

**ABORTION LAW: CONFLICT OF MATERNAL- FETAL RIGHTS**

**(قانون الاجهاض: تضارب حقوق الام والجنين )**

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## المخلص

الهدف من وراء هذا البحث هو تاسيس اطار قانوني فيما يتعلق بقضية الاجهاض في العراق. يتناول البحث انهاء الحمل في ضوء حقوق الانسان وذلك لغرض تحديد مدى شرعية اجراء الاجهاض. اذ يثير موضوع الاجهاض جدل كبير من مختلف نواحي الحياة, وهنالك رؤى مختلفة تعارض او تساند الاجهاض. التنظيمات حول العالم ايضا مختلفة ما بين تبني نظرة مقيدة تساند الحقوق الجنينية في الحياة وما بين نظرة متسامحة تساند حق المرأة في الاجهاض. يتناول هذا البحث ايضا القواعد القانونية المتعلقة بالاجهاض في القانون العراقي, اذ ان الاجهاض ممنوع ومعاقب قانونا في العراق الا في حالة كونه ضروريا لحفظ حياة المرأة الحامل. وعليه فانه سوف يتم تقييم رؤية القانون العراقي المحافظة تجاه الاجهاض في ضوء حقوق الانسان الاساسية, وكذلك بالنظر الى الرؤى المقارنة للتشريعات المتعلقة بالاجهاض في الدول الاخرى. وفقا لهذه الدراسة, فانه ينبغي ان يتبنى القانون العراقي رؤية اكثر تسامحا فيما يتعلق بالاجهاض وذلك بالاعتراف بحق المرأة الحامل في التمتع بالحياة والخصوصية بما في ذلك حق انهاء الحمل وبما لا يتعارض مع الحقوق الاخرى. وكذلك ضرورة توسيع نطاق الاستثناءات التي تسمح باجراء الاجهاض لضرورات طبية واجتماعية متعلقة بالصحة الجسدية والعقلية للطفل والمرأة وحفظ خصوصية وسمعة العائلة.

## Abstract

The aim of this study is to establish legal framework in relation to abortion issue in Iraq. This study examines the termination of a pregnancy in the light of fundamental human rights, in order to determine the legality of abortion. Abortion is a significant topic as it arises controversy from different aspects of the life, and there are different approaches against and with performing abortion. Consequently, regulations throughout are varied between adopting a restrictive approach which supports the fetal right to life, and a permissive approach which supports the right of the woman to the abortion. This article considers legal provisions concerning abortion in Iraqi law, which adopts a conservative view towards abortion, where abortion is prohibited unless it is performed to save the life of the pregnant woman. The Iraqi approach will be analyzed in according to the fundamental rights of women, as well as by observing comparative views of legislation in other countries concerning abortion. Argument of this study is that Iraqi law should adopt more permissible approach in relation to the abortion, by recognizing the fundamental rights of the pregnant woman to enjoy life, liberty and privacy, including the right to the termination of pregnancy at early stage of

gestation, in the way that does not contradict others rights. In addition, enlarging the scope of exemptions that allow carrying out abortion for medical and social necessities, relating to physical and mental health of the newborn and the pregnant woman and preserving the privacy and reputation of the family.

## I: Introduction

Abortion is an old-new issue which has aroused and still arising enormous controversy from different aspects of the life including legal, religious and moral aspects. Regulation of abortion is back in history to the ancient societies, Hammurabi code for instance penalized any action causes miscarriage to a pregnant woman.<sup>(1)</sup> Performing abortion was legally restricted in all countries around the world until the end of the nineteenth century.<sup>(2)</sup> In the current time, there are many countries that permit performing abortion. Abortion is the process which leads to the termination of pregnancy at any stage of gestation before the newborn is able to survive outside of the woman uterus.<sup>(3)</sup> Abortion might be performed at the early or late stages of pregnancy. Early abortion takes place during the first trimester of the pregnancy, while performing abortion that occurs after the twelfth week of the pregnancy is called late-term abortion.<sup>(4)</sup> Abortion is widely practiced in all societies. It is indicated that roughly 44 million abortion cases are done throughout each years, and the ratio of abortion to total pregnancies is about %26.<sup>(5)</sup>

Laws around the world regulate abortion differently, some laws adopt conservative approach prohibiting abortion totally or allowing it in very limited circumstances, while others follow liberal approach permitting abortion and minimizing scope of restrictions. In Iraq legal provisions include a general prohibition on abortion, and there are no direct provisions that allow to terminating the pregnancy for medical, economic or social necessities. This study examines abortion in the light of fundamental human rights of the women and children focusing on Iraqi law, in order to observe if there is legislative shortcoming in relation to abortion and propose solution for that. It will also consider different legislation of abortion worldwide to find out if this topic needs to be re-considered and proposing an approach which should be adopted for regulating abortion under all circumstances. The method that will be employed in this study, is analyzing the legal provisions of Iraqi law in relation to abortion, and weighing them with fundamental human rights for examining the legality of abortion, as well as relying on comparison of different legislative approaches around the world.

For that, this paper will discuss in part II issue of abortion in the light of

(1) Hammurabi Code 1754 BC (Iraq), ss. 214-209.

(2) Marge Berer, "Abortion Law and Policy Around the World: In Search of Decriminalization," Health and Human Rights Journal 19, No. 13,14 :(2017) 1.

(3) The Encyclopedia Britannica. <https://global.britannica.com/science/pregnancy/Abortion> (last visited 11 April 2020).

(4) The Encyclopedia Britannica. <https://global.britannica.com/science/pregnancy/Abortion> (last visited 11 April 2020).

(5) About 26 million of these are performed legally in accordance with the law, while the others occur where process is illegal. Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, Contemporary Bioethics: Islam Perspective (New York, Springer: 156 ,(2015).

fundamental human rights including the women's rights and fetal rights. Such as rights to enjoy life, liberty and privacy. Part III explores comparative approaches that are adopted by different laws in countries around the world. This would be beneficial for Iraq in order to realize how other countries look at abortion issue and evaluating a regulatory framework for abortion. Part IV includes discussion and findings as well as recommendations for Iraqi law, that I believe that it is necessary for reforming the legal provisions of abortion in Iraq. Finally, there will be conclusion summarizing the main points and arguments of this study.

## II: Abortion and Fundamental Human Rights

The Iraqi constitution 2005 guarantees the fundamental human rights for all individuals. Constitutional human rights should not be breached or abridged by laws, where laws should consider the fundamental human rights indicated in the constitution and comply to the constitution, otherwise law that contradicts the constitution will be invalid.<sup>(6)</sup> In relation to performing abortion, there are several fundamental human rights raised including rights to life, liberty and personal privacy. This part considers abortion in the light of fundamental human rights of the woman and unborn child.

### A: The Women's Rights

The right to enjoy life is fundamental right for all human beings, it is indicated in universal conventions and constitution. The universal convention concerning civil and political rights refers the right to life for all human beings.<sup>(7)</sup> Similarly, the universal declaration of human rights also denotes right of person to life and security and liberty.<sup>(8)</sup> Accordingly, the Iraqi constitution assures the right of all individuals to enjoy life and security as well as liberty as it is indicated in section 15 of it, which means that Iraqi constitution recognizes rights of the women to life and to freedom without discrimination. Basing on that women are free to do whatever they want and wish for their lives without intervention of government. Same section also refers that deprivation or restriction of such rights is forbidden, where it is the obligation of the state for not depriving any individual of these rights or restricting them without due process of law.

In addition, laws recognize and guarantee right of all individuals to personal privacy, for living freely without intervention.<sup>(9)</sup> The right to privacy is protected as long as it does not contradict others' rights or public moral.<sup>(10)</sup> According to

(6) The Iraqi Constitution 2005, s. 13 indicates that this constitution is the supreme law in Iraq, and no law contradicts it shall be enacted.

(7) United Nations, International Convention on Civil and Political Rights 1966, Art. 6.

(8) United Nations, The Universal Declaration of the Human Rights 1948, Art. 3.

(9) United Nations, The Universal Declaration of the Human Rights 1948, Art. 12.

(10) Right to personal privacy is stated in s. 17(first) of the Iraqi Constitution.

the right to personal privacy, the woman has the right to choose and decide for her life, including right for reproductive choice. Individuals rights to liberty and personal privacy are complete rights granted for all individuals including women regardless their social or economic status,<sup>(11)</sup> which means that people equally enjoy these rights,<sup>(12)</sup> regardless gender, social and marital status. Further, In terms of right to health, the Iraqi constitution asserts the obligation of the state to provide healthcare for all individuals especially women and children.<sup>(13)</sup>

The issue may be raised in this context, is whether of the right to personal privacy and liberty allows the pregnant woman to make decision about her pregnancy whether to continue and take it to term or terminate it at any stage before delivery time. In general, the pregnant woman is entitled for such right and full legal protection like other persons in the society on the ground of equal opportunities, and should not be deprived of this right because of her pregnancy.<sup>(14)</sup> Where, excepting women in general and pregnant women in particular of these rights may subordinate them, and that represents a breach to the principle of equality. So that, the pregnant woman has the right to enjoy her life and law should respect and protect her liberty and privacy right, including her free choice of getting married or staying single, and having offspring or not. It is prohibited for government or others to deprive or restrict right of the pregnant woman by forcing her for doing and acting against her wish or intervening her personal life. It is, however, practicing and enjoying the right to liberty and personal privacy by the pregnant woman is a personal matter related to her life, and it should not contradict rights of other or cause harm to other and to the society.

## B: The Fetal Rights

Fetal rights in relation to abortion is represented in the right to life and physical integrity. The right to life is a fundamental right for all individuals in the society, and laws ensure and protect this right against any violation or action may threaten a person life.<sup>(15)</sup> The Iraqi constitution, however, is not recognizing or referring right of fetus to life. The issue here is whether or not rights of persons to life and physical integrity could be granted to unborn child, and if description of personhood applied on fetus. Firstly, the Iraqi laws do not include any reference to definition of a person. The Iraqi civil code 1951, refers that legal personality, which is the basis for obtaining the rights and legal protection, begins once a child is born alive and ends by death.<sup>(16)</sup> Basing on that, fetus conceived in mother's uterus

(11) The Iraqi Constitution 2005 indicates in s.14, that all Iraqis are equal before the law.

(12) The Universal Declaration of the Human Rights 1948 states in Art.1 that all individuals are born free and equal in dignity and rights.

(13) The Iraqi Constitution 2005, ss. 31-30.

(14) The Iraqi Constitution 2005, s. 16 which ensures equal opportunities for all individuals.

(15) The Iraqi Constitution 2005, s. 15.

(16) The Civil Code 1951 (Iraq), s. 34.

has no legal personality and it is not entitled for such legal protection against any action may threaten its physical integrity. Iraqi law, however, recognizes some relevant rights for an unborn child, the Iraqi health Act 1981 refers obligation of the state in providing healthcare for the child, expanding this right to include different fetal stages,<sup>(17)</sup> which means Iraqi law recognizes conceived human embryo as potential human life, and provides the healthcare for fetus basing on that. The right of unborn child in healthcare includes its right in medical treatment if there is any genetic disorder at different stages of its development inside mother's womb, and to be born healthy and not suffering from any serious diseases or impairments.

Moreover, Iraqi penal code 1969 provides the legal protection for potential human life and recognizes the right of unborn child to life, by prohibiting and penalizing any action leads to the miscarriage of the pregnant woman or destroying the conceived embryo.<sup>(18)</sup> Iraqi law, however, does not determine at which stage of the pregnancy abortion is illegal and penalized. Resolving this issue is significant for determining the legality of abortion. By looking at Islamic sharia which is a main source of legislation,<sup>(19)</sup> it is noticed that there is no reference to abortion in the primary sources of Sharia, and there is no consensus among jurists of Islamic jurisprudence about abortion and fetal rights to the life. Some scholars argue human embryos are entitled for the legal protection as same as other human beings, at moment of conception. That means the termination of pregnancy is prohibited at all stages except for saving life of the mother,<sup>(20)</sup> where saving life of mother outweighs protecting right of her fetus. Another view believes that performing abortion is allowed only during the first forty days of the pregnancy.<sup>(21)</sup> Where, right of unborn child to life is recognized only after forty days of the conception, while embryo since conception until forty days is not entitled for protection. Other Muslim jurists adopt more liberal view asserting that legal protection is provided for human fetus after four months of the pregnancy. So, carrying out abortion is not prohibited during the first 120 days of the conception, before the soul is given to the fetus. Some of them allow abortion for a minor medical and social reason.<sup>(22)</sup> Although variety of Muslim jurists' opinions about fetal right to life and legality of abortion, there is general consensus that abortion after four months of the pregnancy, when fetus is given

(17) The Public Health Act 1981 (Iraq), s. 6.

(18) Penalty sentences are varied depending on circumstances; of imprisonment one year to 10 years, apply on all participant parties in committing abortion. The Iraqi Penal Code 1969, ss. (-417 419).

(19) The Iraqi Constitution 2005, s. 1)2).

(20) This is attitude of Maliki school. See, Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, Contemporary Bioethics: Islam Perspective, (New York, Springer: 167 ,(2015.

(21) This is view of the majority of Shafii school. See, Dariusch Atighetchi, Islamic Bioethics: Problems and Perspectives (Italy: Springer, 96 ,(2007.

(22) The view of the majority of Hanafi school and Zaidi school. See, Dariusch Atighetchi, Islamic Bioethics: Problems and Perspectives (Italy: Springer, 96 ,(2007. Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, Contemporary Bioethics: Islam Perspective (New York, Springer: 167 ,(2015.



soul, is not permissible. But, there is exceptional circumstances, where abortion should be performed, as in case of saving the mother's life.<sup>(23)</sup>

### C: Balancing Right to Abortion Against Right to Life

As indicated, it is duty of the state to guarantee and ensure the fundamental human rights for all individuals without discrimination. Human rights that should be protected include the rights of the women to enjoy life, liberty and personal privacy, as well as fetal rights in receiving healthcare and to be born alive and healthy. In the context of abortion, recognizing right of the pregnant woman to terminate her pregnancy means restriction of unborn child right to life and vice versa. This reflect the collision of fundamental human rights between the woman and fetus. Such collision of the human rights in relation to abortion requires intervention of the government to regulate this issue in the way which provides legal protection for such rights. Weighing conflicted interests and rights in this regard is necessary for determining which of these rights would have and take the priority for the legal protection, and what considerations should be taken into account for providing full legal protection in such cases.<sup>(24)</sup> The best interest of a born child is an important factor that should be considered in relation to abortion.<sup>(25)</sup> It is right of the child to be born healthy and wanted child in family and society and to enjoy both parents care. So, the child who is born following undesired pregnancy and probably will suffer unhappiness, is against the child interest,<sup>(26)</sup> as well as it is against the child right if the child would be born with serious disease or disorder affect physical or mental health. Such situation might prevent the child to live peacefully and happily as other normal children, and the child would likely feel abandoned and a burden to family and society.

### III: Comparative Legislation Concerning Abortion

This section considers different legislative approaches in relation to abortion around the world. It sets out regulations of abortion in different countries, and legal grounds for regulating abortion. Different regulations are presented in three subsections; legislation in middle east, in Europe and in other jurisdictions.

#### A: Abortion Legislation in Middle East

Legislation concerning abortion in the middle eastern region is different from a country to another. Where we notice various views in relation to abortion in countries of the middle east, from repressive to permissive approaches.

(23) Yusuf Al-Qaradawi, *The Lawful and the Prohibited in Islam* (Al-Falah Foundation for Translation, Publishing and Distribution), 196.

(24) This issue will be discussing in Part: IV.

(25) This principle is stated in Art. 3 of the Convention on the Rights of the Child 1989.

(26) Helen M. Alvare, "Gonzales v. Carhart: Abortion Law that Looks Like Family Law," *Life and Learning* xvii, 147 ,129

Firstly, the current Iraqi law adopts conservation approach in relation to abortion, it prohibits the termination of a pregnancy by any means and for any purpose, with or without the pregnant woman consent. Where, consent of the pregnant woman for performing abortion does not make it legal. So, the prohibition of abortion is absolute in Iraq.<sup>(27)</sup> Although legal provisions in relation to abortion concerning abortion offense under Iraqi penal code did not include any explicit exceptions allowing abortion, the only exemption for carrying out abortion is devised from the general principle of the necessity which indicates that anyone is not liable for committing a crime under necessity for avoiding or preventing a fatal risk. So, physician who terminates the pregnancy for saving the pregnant woman's life is not criminally liable under the Iraqi law.<sup>(28)</sup> This is the only exemption which permits carrying out abortion in Iraq. With same attitude, law in Egypt forbids performing abortion, where any action may cause a miscarriage to a pregnant woman is penalized in Egypt regardless whether it is performed with consent of the pregnant woman or without such consent.<sup>(29)</sup> However, the Egyptian law includes exemption which allows terminating pregnancy in order to save life of the pregnant woman, when the pregnancy forms a threat to the life which should be approved by two specialists.<sup>(30)</sup> Jordanian law concerning abortion increases the scope of exemptions that allow abortion, it prohibits performing abortion except in certain circumstances; for saving the woman's life, or to preserve her physical and mental health. In such cases, performing abortion could be done by specialist on request of the pregnant woman, and with approval of two specialists who should certify the necessity for carrying out abortion.<sup>(31)</sup>

In regard with laws that adopt liberal approach, Turkish law permits voluntary and safe abortion on demand of the pregnant women during the first ten weeks of the pregnancy, unless there is danger could be caused as a result of carrying out abortion. In addition, late-term abortion, after ten weeks of conception, is allowed on request of the pregnant only if there is a medical necessity requires the termination of a pregnancy, such as if the pregnancy represents a risk on the pregnant woman's life, or if there is risk that unborn child would be born with defects. In such cases it is permitted to perform abortion at any stage of the pregnancy by specialized physician.<sup>(32)</sup> Furthermore, law in Tunisia Similarly permits performing abortion by specialist in hospital or licensed clinic on request of the pregnant woman during the first trimester of the pregnancy, or after that gestational age if there is a risk involves with the pregnancy may affect health of the mother, or if the child might be

(27) Penal Code 1969 (Iraq), s. 417.

(28) Penal Code 1969 (Iraq), s. 63.

(29) Penal Code 1937 (Egypt), ss. 264-269.

(30) Code of Ethics, Regulation No. 238 of 21 March 2003 of the Ministry of Health and Population (Egypt). s. 29.

(31) Public Health Act 2008 (Jordan), s. 12 A.

(32) The Population Planning Law No. 1983 ,2827 (Turkey), s. 5.

born with serious disease or impairments.<sup>(33)</sup>

## B: Abortion Legislation in Europe

Most of the European countries adopt a permissive view in regard with abortion. Where, they support the woman's rights to the personal privacy, and basing on that allowing the pregnant woman to terminate her pregnancy. This attitude is consistent with the European convention of human rights 1950.<sup>(34)</sup> The general view in Europe with little differences, is that performing abortion on demand of the pregnant woman is permitted at early stage of the pregnancy, with some restrictions about late-term abortion.

The Termination of a pregnancy in Germany generally is prohibited and penalized.<sup>(35)</sup> But, it is allowed in exceptional conditions, where German law permits abortion under certain circumstances. The termination of pregnancy by a physician is allowed during the first twelve weeks of the pregnancy on request of the pregnant woman who has received counseling prior to the abortion procedure.<sup>(36)</sup> Further, the time for requesting abortion by the pregnant who has obtained counseling would be until twenty-two weeks of conception, if there is court order for the termination of pregnancy.<sup>(37)</sup> In addition, abortion would be performed for a medical necessity which requires the termination of pregnancy, when there is unavoidable risk involved with the pregnancy on life of the woman or her physical or mental health.<sup>(38)</sup>

Likewise, the abortion Act 1967 in Britain permits carrying out abortion by licensed physician up to twenty-four weeks of the pregnancy if there is involved risk with pregnancy threatens the physical or mental health of the pregnant woman or her family member.<sup>(39)</sup> The termination of pregnancy is permitted for a medical necessity to save life of the pregnant, or for preventing health permanent injury in her mental or physical health, as well as abortion is allowed if there is risk on the physical and mental health of the unborn child who might be born with abnormalities.<sup>(40)</sup>

Furthermore, Law in Netherlands adopts liberal view about termination of pregnancy. The law on the termination of pregnancy increases time for requesting abortion to twenty-four weeks of the gestation. It permits physicians to perform abortion on demand of the pregnant woman, who has obtained counseling about

(33) Criminal Code, law No. 53, c. 1973 ,214 (Tunisia).

(34) Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 1950 ,4, Article 8.

(35) German Criminal Code 1998, s. 218

(36) German Criminal Code 1998, s. 218a (1).

(37) German Criminal Code 1998, s. 218a (4).

(38) German Criminal Code 1998, s. 218a (4).

(39) British Abortion Act 1967, c. 87, s. 1(1) (a).

(40) British abortion act 1967, c. 87, s. 1(1) (b,c,d).

abortion, up to twenty-four weeks of the pregnancy.<sup>(41)</sup> So, the pregnant woman is free to terminate her pregnancy as she wishes in hospital after receiving counsel in regard with abortion. Late-term abortion, after twenty-four weeks of the conception, could be only performed in limited circumstances on medical grounds, as if there is serious untreated fetal abnormality and the newborn will suffer because of that.<sup>(42)</sup>

Finally, Irish law on the contrast, adopts a conservative approach in relation to carrying out abortion. Where, performing abortion is permitted in very limited conditions. Such a conservative approach is due to the Irish constitution provides full protection to fetus, as it recognizes the right of unborn child to life as same as of other individuals.<sup>(43)</sup> There is exemption which allows the termination of pregnancy for saving the pregnant woman's life. Where the Act concerning the protection of the pregnant life refers that it is lawful performing a medical procedure by practitioner to end the life of unborn child if there is a real risk involved with pregnancy that likely to affect the pregnant woman, where she who lose her life because of the continuation of pregnancy.<sup>(44)</sup>

### C: Abortion in Other Jurisdictions

In Australia, abortion is regulated by state legislation. The state of New South Wales (NSW) has just recently passed a legislation concerning abortion, it allows termination of pregnancy by specialist in hospital for a woman who is twenty-two weeks or less pregnant with her consent.<sup>(45)</sup> Late-term abortion could be performed by specialist in emergency cases for saving the pregnant woman's life and other fetus life, otherwise late-term abortion requires an agreement of another specialist, and should be based on sufficient grounds as if there is a medical and social circumstance requires carrying out abortion.<sup>(46)</sup> In Victoria, Abortion act permits termination of pregnancy by licensed practitioner during first twenty-four weeks of the pregnancy with the woman consent.<sup>(47)</sup> Performing abortion, after twenty-four weeks of the pregnancy required agreement of two licensed practitioners on belief that termination of pregnancy is proper in all circumstances.<sup>(48)</sup> Further, abortion law in Western Australia (WA) allows abortion if it is done on a good faith by a medical

(41) Law on the Termination of Pregnancy 1981 (Netherlands), s. 3.

(42) Directions on the Non-Prosecution of Cases of Euthanasia Not by Request and Late Abortions 2007 (Netherlands), 6.6.2 available in English language at: <https://www.government.nl/topics/euthanasia/euthanasia-and-newborn-infants> (last visited 6 April 2020).

(43) Ireland's Constitution of 1937, art 40.3.3 stipulates that "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

(44) Protection of Life During Pregnancy Act 2013 (Ireland), s. 1) 7).

(45) Abortion Law Reform act 2019 (NSW), s. 5.

(46) Abortion Law Reform act 2019 (NSW), s. 5) 6).

(47) Abortion Law Reform Act 2008 (Vic), s. 4.

(48) Abortion Law Reform Act 2008 (Vic), s. 5.

practitioner and with skills and reasonable care,<sup>(49)</sup> on request of the pregnant woman during first twenty weeks of the pregnancy in case if the pregnant woman would suffer personal, family or social circumstances because of her pregnancy.<sup>(50)</sup> Moreover, performing abortion is permitted after twenty weeks of the pregnancy, with agreement of two specialists and approval of the minister of health, if there is a risk threatens physical or mental health of the woman or the child.<sup>(51)</sup>

Finally, law in New Zealand bans abortion except in a certain circumstance, when performing abortion, on a good faith, is necessary for saving the life of the pregnant woman.<sup>(52)</sup> Further, it permits termination of pregnancy, during the first twenty weeks of the gestation, in exceptional circumstances including; preserving the mental and physical health of the pregnant woman, or a child would born with mental or physical abnormalities, or if the pregnancy has occurred as a result of sexual assault or incest.<sup>(53)</sup>

#### IV: Discussion and Recommendation

This part provides discussion about main the points and arguments in relation to abortion, and it highlights outcomes of the study, as well as presenting some recommendations for reforming Iraqi law regarding abortion.

##### A: Discussion and Findings

The attitude of Iraqi law in regard to abortion is criticized as it included general prohibition on abortion and penalizing any action may miscarry a pregnant woman by any instrument or means, regardless any other circumstances may require carrying out abortion. Iraqi law here totally ignored fundamental rights of the women specially rights to enjoy life and liberty as well as personal privacy, it also ignored the best interest of the child (newborn). Legal provisions of abortion focused on the protection of fetal right in life although human embryo is not recognized as a person, especially at early phase of the gestation. Moreover, Iraqi law did not take into account stage of development of conceived fetus. So, Iraqi law is criticized in relation to abortion issue for not including exemptions in this context, where a pregnant woman may have a legitimate interest in termination of her pregnancy, as if the pregnancy is resulted from rape or incest, or if there is fetal disorder, as well as if the pregnancy threatens health of the pregnant women. where, medical necessity could consider a justification for the termination of pregnancy in order to protect the woman health and newborn welfare.

In this context, it is asserted that adopting prohibitive or restrictive

(49) Acts Amendments (Abortion) Act 1998 (WA), s. 4, which amended s. 199 of Criminal Code Act Compilation Act 1913 (WA).

(50) The Health Act 1911 (WA), s. 3) 334).

(51) The Health Act 1911 (WA), s. 7) 334).

(52) The Crimes Act 1961 (NZ), s. 182.

(53) The Crimes Act 1961 (NZ), s. 187 A.

approach concerning abortion might not represent a good choice for minimizing number of abortions. Where, the pregnant women who wish or need to terminate the pregnancy for different intentions and purposes will look for illegal abortion to achieve abortion which is usually unsafe procedure.<sup>(54)</sup> Studies indicated that about %56 of overall abortions in developing countries consider unsafe procedure which is high rate compared with %6 in developed countries.<sup>(55)</sup> The increased rate of unsafe abortion in the developing countries could be due to a prohibitive and extremely restrictive approach concerning abortion, compared with abortion in the developed countries, where a liberal approach is existed.

In terms of abortion and fetal rights, abortion may not be contradicting the fetal rights, right of the human embryo to life. Where, the human embryo is not recognized as person, and performing late-term abortion in certain circumstances could be necessary for protecting interest of newborn. Specially, if it is presumable that newborn will suffer a serious untreated diseases or disorder. So, it is right of the newborn to be born healthy and wanted child in the family and society not suffering from serious diseases or disorders affect their physical or mental health. Although Iraqi law prohibits abortion for protecting human fetus, that does not mean that human fetus is recognized as a human being, where penalty imposed in case of abortion is less sever that penalty in case of murder.<sup>(56)</sup> Further, in relation to attitude of Islamic jurisprudence, it is noticed that there is no consensus about legality of abortion, Muslim schools are varied about it from restrictive to liberal approach. It is, however, the general acceptance of the different opinions of scholars agree that performing abortion during first forty days of the gestation is permissible, and late-term abortion after four months of the gestation is prohibited.

In regard with abortion and the women's rights, rights of the pregnant woman to enjoy life and her reproductive choice as well as personal and family privacy may represent a sufficient ground for the termination of a pregnancy, especially at early stage of the pregnancy. That would enable woman to be free for living her life as she wishes, where it is right of woman to choose and make decision about her pregnancy. Especially, when the pregnant woman would like to terminate the pregnancy because she is not ready to become mother and have baby, or there are for social and economic reasons for performing abortion. However, rights of the pregnant woman to liberty and privacy is insufficient as justification for the termination of pregnancy after the first twelfth week of it, when fetus organs are formed inside the uterus. In such case, law should have interest in protection potential human life of the fetus, unless there is risk threatens health of the woman

(54) "Unsafe abortion occurs when a pregnancy is terminated either by persons lacking= the necessary skills or in an environment that does not conform to minimal medical standards, or both." World health organization <https://www.who.int/news-room/fact-sheets/detail/preventing-unsafe-abortion> (last visited 15 April 2020).

(55) Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, Contemporary Bioethics. 156.

(56) See murder crimes, Iraqi Penal Code 1969, ss. 411-405.



or her fetus. The priority is for protection of potential human life over protecting an ensuring the right of the pregnant woman to liberty and privacy. So, abortion here would be prohibited unless it is based on other serious considerations. For instance, performing abortion for medical necessity to save life of the pregnant woman, or preserving her physical and mental health. In addition, performing abortion for social necessity as if the pregnancy occurred as a result of rape or sexual assault. In such case protection of the woman from any risk threatens her life or health, as well as protecting the reputation of family is outweighing protecting the potential human life of human fetus.

## B: Recommendations to Reform Iraqi Law

As discussed, there is an interest of Iraqi law for regulating of abortion in accordance with needs of individuals to protect rights of women and newborn as well as society. It is recommended that Iraqi law should be reformed by enacting a special legislation concerning abortion for regulating and controlling medical procedures for performing abortion. The principal factors that should be considered and taken into account for determination of the legality of abortion are; timing of the pregnancy (gestational age) and purpose of performing it as well as the best interest of newborn. We believe that a proposal model for regulating performing abortion as follows: -

1. Illegal abortion: any action or procedure might lead to abortion without request and consent of the pregnant woman considers illegal and penalized. This include committing violation against the woman body, or performing medical procedure by physician or any other causing the termination of a pregnancy against the wish of the pregnant woman.
2. Early safe abortion: Law should permit performing abortion by a qualified skilled personal at a licensed hospital or clinic during the first twelve weeks of the pregnancy, on request and informed consent of the pregnant woman and her husband if she is married, or and her parents' consent if she is minor under eighteen years old, after receiving a counsel about medical and social consequences of performing abortion. The Termination of pregnancy up to twelfth week of the pregnancy is not contradicting Islamic view about fetal right to life, where there is no consensus among Muslim scholars for prohibition of abortion at early stage of the gestation.
3. Late-term abortion: performing abortion after the twelfth week of the pregnancy should be prohibited for protecting interest of unborn child and its right to life, unless there is actual necessity requires carrying out abortion. So, late-term abortion would be permitted on the request of the pregnant only in exceptional and limited circumstances relating to health of the woman and her fetus. Exceptional conditions for performing abortion may include saving the pregnant woman's life, or if there is a risk involved with the pregnancy

threatens the physical or mental health of the pregnant. Furthermore, if there is a serious untreated disease or disorder might affect mental or physical health of the newborn, such as if the child would suffer abnormality or impairment after its birth. In addition, termination would be allowed if the pregnancy has occurred as a result of rape or incest. Where, performing abortion and termination of pregnancy in such cases would protect the woman and her child as well as family reputation.

4. Establishing specialized panel: it consists of number of specialists, task of this panel is to look at presented applications for performing late-term abortion. The Termination of a pregnancy in exceptional circumstances would require, in addition to other general requirements, approval of the panel for performing abortion if it is based on sufficient grounds. The general grounds for termination of pregnancy under exceptional cases would be represented in preserving health of the woman, as well as health of born child, as both have the right to enjoy life without suffering from any mental or physical impairment.
5. Issuing detailed regulation: such regulation is to be issued by the ministry of health, to determinate a list of serious and untreated diseases and disorders that presumably to affect mental or physical health of newborn or the woman. Such diseases consider a justification for performing abortion.



## V: Conclusion

This paper has highlighted regulation of abortion in the light of collusion of human rights and controversial debate over it. It has been argued that rights of women to liberty and personal privacy support performing abortion on the request of the pregnant woman, as this is personal matter and government has no right to intervene by prohibition abortion or restricting this right. Though, the right of the pregnant in termination of the gestation is not absolute, due to practicing this right should not cause any harm and affect negatively on rights of others including the fetal right to life. In addition, the termination of pregnancy on the request of the pregnant should be restricted depending on gestational age.

This study has also shown that existing legal provisions concerning abortion in Iraq safeguard the fetal rights to life more than the woman rights, and these legal provisions are insufficient and inadequate to regulate issue of abortion. The conservative view of Iraqi law that prohibits abortion might not represent a suitable choice for controlling and regulating this issue, where a pregnant woman who needs to terminate her pregnancy may seek illegal way to ride of the pregnancy which is often unsafe procedure of abortion. So, it is necessary that Iraqi law to ease restrictions about performing abortion, and adopt more permissible view towards the right of the pregnant woman to abortion.

It has also suggested that performing abortion at late stage of pregnancy, after twelve weeks of gestation, should not be permitted, where interest in protection the potential human life of the conceived formed fetus has the priority, and it is outweighing interest for protection of the pregnant woman right to liberty and privacy. So that, late-term abortion is prohibited unless there are certain circumstances require abortion for a medical or social necessity. Exceptional circumstances here include performing abortion for saving the pregnant life, or preserving physical and mental health of the woman, as well as if newborn would be born carrying serious diseases or disorders, or for protection the privacy and reputation of the family in case if the pregnancy is resulted from rape or incest.