

B. Exposing a Child's Life to Danger

The stage of childhood is the most important in terms of the process of building an individual's personality, and determining future behavioral trends. At this stage, the contributing factors will be constructed, evolved, and interacted to direct the child's growth and the evolution of their personality, which determines the direction of their behavior in the future. The legislation is expected to intervene to provide the necessary legal protection of children that are in dire need of a comfortable and a secure environment to ensure

proper growth. Due to the weakness of a child, especially during the first stages of life [48], the simplest attack or risk may expose their life to danger [10].

There are actions taken against a child and that would expose their life to danger, such as kidnapping, whether a newborn or not, and whether the motivation for the act is implemented to take him away from relatives or for the sake of trade or sale, in which case, criminal legislation intervenes to criminalize the abduction of children [10].

X. CHILD KIDNAPPING AND THE EXTENT OF REDUCTION OR EXEMPTION FROM PUNISHMENT

The crime of kidnapping is not a modern crime. It dates back to the ancient societies; for example, in primitive societies the crime of kidnapping women for marriage was very common. In some cases, the abducted girl was under the legal age, which means that she was still a child. Therefore, it can be said that the crime of kidnapping female children was very common at that time [9]. The crime of child abduction was shed light on these ancient codes, such as the Code of Hammurabi, which defined the crime of kidnapping, and set for it severe punishment (Execution), as is stated in the Article No. 14 of the Code "If a man kidnapped a child (son) of another man, so the kidnapper should be killed" [44].

Nowadays, child kidnapping has considerably increased, especially in Iraq, a situation that may have arisen out of security and economy instability. The reasons behind child kidnappings may vary, as for the purpose of sexual abuse/exploitation, trafficking, adoption, coercion in criminal activities, revenge upon their parents, or taken for ransom, etc.

A. The Concept of Kidnapping

1. Legal Concept of the Crime of Kidnapping

Arab penal codes do not follow a united attitude in the process of defining the crime of kidnapping, as they generally prefer to leave this crime without definition. Instead, Arab penal codes only state the penalties that are enacted for this crime as in the Egyptian, Lebanese, Libyan, Jordanian and the Iraqi Penal Code.

The avoidance of giving a precise definition to the crime of kidnapping by the legislator is a good point, because giving definition is not among the authority of the legislator; this task should be left to the jurists [9], or it is left to the judge who is in charge of a trial in a court to decide how a person who is accused of a crime should be punished [11]. Moreover, a precise definition would make the text rigid and non-applicable after a period of time, as a consequence the definition would require constant periodic modification [28]. Thus, these legislations did well by avoiding precise definition to the crime of kidnapping and leaving it to the judiciary assessment.

2. Judicial Concept of Kidnapping

There is a kind of consensus among Arab legislations regarding the definition of kidnapping [11]. For example, the Iraqi Court of Cassation, in the Articles 82 and 83 of 1983, defines kidnapping as the crime of illegally seizing and

carrying away a person by force or fraud from a place to another.

Penal legislations are in disagreement in the disciplining this crime, in a way that there are penal legislations that have provided legal articles to consider adults' kidnapping, and some other special legal articles to consider kidnapping of newborns as it is found in the Iraqi legislation and Egyptian legislation, whereas some of the legislations do not indicate a certain age for the victim (i.e.) According to these legislations, the abduction could be implemented on a newborn or on anyone else as in the Swede Penal Code [13]. Moreover, some legislation differentiates between adult/child kidnapping, but fails to specify any legal article for the kidnapping of a newborn. Moreover, some legislation also makes the distinction between the crimes of male/female kidnapping. There are also differences in the penalty of kidnapping by force and kidnapping by coercion compared to kidnapping without force and coercion.

B. Common Pillars in the Crime of Child Kidnapping

The crime of kidnapping has general pillars as well as specific ones, which enable it to be distinguished from other types of crimes. The general and common pillars for this crime are material pillar, moral pillar, and criminal intent.

1 Material Pillar

The material pillar in this crime is the implementation of kidnapping, which consists of two elements: the first is carrying the child away from its environment, and the second is moving a child to another location to hide him/her [17]. Anyone who takes part actively or partially in these two acts (taking a child away from his/her environment and moving him/her to another place) is regarded as the genuine doer of the crime, i.e. the law does not make a distinction between the kidnapper of a child and the partner(s) of the kidnapper; both are regarded as the genuine doer of the crime [17].

In the implementation of the crime of kidnapping, the position of the kidnapper is not considered even if the kidnapper is one of the victim's relatives, as long as the victim is a child. For example, it is regarded as the crime of kidnapping whatever if it performed by the infant's parents that have no legal custody over him/her [7]. However, it is not regarded as the crime of kidnapping if the offender did not carry the victim away from his/her own place. For example, according to the French Penal Code, if the offender took the child for a short trip for pleasure, it is not kidnapping [53].

The location of where the act of kidnapping takes place is not relevant, whether it is the victim's permanent residence, workplace or any other place, such as public places including parks, public squares, or the cinema, etc., or private places including the home or that of a friend's home [50].

Voluntarily leaving parents and moving to live with someone else is regarded as the crime of kidnapping by some Arab legislations as in the Egyptian and in the Iraqi Penal Code, whereas it is not regarded as the crime of kidnapping in Some Arab legislations as in the Libyan Penal Code [17].

Length of time is also necessary to prove the crime of

kidnapping. The period of the absence of the victim can play a great role in recognizing a crime as kidnapping.

2 Moral Pillar

The crime of child kidnapping is regarded as an intentional criminal act. The confirmation of the crime of kidnapping requires: 1. The existence of the criminal intent by accused person; and 2. The awareness of the kidnapper that this act result in disconnection between the victim and his/her family [17]. With the proof of the intent, the elements of the crime will be completed. Moreover, the motivations and the reasons behind performing the act of kidnapping do not have any impact on the punishment [2].

Criminal intent consists of two elements, which are: willingness and awareness [31]. The purpose behind kidnapping is to carry a victim away with force or coercion without taking permission, so it looks like the crime of robbery. Therefore, some researchers define kidnapping as stealing [11].

Awareness is the second element of the intentional criminal elements that is legally significant to proof the crime of kidnapping. Thus, awareness (of the criminal act) is regarded as one of the criminal pillars and its most important elements [30].

XI. THE CRIME OF KIDNAPPING A NEWBORN BABY

The crime of kidnapping a newborn is one of the most dangerous crimes against humanity, as it affects the concerned family as a social entity. This crime usually results in fear, anxiety, and disturbance [9]. This crime is defined as the process of carrying a newborn away from the birthplace to another place aims at giving the newborn a new identity [41]. The offenders in the crime of kidnapping usually aim at changing the identity of the newborn to attach him/her to a non-parental people.

The life of a kidnapped newborn is exposed to danger, because this crime deprives the victim from the mother's breastfeeding, the tenderness, and the care that others cannot provide [34].

The Iraqi legislator in the Article 381 indicates that "the offender who takes a newborn away from those who have legal authority over him/her to hide him/her, replace him/her, falsify his/her descent, will be punished by imprisonment. The Egyptian legislation also considers this crime in the Article 283 by stating that anyone who takes a newborn away from those who have legal authority over him/her, to hide him/her, replace him/her, falsify his/her identity will be punished by imprisonment.

A. Pillars of the Crime of Kidnapping Newborns

Through examining the legal definitions and texts that have been considered above, it can be concluded that the crime of kidnapping newborns is based on three pillars, which are:

1 Private Pillar (The Status of the Criminal)

This crime is concerned with a newborn baby, and it does not make any distinctions between male or female, healthy or

sick. Moreover, the Egyptian legislation adds the status of death and life to the case (i.e.) whether the kidnapped newborn was alive or dead the kidnapper will be punished for if the criminal intent was proved [49].

2 Material Pillar

The material pillar for the crime of kidnapping is fulfilled if the offender commits two actions: the first is detaching a child from his/her parents and causing disconnection with them; and the second is carrying a child to a new place. The Iraqi Panel Code in Article 381 and the Egyptian Panel Code in the Article 283 propose different forms of the crime of newborn kidnapping including: deportation, concealment, replacement, and changing identity. However, the application of these articles will not be implemented if the identity was not changed, and the genuine name is kept [33]. These four involved acts result in one thing, which is depriving the child of his/her freedom for a period of time. Moreover, It is not condition to have all these four acts at a time to prove the crime of kidnapping (i.e.) one of the material elements is enough [41].

3 Moral Pillar

The crime of a newborn kidnapping is regarded as an intentional crime. This crime is proved when there are a crime intent, and the action of kidnaping [54]. If the intent was proved the criminal pillars would be completed without paying any attention to the factors and motivations [2].

After recognizing the legal pillars of the crime of kidnapping in any case the accusation of the doer of the crime will be proved and then the kidnapper will be punished.

B. The Attitude of the Iraqi Legislation and the Comparative Legislation

1. The Attitude of the Iraqi Legislation

The Iraqi legislation in the current Iraqi penal code in the chapter 8 that is concerned with social crimes, and in the Section V that is concerned with the filiation and child care state that " anyone who takes a child away, replace one with another, or changes his/her identity is punished for imprisonment". It can be observed in the text that the legislation aims at criminalizing the act of kidnapping newborn in order to keep the identity right of a newborn to his genuine parents [15].

According to the Iraqi legislation the criminal of the crime of a newborn kidnapping is sentenced for imprisonment only (i.e.) no any other sort of punishment is given. This penalty is ranging from the minimum three months to the maximum five years imprisonment as in Article 26 of 1969.

2 Attitude of the Egyptian Legislation

The Egyptian legislation in its penal code states that anyone who kidnaps, replaces, or changes the identity of a newborn is punished with imprisonment. However, it classifies the punishment according to the healthy status of the kidnapped newborn. If it is proved that the infant was born alive before the act of kidnapping, the penalty is the imprisonment for a term not exceeding one year. If the newborn was born alive,

but not expected to live, so the penalty is the imprisonment for no more than a year. Finally, if it is proved that the infant was born dead, the penalty is imprisonment for a period not exceeding two months, as in the Article 283 of 1937[34].

Egyptian legislation has commuted the punishment for the kidnapper to be imprisoned for a period not exceeding a year if it is proved that the kidnapped newborn was born dead, whereas the Iraqi legislator in the crime of newborn kidnapping has not stated any sort of commutation in this crime.

After the consideration of both the Iraqi and the Egyptian legislations' attitude, it can be concluded that the wisdom of the legislation of the provisions in the Iraqi Penal Code is recognized in two aspects. The first is to preserve individual's freedom for the baby, although it is just a newborn baby; and the second is to reserve the identity. It can be observed that the Egyptian legislation has dominated the personal side on the criminal aspect. On the contrary, the Iraqi legislation focuses on the crime from a public perspective that is stated in the second book devoted to the crimes that are harmful to the public interest.

3 Attitude of the French Legislator

The French Penal Code in the Article No 227-13 punishes the criminal act for a three-year imprisonment and a fine of 45,000 Euros on the crime of a newborn replacement or identity change [52].

XII. THE CRIME OF NON-NEWBORN KIDNAPPING

The concept of non-newborn child is used to cover all who are not regarded newborn until eighteen years of age and to some legislation until 21 years of age. Some legislation also makes a distinction between genders in the kidnapping of a male or female child in terms of punishment [34]. Some others also make differentiation between the kidnappings that are implemented with coercion from the kidnappings that are implemented without coercion:

A. Legal Provision of the Crime of Child Kidnapping with Deception and Coercion

- Deception is fraud and deceit, which is normally defined by judiciary provisions as a means of using fraudulent methods.
- Coercion is associated with anything that results in depriving a victim from his own will. It involves methods, such as lifting someone and moving him to somewhere against his/her will, or anesthetizes someone to take him away [7].

Article No. 421 in the Iraqi legislation indicates that "if the crime of kidnapping occurred in connection to deception and coercion or one of them, the penalty is life imprisonment if the kidnapped child was female, and imprisonment for a period of no more than 15 years if the kidnapped child was male. But, the Egyptian legislation in its Penal Code in Article 288 of 1937 states that "anyone who kidnaps a child of less than 18 years old with deception and coercion will be imprisoned for at least five years".

It is clear from the text that the criminal pillars consist of the material pillar and the moral pillar as well as the elements of deception and coercion. Anyone who implements child kidnapping, and the child is male and still less than 18 years old, the kidnapper will be sentenced with aggravated imprisonment as in the Iraqi Penal code.

The Egyptian legislation in the Article 49 of 1937 also states that "anyone who implements a female child kidnapping with deception and coercion, alone or with the assistance of others, will be sentenced for life imprisonment or by penalty of death if the crime was accompanied by sexual intercourse".

The crime that will be proved by taking the female away against her will. Moreover, the place does not make any difference [7].

It is evident from the above text that there is no consensus regarding the punishment in the crime of female kidnapping (age) with deception and coercion. The crime in its normal form will be sentenced to life imprisonment or by penalty of death in its aggravating form if it was accompanied by a sexual assault" [2]. Moreover, the consent of the victim does not prevent aggravating punishment except in cases where the victim is older than 16 years old and accepts to be taken away, while in cases where the victim is less than 16 years old their consent has no impact on the penalty [17].

B. The Legal Provision of the Crime of Child Kidnapping without Deception and Coercion

Paragraph one of Article No. 422 of the Iraqi Penal Code states that "anyone, alone or with the assistance, who kidnaps a child of less than 18 years old without coercion or deception is punished by imprisonment for a term not exceeding 15 years if the victim was female, or imprisonment for a period not exceeding 10 years if the victim was male".

It is clear from this article that the legislation makes a difference between the male kidnapping and the female kidnapping if they are implemented without coercion and deception.

In Egyptian legislation, Article No. 289 states that "anyone who kidnaps a child of less than 12 years old without coercion or deception shall be punished by aggravated imprisonment for no more than 5 years, and the penalty for a crime of child kidnapping is no less than 5 years if the age of the victim exceeds 12 years but it is still less than 18 years." Moreover, if the kidnapped child was female, the punishment will be aggravated to be punished for no less than 10 years. Furthermore, the kidnapper will be sentenced with a death penalty if the action of kidnapping was accompanied by sexual intercourse or abusing.

It is clear from this text that Egyptian legislation does not make a distinction on whether the kidnapping is implemented with deception and coercion or not. Thus, the penalties for both the cases are the same. However, Egyptian legislation makes distinction between two cases: the first is the gender of the kidnapped child (male or female). In this case the kidnapper will be sentenced by aggravated imprisonment for no less than 5 years if the age of the victim is less 12 years, while for the second case if the kidnapped child exceeds 12

years but is less than 18 years, the kidnapper must be sentenced to not less than 5 years if the victim was male, or not less than 10 years imprisonment if the victim was female.

It can be observed that the policy of Egyptian legislation is aggravating the penalty of female kidnapping comparing to the male kidnapping. This philosophy resulted from the fact that females in terms of physical strength are weaker compared to the males; as a result, female's Combat against the kidnapper is usually less compared to the Combat of a male. On the other hand, females, especially in the eastern societies, pay a great attention to honor, and reputation; therefore, kidnapping a female has an impact on the honor and reputation of the victim, and as a consequence, has a negative impact on her future [34]. It can be stated that this aggravating condition is associated with the circumstances of the victim.

The circumstance of the crime is meant to consider these activities that are associated with or follow the crime of kidnapping (such as, killing, adultery, and homosexuality), and these acts are categorized as the aggravating acts of punishment [28]. Thus, according to Egyptian legislation in its Penal Code in Article No. 290 of 1937, the kidnapper of a female is sentenced with the death penalty if the crime was accompanied with sexual intercourse assault without out of her consent. However, the French legislation in Articles 224-5 is aggravating the punishment of the crime of kidnapping if the victim is a child of less than 15 years. Thus, if the punishment for a crime of kidnapping is 30 years, in the case of aggravated circumstances, the kidnapper will be sentenced to life imprisonment; while if the punishment for a crime of kidnapping is 20 years imprisonment, in the cases with aggravating circumstance that punishment will be extended to 30 years imprisonment.

In the crime of kidnapping, in order to encourage the offender to regret the implementation of the crime, penal legislation intentionally mitigates the penalty of the crime, when the kidnapper returns the victim to his/her family in a short period of time [11].

Among the mitigated circumstances of the crime is the urgent return of the kidnapped individual, in a way that the majority of the legislations adopt this principle. Iraqi legislation states that " if the kidnapper did not physically harm the kidnapped individual, and the victim was released less than 48 hours from the time of kidnapping in a safe place where they can easily return back home that in such cases, the kidnapper will be sentenced to no more than a year, as stated in the Iraqi Penal Code, Article 426 of 1969. This article points out that the Iraqi legislation sets some conditions to mitigate the penalty of the crime, including the avoidance of physical pain by the kidnapper, and the release of the kidnapped child before 48 hours. However, this statement is not logically true because kidnapping at least causes psychological pain to the victim [6].

In some legislation, child kidnapping by one of the parents or grandparents is regarded as a mitigated condition, as it is found in both Iraqi legislation in its Penal Code, Article 427 of 1969, and in the Egyptian legislation in its Penal Code, Article 292 of 1937.

Concerning the exemption of the kidnapper from punishment, Iraqi legislation indicates only two cases, which are:

The first case is the marriage between the kidnapper and the victim. The Iraqi legislation in its Penal Code, Article 427 of 1967 suspends the execution of the punishment if the victim marries with the kidnapper. In the other words, a marriage between a kidnapper and the kidnapping victim suspends the process of investigation and judgment. However, the suspended provisions will resume again if the marriage ends in divorce. Egyptian legislation, Article 291 of the Penal Code, before being replaced by the Article No. 14 of 1999, also considers marriage as a temporal preventable condition for punishment [11].

The second case is about reporting to police on a kidnapping crime by the kidnapper himself. It is stated by Iraqi legislation in Penal Code, Article No. 246 of 1969 that "a kidnapper will be exempted from punishment if he/she reports to the authorities the crime of kidnapping by telling them the place where the kidnapper is." However, the report should be given before the police find the victim.

In French legislation, Article No. 224 / 5-1 of the Penal Code also states that the kidnapper will be exempt from punishment if he reports to the judicial or administrative authority to prevent the occurrence of a crime.

The conditions to exempt the kidnapper are:

- The kidnapper should report the crime either before initiating the investigation by the authority, or before finding the kidnapped individual.
- The report should result in revealing the identity of the offenders, and indicating their location.
- The report should also result in arresting the offenders, and to release the kidnapped child.

XIII. PROTECTION OF THE CHILD FROM PHYSICAL ABUSE

A child has the right to be protected from crimes, and to enjoy physical safety in general. In addition, those who are concerned with the child's affairs assert that a child requires special criminal protection because of their physical weakness, which prevents them from defending themselves [34].

The physical abuse is among the most common dangerous types of abuse that is facing a child. It might be the result of the neglect of care by the parents or custodian or from an act that limits the physical development of the child. These types of abuse may have a negative impact on the psychology and the future of child [23].

A. The Notion of Physical Abuse

Physical abuse is causing physical assault, harm, and injury. It is the most common type of abuse as it leaves clear signs on the body of the victim [34]. These kinds of physical abuse on child are usually similar to these physical abuses that are implemented on a mature as well [34].

Despite the danger of the phenomenon of physical abuse against child, the determination of the actual size of this phenomenon is very difficult because a child is not qualified enough to inform the concerned authorities of the abuse is

he/she exposed to. In, signs of abuse are not always clearly apparent on the body of the child. Moreover, if the child's family members caused the abuse, it would generally be covered up. Furthermore, in the case of children, it is hard to prove that the child's injury is resulted from abuse, and not from playing. Therefore, the difficulty of detecting crimes of violence makes the mission of the concerned authorities in addressing this type of crime very difficult [24].

B. The Attitude of the Comparative Legislations

Before considering the attitude of the comparative criminal legislations, it is supposed to shed light on the attentions of the international agreements for child protection from all the types of physical abuse. The Universal Declaration of Child's Rights in the Article No. 3 states that every individual has the right to life, liberty and personal security. Also, Article 5 states that no one should be exposed to torture, punishment, cruel and savage treatment, or disgrace. Moreover, Article No. 7 of the International Covenant on civil and political rights declares that it is not allowed to subject an individual to torture, punishment or cruel treatment. Moreover, all articles in the Convention of the Child's Rights criminalize all forms of cruelty against children, especially Articles No. 19 and 37 [36].

1 Attitude of Iraqi Legislation

With the reference to the Iraqi Penal Code No. 111 of 1969, it can be observed that the legislation considers all types of abuse as criminal. The punishment by the Iraqi legislation in the Iraqi Penal Code is imprisonment for a period that does not exceed one year or a fine not exceeding 225,000 dinars in return to the right of anyone who is injured intentionally. However, if a beating results in bone fracture, or an illness that prevents the victim from exercising his/her daily activities for more than 20 days, the punishment will be imprisonment for a term not exceeding three years, or a fine not exceeding 225,000 dinars. According to the same penal code, as in the Article No. 12, if the physical crime of beating results in permanent disability, the offender must be punished by imprisonment for not more than 15 years. Also in the case of the death of the victim, as a result of the beatings, the offender is punished by the same penalty (imprisonment for not more than fifteen years) as it is stated in Article No. 410. However, the penalty will be aggravated if the death that is the result of the assault was premeditated, or if the crime was implemented against a public sector employee (Governmental sector) during office hours.

In Iraqi legislation, Article No. 414 has identified five conditions that if met, aggravate the penalty. These five aggravating conditions are: implementing the act with premeditation, involving more than one offender, proving the kinship between the offender and the victim, attacking an officer assigned to public service, or having advance preparation [35].

It is clarified in the previous statements that the Iraqi Legislation does not devote special provisions to consider the crimes that are implemented against child's physical safety,

whereas the provisions of these crimes are subjected to the general rules that are stated in the Penal Code. Moreover, the Iraqi Kurdistan legislation in the law of Family Abuse Combat in Articles No. 8 and 2 of 2011 introduces three forms of family physical violence, which are female circumcision, beatings, and abuse. The legislation stipulates in Article 2 that family members do not have the right of offending their own family members. The following offensive acts are regarded as acts of family violence: female circumcision, as in the Article No. 7; abusing family members and children under any pretext, as in the Article No.12; and also humiliation, insulting, abusing, hurting family members as well as implementing psychological pressure, violating their rights, and performing compulsory marital cohabitation, as in the Article No. 13. It is also clear that the occurrence of abuse against anyone is criminalized in general, regardless of their relationship. Therefore, the law forbids the physically torture of children (male and female) by the parents.

In Iraqi legislation, Article No.7 states that those found guilty of family physical abuse will be punished with imprisonment for not less than six months, and no more than three years and/or be fined no less than one million Iraqi Dinars and no more than five million Iraqi Dinars.

XIV. PHYSICAL ABUSE AS A CONSEQUENCE OF CIRCUMCISION

Since early times, humans have, based on different beliefs, rituals or trends, chosen to modify their appearance. These changes and practices could be performed on all organs, with some long-held practices performed on the sexual organ such as circumcision. Other examples of such modifications include changing the size of an organ, tattooing, and piercing etc. Despite the development and modernization of society many of these practices remain popular today, regardless of class or financial status.

A. Definition of Circumcision

Circumcision (L'excision) is a surgery to remove a part of skin of the mucous tissue that normally covers the glans (head) of the penis in males, or removing a part of the skin of mucous tissue around the vagina of females [29], in the other words, it is a cut of a particular part of a particular organ [47]. This process definitely causes pain to the child (male or female), and it may cause bleeding and psychological stress that definitely affects their psychology and behavior, even in maturity, especially in terms of the sexual relationship. Therefore, circumcision is regarded as a form of child physical abuse [34].

Some believe that female circumcision is regarded as a physical deformation, which may have dire health consequences that can sometimes result in physical disability. The World Health Organization defines female circumcision as the deformation of the female genital organs, which includes all the sorts of deformation, such as cutting or removing partial or total external genitalia [3].

B. Attitude of Comparative Legislation Regarding Circumcision

Circumcision is illegal from the perspective of the international law because it is regarded as a criminal act. Of late, legislations have criminalized female genital mutilation in clear texts, but there are no texts to criminalize male circumcision if it is managed properly. Concerning the attitude of the legislations towards female genital mutilation, the majority of the legislation considers female genital mutilation as a crime.

1 Attitude of Iraqi Legislation

There is no a clear text criminalizing female genital mutilation in the Iraqi Penal Code. Thus, it can be said that Iraqi legislation allows circumcision for both males and females on the condition that the male circumcision and female genital mutilation be implemented properly and is free from violation [47]. However, the case is different in the law of Family Abuse Combat of the Kurdistan region in which Article No. 8 of 2011 criminalizes the act of female genital mutilation by stating that "no one from the family is allowed to implement physical, sexual, and psychological abuse within the frame of family; and the following acts are regarded as family abuse...7-Female genital mutilation".

It can be deduced from the above texts that female genital mutilation is categorized as family abuse crimes in a way that both the doer of the act of mutilation and the contributor to the process of genital mutilation will be punished for a period of no less than six months, and no more than two years of imprisonment, or with the fine of no more than two million Iraqi Dinar, and no more than three years imprisonment, as stated in the Iraqi Kurdistan law of family abuse Combat, Article 6-text 2 of 2011. According to the same source, if the victim was underage, the punishment will be aggravated which is the imprisonment for no less than 1 year and no more than 3 years, and a fine of no less than 5 million Iraqi Dinar, and no more than 10 million Iraqi Dinar, or by one of the stated penalties. Moreover, another form of aggravating a crime is the involvement of a doctor, a pharmacist, a chemist, or a nurse in the criminal act. In such cases, the court can rule to ban those convicted from practicing their professions for a period not exceeding three years. Enactment of the law in this respect was done with full awareness by the legislators in order to deter others from performing the act of female genital mutilation.

It is clear from the penalty that Iraqi Kurdistan legislation considers the act of female genital mutilation as a serious form of child's abuse. According to Iraqi Kurdistan law, Family Abuse Prevention Act, Article 6, text 4 states that even encouragement of the act is regarded as a crime punishable with a fine of no less than one million Iraqi Dinars, and no more than five million Iraqi Dinars. The Iraqi Kurdistan law of Family Abuse Prevention Act of 2011 is regarded as one of the best laws to combat the act of female genital mutilation on the Asian continent, after Egypt's Child Law of 2008 in the African continent [43].

2 Attitude of the Egyptian Legislation

Unlike Iraqi legislation, Egyptian legislation criminalizes the act of female genital mutilation by adding an Article (No.242 the repeated) to the Penal Code [26]. It states that "the guilty is punished to imprisonment of not less than three months and not exceeding two years, or fined not less than one thousand Egyptian pounds and no more than five thousand Egyptian pounds".

XV. CONCLUSIONS

- Once a child was born, he/she is provided with many rights and protected by law; this protection can be observed in various branches of law.
- The current legislation disagrees on the labels that distinguish a child, such as underage, juvenile, and small (boy/girl).
- Although Iraqi legislation does not identify the child in its law, different labels are used to distinguish a child in its running laws, such as: little (boy/girl), underage, juvenile, boy, and newborn. Whereas Egyptian legislation defines the child in Article No. 2 of the Children's Act No. 12 of 1996, and amended by Article No. 126 of 2008, as anyone under the age of 18 years.
- The protection of the child's rights to life is not restricted to protecting the child from murder alone, but also extends to preventing exposing his/her life to danger.
- Some of the legislation fails to provide special provision to protect child from intentional murder, as in Iraqi and Egyptian legislation. On the contrary, some legislation includes special provisions to protect the child by considering the status of childhood as an aggravating condition as in French and Syrian legislation.
- The act of child kidnapping is one of the most serious crimes that affects the kidnapped child and his/her family at a time. It often results in psychological disturbance, physical pain, and/or sometimes death.
- Some legislation considers marriage between the kidnapper and the victim as a condition to suspend the crime.
- Iraqi legislation does not devote special provisions to be applied to crimes against the child's rights. The provisions of such crimes are subjected to the general rules that are stated in the Penal Code as a penalty of physical abuse, injuring, or unhealthy feeding.
- Iraqi legislation does not make the distinction between the intentional and unintentional crime if it is implemented against a child. However, this distinction can be clearly observed in Iraqi Kurdistan legislation in the law of Family Abuse Combat No. 8 of 2011 that provides special protection of the child from physical abuse.
- There is no an explicit text to criminalize female genital mutilation in the Iraqi Penal Code. Iraqi legislation conditionally allows both male circumcision and female genital mutilation, on the condition of the proper implementation of the process without any abuse and/or

insult. Whereas, the situation is different in the Kurdistan region and Iraq with the enactment of the Family Abuse Combat law that bans female genital mutilation.

- Unlike the Iraq legislation, the Egyptian legislation criminalizes the female genital mutilation obviously in the article (242 the repeated) of its Penal Code.

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