



U. G. LAW

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

Homosexuality

Debauchery and Incitement to Debauchery in Egyptian Legislation

Legal Overview





U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

Summary

- Egyptian legislation does not include any reference to the term "Homosexuality" nor does it define it.
- The Court of Cassation has interpreted the term "Debauchery" which is included in Law No. 10/1961 on Combatting Prostitution, to mean "sex between men."
- The crime of debauchery as prescribed in Article 9; Paragraph (c) of Law 10/1961 is unconstitutional. First, the word debauchery is ambiguous, and vague. Second, the linguistic and terminological definitions of the word do not specifically express the act of sex between men.
- Egyptian legislation does not criminalize sexual act between women "Lesbianism".
- Elements of the crime of "inciting debauchery" are not be satisfied simply by the act of raising a flag, regardless of its symbolism.
- The forced anal examinations conducted on suspects- "the accused"- to determine their sexual orientation constitute a form of torture. More so, these examination should not be relied upon as incriminating evidence before the court, as it was obtained through an illegal procedure, specifically a violation of right to bodily integrity, which is protected in the Egyptian Constitution.



U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

Introduction

Most recently, the topic of homosexuality has received much attention in both traditional and social media outlets. It has become a hot topic and sparked much controversy and became a topic of my debate particularly among legal practitioners and others in the public space. The recent attention given to the topic goes back to September 22, 2017, when Mashrou' Leila (a rock band) held a concert in Cairo. During the concert, some concertgoers waved a rainbow-coloured flag. The rainbow flag was originally designed by Gilbert Baker, who was challenged by Harvey Milk, a gay rights activist to come up with a symbol of pride for the gay community. The flag first appeared in the late 70s after the United States emerged from the Vietnam War. The rainbow flag became a symbol of lesbian, gay, bisexual and transgender (LGBTQ) pride, and was used during protests to demand freedom to express sexual orientation in all its forms.

In the days that followed, the media mounted a fierce attack on the individuals who raised the flag. This was followed, and according to a story by Reuters¹, by sweeping arrests-as many as 33 were arrested. They were charged with committing debauchery, inciting debauchery., and joining an outlawed group that incite deviancy and debauchery. Upon concluding its interrogations, the State Security Prosecution ordered the provisional detention of several those arrested for 15 days pending investigations.

More so, BBC reported that based on a report by Amnesty International, the Egyptian authorities will subject six of the men accused in this case to anal examinations by the Forensic Medical Authority.²

United Group noted that there are a number of variant legal opinions on this issue. Some argue that Egyptian laws do not define/recognize a crime related to homosexuality in its two forms--gay and lesbian, and that subjecting those “accused of the crime” to anal examinations constitute sexual violence and a violation of international law. Others argue otherwise.

¹ https://ara.reuters.com/article/ME_TOPNEWS_MORE/idARAKCN1C72KB

² <http://www.bbc.com/arabic/live/41459156>



U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

In this Paper, United Group will attempt to respond to many of the questions raised about this issue, however from a strictly legal point of view. Some of the key questions addressed include: What is the definition of homosexuality? Is homosexuality criminalized in the Egyptian laws, and if yes, what is the prescribed punishment? Does raising the rainbow flag constitute an act of inciting debauchery? Is sex between women criminalized in the law? The paper will also briefly look into the crimes of debauchery and inciting debauchery according to Law No. 10/1961 on Combatting Prostitution.

1- Definition of Homosexuality³

The term ‘Homosexuality’ is used to refer to the sexual relationship between two individuals of the same sex (male - male, female - female). The term was coined by a German psychologist Karoly Benkert in 1869. Since then, the term became widely used in all languages, and is now one of the terms used in the natural, psychological, social and legal sciences.⁴ The term was recently introduced in the Arabic language.

The term is a compound of Greek homo, same, and Medieval Latin, sexualis, sexual. It is a generic term that describes a sexual relationship between two individuals of same sex, without specifying whether the sexual relationship is between males or females. Thus the term "Male Homosexuality" is used to signify that the sexual relationship is between two men, and "Female Homosexuality" to signify that the sexual relationship is between two women.⁵

Outside the boundaries of the medical and psychological fields, the term “Al Liwat” is the traditional and commonly used term in the Arabic language for "Male Homosexuality". The term is derived from the name of the Prophet of God Lut (upon him be peace). Others relevant terms in the Arabic language are also derived from the same origin, such as “Al tat” and “Laat”, all to denote acts similar to the acts committed by the people of Lut. As for Female Homosexuality”, “Sihag” is the traditional Arabic

³ ElNawaisa, A. M. (2009). *Consensual Homosexuality: Its Prohibition and Permissiveness* (Vol. 37, Sharia and Law Magazine). UAE: Faculty of Law, UAE University.

⁴ Charbel, M. (1999), *Our Sexual Problems: Reasons and Treatment*. 1st ed. Beirut: AlMaaref foundation, p.70.

⁵ Kamal, A. (1990) *Sex and Self in the Human Life*, 2nd ed. London: Waset House, p.238.



U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

term which is widely- used to refer to it.⁶ In the English language though, there are several terms for describing same-sex relationship between two women, the widely-used term is Lesbianism, which is derived from the name of a Greek island called Lesbos.

2- Laws on Homosexuality in Different Countries⁷

While all agree that homosexuality is as old as humanity, yet the matter of criminalization or permissibility homosexuality remains an unsettled issue, with many considerations influencing the perception towards it. By the second half of the twentieth century, several countries witnessed revolts against laws that criminalize homosexuality. By time, regulating the issue has gone beyond the notion of criminality or permissibility. In some countries, laws now recognize homosexual unions or marriages, with consideration to all the legal consequences thereof, and prohibit and criminalize discrimination on the grounds on sexual orientation.

2-1 Homosexuality in the Legislation of Arab Countries

Some Arab countries explicitly criminalize homosexuality. For example, under Article 534 of the Lebanese Penal Code homosexuality is punishable with up to one year imprisonment for every "intercourse against nature". Article 520 of the Syrian Penal Code also penalizes homosexuality with an imprisonment of up to three years. The term "Intercourse against nature" refers to sodomy and lesbianism, as well as anal intercourse between a man and a woman. Likewise, Article 50 of the Jordanian Military Penal Code criminalizes "whoever performs sex with another person of the same sex with his consent." The Sudanese law only criminalizes male homosexuality (sodomy), according to Article 148, Paragraph 1:"There shall be deemed to commit sodomy, every man who penetrates his glans, or the equivalent thereof, in the anus of another woman or man, or permits another man to penetrate his glans, or its equivalent, in his anus. "Article 193 of the Kuwaiti Penal Code criminalize "the sexual act between a man and another man with his consent", so does Article 223 of the Omani Penal Code states that criminalizes "whoever performs sensual acts with

⁶ Ibn Manzur, A. (1994). *Lisan al 'arab*, Beirut: Sader, p.394.

⁷ ElNawaisa, A. M., previous reference, p.246.



U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

another person of the same sex.” Article 377 of the Bahraini Penal Code penalizes “whoever preforms sex against nature”, and Article 102 of the Qatari Penal Code likewise criminalizes "sodomy". While the federal Penal Code of the United Arab Emirates does not criminalize homosexuality, Article 80 of Abu Dhabi Penal Code criminalizes it.

2-2 Homosexuality in African legislations

On the African continent, 34 out of 51 countries criminalize homosexuality-sodomy and lesbianism. Among the countries that criminalize such acts are: Angola, Botswana, Nigeria, Cameroon, Djibouti, Eritrea, Ethiopia, Gambia, Ghana, Guyana, Liberia, Malawi, Mozambique, Senegal, Sierra Leone, Tanzania and Togo. Other countries criminalize only sodomy-male same-sex sexual activity-, such as Zimbabwe, Zambia, Uganda, Kenya and Namibia.

2-3 Homosexuality in European and US Legislations

The 1994 decision of the UN Human Rights Committee on the case of Toonen v. Australia, is considered a groundbreaking decision by a global body, concerning international human rights law and discrimination based on sexual orientation. The decision was based on a petition filed by Nicholas Toonen, an Australian, before the committee two provisions of the Tasmanian Criminal Code that criminalized all forms of sexual conduct between consenting adults. The Committee unanimously held that the Act violated Articles 2/1 and 26 of the International Covenant on Civil and Political Rights.

In 1995, the United Nations Committee expressed its concern about the encroachment of private life in some states in the United States of America that criminalizes sexual relations between adult consenting partners of the same sex carried out in private.⁸ In 1998, the committee expressed its concern regarding some provisions in the Cypriot laws that criminalize performing sex between adult consenting partners.⁹

⁸ U.N.doc.ccpR/c/79/Add.50

⁹ U.N.doc.ccpR/c/79/Add.88



U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

Over the years, countries legalized homosexuality after being criminalized. For example, France legalized homosexuality after the French Revolution and its Penal Code of 1791 does not criminalize homosexuality. Poland decriminalized homosexuality in 1932, other countries followed suit. Sweden decriminalized homosexuality in 1944, Greece in 1951, England and Wales 1967, Germany in 1968, Portugal in 1982, Spain in 1979, Russia in 1993, and Japan in 1980. In the United States of America, most states decriminalized homosexual acts between consenting adults, starting with Illinois in 1962. Other states followed: Connecticut in 1971, Colorado and Oregon in 1972, Delaware, South Dakota and Hawaii at 1973 then Ohio at 1974. The seventies witness decriminalizing homosexual acts in a

number of states including California, West Virginia, Wyoming, South Dakota, and Vermont. In the eighties, Alaska and Wisconsin decriminalized the act, followed by Maryland, Georgia, Tennessee, Montana, Nevada in the nineties and Arizona and Minnesota in 2001.

In 2003, the Supreme Court struck down the sodomy law in Texas, and by extension, the ruling invalidated sodomy laws in the remaining states where it was still on the books. Last, on June 26, 2016, the Supreme Court legalized same sex marriages throughout the United States. A year later, in 2017, the German Parliament passed a law legalizing marriages and full adoption rights for same sex-couples.

3- Crimes against Morality in Egyptian laws

This category of crime-crimes against morality-, which are relevant to the subject of this paper, includes a wide range of crimes prescribed in the Penal Code and others in Law No. 10 of 1961, on the Combatting of Prostitution.

The Penal Code enumerates several these crimes including:

Crime of scandalous act in public: Article 278 of the Penal Code stipulates that "Whoever commits in public a scandalous act against pudency shall be punished with detention for a period not exceeding one year, or a fine not exceeding three hundred pounds." Perhaps the most lucid definition of this criminal act is the one provided by



U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

the Court of Cassation in its rulings, which defines it as: "The willful act of impudency that offends the decency of the victim, by words or sight."¹⁰

Crime of molesting a female in a manner that offends her modesty: Article 306 bis A of the Penal Code stipulates that: "A penalty of imprisonment for a period not exceeding one year and a fine of not less than two hundred and not more than one thousand pounds, or either penalty, shall be imposed on whoever molests a female in a manner that offends her modesty, by words or deed in a public road or a frequented place. "It is worth noting here that for this type of crime, it is essential that the words or deed Committed be sufficient enough to reveal the nature of the breach of modesty. Such a determination depends on a number of factors including the conditions and circumstances of each case, the established customs and culture standards that might exonerate the offender, and how these acts deeds and acts are widely perceived, in other words, the extent to which they indicate hidden intentions that are different from appearance. Thus, for the act to be considered a crime, it is not necessary that the offence of modesty materialize, it is sufficient that the deed or words be considered as capable of offending such modesty.

Besides these two examples, there are other acts that are considered crimes against public morality, including sexual assault, rape and promoting lewdness. While these examples are not directly related to the issue under review, yet, they are highlighted here to note that there are other crimes against morality that are contained in Law No. 10 of 1961. This law includes several terms that are very close to each other, to the extent that some would think that using one of the words would suffice and obviates the need for using the other words. Below are some examples of such words and their meaning:

Prostitution: Linguistically speaking, the definition of the word overlaps with that of other words such lewdness, malevolence, debauchery, licentious, adulterer and others. However, as a term, it is restricted to mean: engaging in the practice of lewdness in a non-selective manner, women prostitution.¹¹ In other word, the term prostitution is

¹⁰ Court of Cassation, session held in 23 Nov. 1928, *References Book*, p.567.

¹¹ Hatata, M. (1984), *Prostitution Crimes: A Comparative Study*. PhD, Cairo University Library.



U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

restricted to the prostitution of women who engages in sexual acts with others, in a non-selective manner.¹²

Harlotry: Linguistically speaking, the definition of the word overlaps with that of other words. It carries more than one meaning including: exceeded the limits, aggression, bullying, and a woman engaged in harlotry means that she is a woman who deprived and gained something through her depravation. In terms of terminology, it denotes to acts of harlotry committed by men or women- in other words, men and women committing acts with the purpose of directly fulfilling the lust of others and in a non-selective manner.¹³

Cohabitation: There are two categories of cohabitation: permanent and temporary. As for the former, it refers to an agreement between a male and a female or male and another male, with the purpose of enjoying each other for an unspecified period of time. As for the latter, it refers to the desire to fulfill the sexual lust once or several times, driven by love, or sexual desire between a male and a female or a male and another male.

Lechery: Is the carrying out of an illicit act or acts, and it applies to both men and women. The term is broad enough to encompass all sexual acts that are illicit.

Obscenity: Any act that a person carries out on oneself or with others for the purpose of fulfilling the sexual lust of another person, irrespective if the act is in the order of nature or contrary to it.¹⁴

Debauchery: Linguistically, the word means engaging in licentious acts, with indifference. In this regard “indifference” is key here in distinguishing debauchery. In other words, a debauched individual is a lecherous individual, however acting with indifference. Additionally, “an individual who debauched”, means that the individual lechered and adulterated. In terms of terminology, it is customary to use the term “debauched” for describing an individual who commits licentious acts without being

¹² Fouda, A. (n.d.). *Crimes related to common decency and honor in light of jurisprudence and Cassation*, 2nd ed. Legal Books House, p.22.

¹³ Elzahaby, E. (1997). *Sexual Crimes*, 2nd ed. ElRa'ei Press, p.213.

¹⁴ Abdeen, M. and ElQamhaway, M. (2007) *Common Decency Crimes*, p.53-54



U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

awkward, or gloats over his acts. The term “debauched individual” is used to describe an individual who indulges in drinking alcohol, committing adultery/fornication, lying, or swearing deceptively, or giving false testimony.¹⁵

4- Homosexuality in Egyptian legislations

Egyptian law does not use the term homosexuality. However, all relevant judicial rulings and developed jurisprudence consistently consider the term “debauchery” to mean a sexual relationship between a man and another man (Luwat/male homosexuality). Neither the law, nor judicial rulings address women homosexuality (Lesbianism).

Article 9, Paragraph C of Law No. 10 of 1961, equally criminalizes the practice of prostitution or debauchery. It stipulates that "a penalty of imprisonment for not less than three months and not exceeding three years, and a fine of not less than twenty-five pounds and not more than three hundred pounds, or either of these penalties, will be imposed on whoever habitually engages in debauchery or prostitution." It should be highlighted here that the legislature has consistently used the two term of "prostitution" and "debauchery" in all the provisions of the law, which indicates that each term has its own meaning-that is the law distinguishes between the two words.

The Court of Cassation stated that “Since Paragraph 3 of Article 9 of the aforementioned law provides punishment for "whoever habitually engages in debauchery or prostitution", thus, the understanding of this provision indicates that the specified crime is considered as to have occurred only through engaging in obscene activities in a non-selective manner, and that this practice is habitual, whether the individual committing the offense is a woman or a man. In the instance a woman engages in obscenity, and surrenders her honour to anyone who requests it, the obscene act is considered prostitution - an act that is committed by only such a woman-a prostitute. On the other hand, “debauchery” is the term associated with men who surrender their honour to any other man in a non-selective manner- an act which is committed by only by such men who engage in debauchery. This conclusion is based on the report issued by the First Justice Committee and the Social Affairs Committee of

¹⁵ Abdeen, M. and ElQamhawy, M. *Previous reference*, p.151.



U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

the Egyptian Senate regarding the draft law No. 68 of 1951, which provisions were included in the current law, Law No. 10 of 1961 on Combatting Prostitution. More so, the Explanatory Memorandum of the current law explicitly stated that “the committee disagreed with the opinion of some of its members who proposed deleting the term “prostitution” and only including the term “debauchery” which linguistically means the committing of vice and immorality in general terms, without be specifically associated with either a man or a woman. However, and in line with judicial custom, which uses the term “prostitution” to refer to obscene acts by women, and the term “debauchery” to refer to obscene acts by men, the committee decided to retain both terms in the law, so as the text will include reference to obscene acts by men and women.”¹⁶

5- Constitutionality of Paragraph (c), Article 9, of Law No. 10 of 1961

Paragraph(c), of Article 9 of Law No. 10 of 1961 is unconstitutional. The term "debauchery" referenced in the article is vague, ambiguous and lacks precision. Both the linguistic and terminological definition of the term do not express the act of male homosexuality. More so, Article 9, Paragraph(c), of the law does not provide any definition for the crime, and does not its elements in any clear and definitive manner. Thus the way the article is formulated is neither authoritative nor precise which, in and of itself, demonstrates the deviation of the legislature in formulating the article and indicates its desire to entrap the innocent , as it is impossible for the average person to assess the risks of his actions in a precise manner. Accordingly, the article is inconsistent with Article 95 of the Constitution.

In one of its decisions, the Constitutional Court affirmed that “... The constitution esteemed individual freedom and considered it one of the natural right inherent to all human beings, and which cannot be taken away. Therefore, to uphold individual freedom, and consolidate its many dimensions, which are dictated by its own nature, an unequivocal and fundamental rule, mandates that the penalty provisions included in these laws must embody a high degree of certainty. Accordingly, the provisions of the law relating to crimes and punishments should not be ambiguous or over-board. Any ambiguity in the prescribed punishment means that its content is not clear to the people as they will differ over its essence, scope of its application and its real intention.

¹⁶ Court of Cassation, *criminal appeal 24450/59 judicial*, session 5 Dec. 1994, Technical Office 45 Part, 1 p.1079.



U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

Thus, it will not clearly define or delineate in any conclusive manner, the acts which are prohibited, rather, it will be render them unknown and ambiguous. As a result, Implementation of the law will be based on subjective standards and influenced by personal notions and impulses. These subjective standards are grounded in the individual assessment and understanding of the content of the law by those responsible for its implementation- in other words, they replace the real intentions of the law with their own understanding of these intentions, and usually their assessment disregards and twist the real intentions of the law, to entrap innocent people. The basic principle in the drafting penal provisions is that they must be narrowly tailored manner, to ensure precision in its application. As a matter of fact, it is imperative that ambiguity in drafting penal provisions be prohibited, because broad meaning and wide scope are likely to result in the law achieving other objectives that the ones it is meant to achieve.¹⁷

6- Elements of the Crime of Habitual Practice of Debauchery

6-1 The material element (actus reus)

The material element of the crime is considered satisfied when a man habitually commits debauchery in a non-selective manner with the intention of satisfying his desires or desires of others directly. The Court of Cassation has defined this element stating: “Debauchery is associated with men who surrender their honour to any other man in a non-selective manner.”¹⁸

Thus, the material element of this crime consists of:

First: The Practice of debauchery: In this regard, the term “practice” means committing the act, in other words, having sex with other man, even for one time. More so, it does not mean repeating the act, and does not require that the act be performed in a place specified for practicing debauchery-a brothel for example.¹⁹

¹⁷ Supreme Constitutional Court, appeal 105/12 judicial, session 12 Feb. 1994, Technical Office 6 Part, 1 p.154.

¹⁸ Court of Cassation, criminal appeal 3654/57 judicial, session 1 Mar. 1990, Technical Office 41 Part, 1 p.446.

¹⁹ Court of Cassation, session held in 27 Nov. 1951, *Collection of cassation*, p.223.



U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

Second: Habituality: As for the second material element of the crime, habituality, it refers to the repetition of the occasion; however the crime scene is not the same. Thus, this means that the offender should not be asked about the act unless he is engaged in the practice of harlotry. Habituality then is the repetition of this act more than once. The assessment of whether this element of the crime can be deemed proven is left to the court. However, it is only required that the act takes the form of practicing debauchery. It is also required that for “repetition of this act” to be proven, the legally mandated three years must not have elapsed between the practice of two any acts, or between date of committing the last act and the date of commencing the investigation or submitting the case to court. After the three-year limitation period, the right to initiate legal public proceedings lapses.²⁰

Repeating the act of harlotry does not mean it is habitual unless the act is repeated in different and recurring occasions. Therefore, repeating the act in the same occasion and in the same place (scene) does not make it habitual. This interpretation also applies if the act is repeated at one time with different people. Thus, if the individual repeats the act at one time with one specific individual, or if he individual routinely visit a place prepared for the purpose of practicing debauchery and commits the act of debauchery a number of times, then the elements of the crime provided in Paragraph (c), of Article 9 would be satisfied.²¹

In other words, the law does not provide a penalty if the act is committed once but rather if it is repeated and became a routine. In this regard, one can say that the law punishes a situation or condition existing in the person and not just a material act. The Court of Cassation has ruled that the habit of debauchery is characterized by repetition of the occasion, and that assessing whether it is considered habitual debauchery is left to the court.²²

Third: Non-Selectivity in practicing acts of debauchery: This means that the offender commits the act with anyone, in a non-selective manner. Thus, the cohabitation arrangements do not fall under the rubric of the crime of “debauchery”, neither do emotional relationships. Equally, a man who receives another man in his home to

²⁰ Court of Cassation, session held in 30 Jun. 1953, *appeal 729/23 judicial*.

²¹ Court of Cassation, session held in 3 Apr. 1956, *appeal 84/25 judicial*.

²² Court of Cassation, session held in 11 Jan. 1979, *appeal 1529/48 judicial*.



U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

engage in debauchery cannot be considered as someone habitually practicing debauchery. This crime occurs when a man practices acts of debauchery with any other man to satisfy his lust, or the lust of others. A man who practices debauchery will only one man is considered a selective relationship.²³

6-2 The crime of habitual debauchery and its specific intent (dolus specialis)

The offense of habitual practice of debauchery is an intent crime, and criminal intent is a fundamental part of intent crimes. Criminal intent involves a deliberate will directed towards a prohibited purpose stipulated in the Penal Code, and is based on the elements of knowledge and will.

Knowledge means that the offender must be aware of all elements of the crime, that is to say, he knows that he is committing the act of obscenity, without selectivity. The will is the intention of the offender to commit the wrongful act, and his will must be free and legally considered, otherwise the act will not be considered a crime.

The jurisprudence differed whether this crime requires a general criminal intent only or there must also be a specific intent. Some argue that the crime requires a general intent only²⁴, represented by the offender's will to commit the criminal act, having the knowledge about all the elements of his crime. Others hold the view that there must be a specific intent besides the general intent.²⁵ The former, the specific intent, is represented by the intention to satisfy the lust of others in a no-selective manner. Thus, if the offender intends to satisfy his personal desires only, then, he would not have in the specific intent requirement of the crime.

7- Crime of Incitement to Debauchery.

Incite as a word has many meanings such as: urge, motivate, entice. However, used as a technical term, it means to influence the person incited (who is subject to the act of incitement,) to commit a specific act, and convince him of the need to commit the act.

²³ Mohammad, F. (2012). *Legal Responsibility in Prostitution Crimes*, Alexandria: Elgamaa Elgedida House, p.81.

²⁴ Hatata, M. *Previous reference*, p.168. - Abdeen, M. and ElQamhawy, M. *Previous reference*, p.140. - Elshawarby, A. *Previous reference*, p.80.

²⁵ Elzahaby, E. *Previous reference*, p.213.



U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

It also means convincing the person and influencing him to commit an act of debauchery, so that the person incited finds no escape and complies with the will of the inciter, and follow his suit.²⁶

The text of this crime is stipulated in the Article 1 of Law No. 10 of 1961 which states: "Whoever incites a male or female person to commit debauchery or prostitution, or helped him do this, or facilitated it for him shall be liable to imprisonment for a period not less than one year and not more than three years and a fine of one hundred pounds to three hundred pounds."

It follows that incitement takes place when the inciter persuades a specific person to commit the act of debauchery by influencing his will, and directing him towards what the inciter wants. The action of the inciter is considered psychological in nature, as he, aims at convincing the person incited of his ideas and reduce the obstacles that may impede the execution of these ideas.²⁷ Incitement may be limited to encouraging the other to commit the crime which he may have been entertaining before being subjected to the incitement. In other instances, incitement can lead the other to commit the crime.²⁸

As for words, such as praise and advice, that do not influence the will of the victim and incite him to consider practicing debauchery, they do not qualify as incitement.²⁹

Incitement may take different forms. It can be through the use of words, or it can accompanied by some sort of enticement such as offering a gift or a promise, to influence the individual, in the event the inciter has power over him. Incitement also can be through action. In either cases, whether words or actions are used to incite, they must be deemed sufficient or adequate enough to generate an impact on the psyche, of the victim (the other party). In the instance that the words and actions do not lead the victim to be convinced of carrying out the act, then the action of the inciter is considered an attempt to incite.³⁰ Accordingly, as per the Court of Cassation

²⁶ Hatata, M. *Previous reference*, p.370.

²⁷ Elshawarby, A. (n.d.). *Act against Prostitution and Acts against Decency*. Alexandria: Monshaat Al Maaref, pp.27-28.

²⁸ Sorour, A. (1991). *Penal Code Arbiter: General Section*, 5th ed. ElNahda ElArabia House, p.532.

²⁹ Fouda, A. *Previous reference*, p.173.

³⁰ Hatata, M. *Previous reference*, p.373.



U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

ruling: "Incitement must include an offer that has the appearance of seriousness, and in itself is sufficient to influence and seduce the victim to commit debauchery".³¹

The second component of the material element of the crime involves guiding, directing and making known to the victim the ways and means of committing the act of debauchery. More so, the offense is considered substantive irrespective of whether the person incited acted upon the incitement or did not.³²

8- The Specific Intent in the Incitement to Debauchery Offence

Egyptian jurisprudence has concluded that incitement to debauchery is classified as a crime that requires both general and specific intent. The general intent refers to the offender's intention to achieve his goal, that is having the victim engage in the practice of harlotry. As for the specific intent, it refers to offender's intention to push or encourage the victim to practice harlotry in a not selective manner (with anyone and everyone) to satisfy their lust.³³

It should be noted that pimps (inciters) commit the crime of pimping unprompted, but rather of their own accord. The intent to satisfy the lust of others does not necessitate making a request to a pimp or delegating him to facilitate the act. In other words, in the instance that the inciter knows of a man who is infatuated with men, he proceeds, unprompted, with sending him a man, who the inciter knows is homosexual. In this regard, jurisprudence has concluded that the type of sexual pleasure that the pimp provides does not matter- whether it was normal, or substantively deviant, or just watching sex.³⁴

As for the mental element of the offence, it entails the existence of knowledge and will. The offender should be aware that his act of incitement, regardless if he uses words or deed, would result in the victim committing the crime of debauchery. More so, it is immaterial whether the victim committed the crime of debauchery as a result of the

³¹ Court of Cassation, session held in 27 Feb. 1967, *appeal 3052/37 judicial*.

³² Abdeen, M. and ElQamhawy, M. *Previous reference*, p.63.

³³ Abdeen, M. and ElQamhawy, M. *Previous reference*, p.64.

³⁴ Hatata, M. *Previous reference*, p.176.



U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

incitement or not. What is important here is that the inciter's will, which must be free and legally considered, should be directed toward committing the crime³⁵.

9- Criminality of Raising Flags and Symbols

The crime of incitement to debauchery should not be considered materialized by the raising of a flag, irrespective of its symbolism. Simply but, the legal form of the crime cannot be realized by just raising that flag – regardless its symbolism. For the crime - incitement to debauchery- to occur, it requires that defendant influences the victim and convinces him to commit the crime of debauchery, in a manner that the victim is not able to find an escape from committing the crime. It requires that the defendant has control over the will of the person who he incited so as the victim follows his suit. Hence, the defendant has to seriously guide and direct the victim to entice him to practice debauchery. Furthermore, for the crime of incitement to debauchery to be realized the person who raised the flag must have the intention to push the victim into practice debauchery with others, in a non-selective manner, to satisfy their lust. All together these are elements cannot be satisfied by the raising of a flag or any symbol, irrespective of what they may symbolize.

10- Illegality of the Evidence Obtained as a Result of an Anal Examination

The incriminating evidence must be legally obtained for the conviction not to be wrongful. One of the fundamental principles of criminal proceedings is that every accused person is presumed innocent until proven guilty, by a final court ruling.³⁶ Moreover, the criminal judge may reach his decision, using any of the elements of the lawsuit, unless the element was obtained through illegal procedures.³⁷

The Egyptian Constitutions contains several important provisions- Articles 51, 53, 54, 57, and 60 - in Chapter Three, 'Rights, Freedoms and Duties', which are directly relevant to the issue under discussion.

According to these provisions: Dignity is a right of every human and may not be violated; The State shall respect it and protect it; All citizens are equal before the law;

³⁵ Mohammad, F. *Previous reference*, p.139.

³⁶ Court of Cassation, *criminal appeal* session held in 15 Feb. 1984, *35 judicial*.

³⁷ Court of Cassation, *criminal appeal* session held in 9 Feb. 1984, *23 judicial*.



U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

Personal freedom is a natural right, shall be protected and may not be infringed upon; The right to privacy may not be violated, shall be protected and may not be infringed upon , and ,that the human body is inviolable, and any assault or mutilation committed shall be a crime punishable by law.

In addition, Article 94 of the Constitution stipulates that: “The rule of law is the basis of governance in the State. The State is subject to the law. The independence, immunity and impartiality of the judiciary are fundamental guarantees for the protection of rights and freedoms.” Hence, the judiciary is the natural guardian of freedoms. This is particularly important as in general, criminal proceedings entail infringement on rights and freedoms, such as freedom of movement, the right to privacy, and the right to *inviolability* of the human *body*. By resorting to the judiciary, freedoms are protected as judges closely review and oversee criminal proceedings to ensure their legitimacy. There is no doubt that the mission of Judiciary to protect freedoms necessitates the direct oversight of the proceedings which may infringe these freedoms as well as overseeing any legal procedure. This noble mission is indeed a fundamental part of procedural legitimacy³⁸

Since subjecting defendants to coercive anal examinations represents an infringement of their right to bodily integrity, which is protected by the Constitution, the evidence obtained from these examinations is illegal and therefore, cannot be relied on in court for securing a conviction obtained by illegal means.

11- Anal Examinations are a form of Torture

Article 4 of the African Charter on Human and Peoples' Rights stipulates: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”

Coercive anal examinations are one form of torture. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, commonly known as the UN Convention against Torture (UNCAT), defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on

³⁸ Sorour, A. (2014). *Criminal Procedure Code Arbitrator: first book*. ElNahda ElArabia House, p.175.



U . G . L A W

المجموعة المتحدة للقانون نجاد البرعي وشركاه
NEGAD EL-BORAI & PARTNERS

a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed”

In a 2001 report published by Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, he noted and condemned the humiliating coercive internal anal examinations that aim at determining whether a penetration has happened or not.³⁹ The Special Rapporteur described the coercive anal examinations as torturous, cruel, inhuman or degrading. Furthermore, the Independent Forensic Experts Group (IFEG), composed of forensic medicine specialists from around the world, condemned forced anal examinations and issued a statement asserts that, “Forcibly conducting anal examinations on individuals is humiliating, demeaning, and, not surprisingly, almost invariably causes significant psychological suffering”.⁴⁰

It important to realize that that international conventions and covenants, once ratified by the Parliament, become part of the domestic law of the Egyptian State. Article 93 of the Constitution stipulates that “The State shall be bound by the international human rights agreements, covenants and conventions ratified by Egypt, and which shall have the force of law after publication in accordance with the prescribed conditions.”

To conclude, forcing the suspects to undergo anal examinations amount to torture-a crime as stipulated in Article 52 of the Constitution: “Torture in all forms and types is a crime that is not subject to prescription.”

³⁹ U.N.A/56/156

⁴⁰ <https://www.hrw.org/ar/news/2016/04/13/288816>