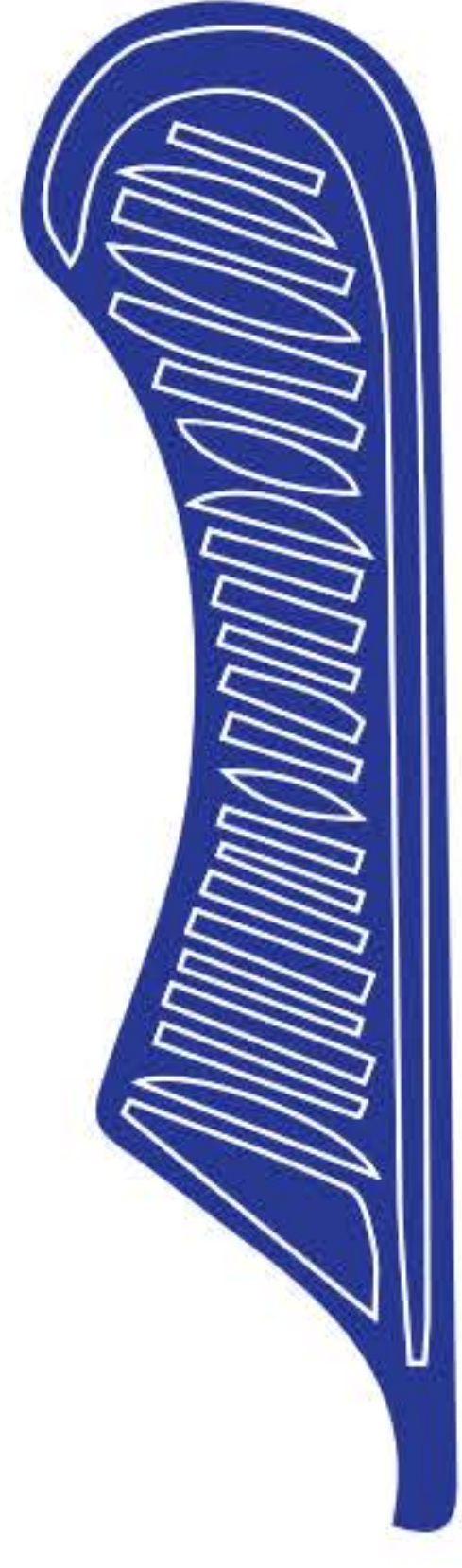


A Litigation Guide on Crimes of Sex Working and Homosexuality (Prostitution and Debauchery)

Supported by Legal Principles from The Court of Cassation and Defense Memorandums Presented in Front of The Egyptian Courts, in Addition to an example of a Constitutional Memorandums on Article 9(C) of Law 10/1961



القاهرة ٥٢

للأبحاث القانونية

CAIRO 52

LEGAL RESEARCH INSTITUTE

Toward a society, aware of its fundamental and bodily rights.

Founded 2020

Cairo, Egypt

Written and Edited by

Nora Noralla

Legal Review

Islam Khalifa & Mariam Mahmoud

**Special Thanks to our Colleagues
Who Provided the Defense Memorandums**

Ahmed Hossam

Mohamed Nader

Mahmoud Othman

Islam Khalifa

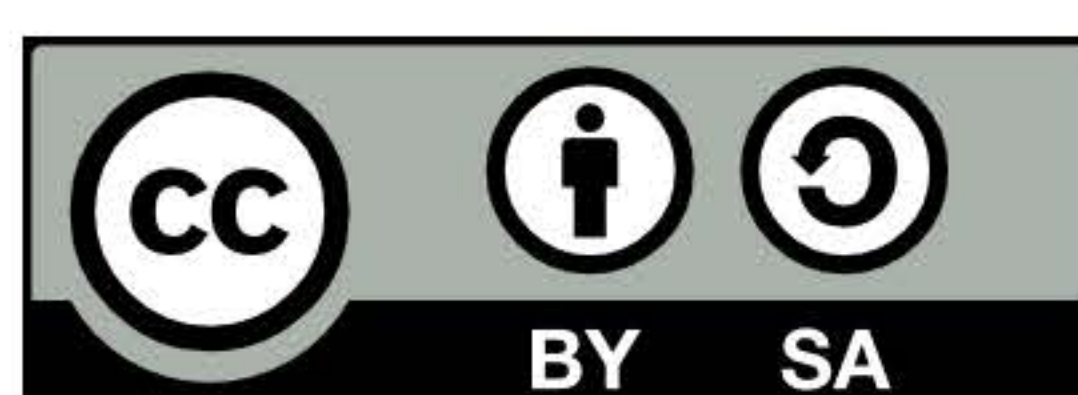
Mariam Mahmoud

In The Memory of Mr. Issac Wadaih, a legal advocate and a mentor who we lost to COVID-19 this year.

www.cairo52.com

info@cairo52.com

All rights reserved Cairo 52 Legal Research Institute
Attribution-ShareAlike 4.0 International (CC BY-SA 4.0)



Introduction

This is an English Summary of the book “A Litigation Guide on Crimes of Sex Working and Homosexuality (Prostitution and Debauchery) “. The book aims to provide a litigation guide and a legal overview of principles and procedures to legal advocates and whoever wishes to know more about “prostitution” or “debauchery” crimes under Egyptian law. The book is divided into three chapters; these complement each other to provide the best possible knowledge on the matter. The first chapter contains a brief explanation of the crimes covered in this book; practicing Habitual Prostitution or Debauchery, the incitement and aiding of Prostitution or Debauchery, the Advertising of Prostitution or Debauchery, and violating public morals. The second chapter provides the reader with a broad collection of legal principles issued by the Court of Cassation regarding the crimes discussed in the first chapter. The third chapter provides the reader with practical examples of different defense memorandums presented in the cases, which were reviewed by Misdemeanor, Appeal, and Cassation courts, in addition to one example of a memorandum regarding the unconstitutionality of the crime of habitual Prostitution or Debauchery. The aim of this book is to offer a comprehensive, yet understandable legal knowledge to a wider audience and provide young lawyers with guidelines they can effectively utilize in defense of their clients. The book consciously makes an effort to reach out to the wider public and not only legal advocates, and for this reason the text is presented in a way that allows everyone interested in sexual and bodily freedoms in Egypt to read and comprehend it.

* This is a translation of only the chapter one, chapter two and three are only available in Arabic. In chapter two, an extended bibliography of important legal principles from the Court of Cassation will be provided and in Chapter Three, we will provide practical examples from different defense memorandums regarding these crimes from different cases from 2014 to 2020. You can view the Arabic version [from here](#).

Chapter one: Brief Legal Explanation for the crimes covered in this book.

Egypt only started criminalizing sex work or “production” as officially called in the early 50s. The Egyptian parliament passed law No 68/1951, which prescribed criminal sanctions for criminalized the entirety of the sex work industry. In 1959 Egypt (The United Arab Republic then) joined the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others and the government brought the domestic law in line with the requirements of the Convention in 1961 with the adoption of Law Nr. 10/1961 on Combating of Prostitution. The scope of this law – which is criminal in nature – covers all aspects of the sex working industry and beyond e.g. homosexuality and transsexualism in some cases. Individuals can be prosecuted for aiding, inciting, seducing and advertising of debauchery or prostitution, in addition to, owning a brothel, forced sex work and habitual debauchery or prostitution. In this chapter, we will cover some of the actions criminalized by this law, in addition to the criminalization scope under Article 178 of the Penal Code. It is important to note that criminal crimes always consist of two core elements; actus reus¹ and mens rea², and whilst actus reus is changeable among different crimes, mens rea is almost always have the same elements to be fulfilled for the crimes under review in his book.

1. What is Al-Bagh’a?

Bagh’a in Arabic refers to any sinful sexual contact and is often used to refer to the act of prostitution. Legally, the word does not exist in Egyptian law as the Egyptian lawmaker saw it fit to use the words El-Dahra and El-Fgoor. El-Dahra is used to refer to female prostitution, while El-fgoor is referred to male one. The committee in the Egyptian Parliament entrusted with drafting Law No. 68/1951 insisted on using the words prostitution and debauchery to distinguish between acts of indecency committed by men and acts of indecency committed by women, as the contemporary judicial custom was that the word Dahra «prostitution» describes female prostitution only³. The legal definition of Al- Bagh’a is any act that the person commits to satisfy others’ sexual needs, whether this act is normal or abnormal to human nature⁴.

Al-Bagh’a, Al-Fasq (Debauch) and Al-Mohkadna (cohabitational partner-

1 2021. “Actus Reus”. LII / Legal Information Institute. https://www.law.cornell.edu/wex/actus_reus.

2 2021. “Mens Rea”. LII / Legal Information Institute. https://www.law.cornell.edu/wex/mens_rea.

3 See the committee consisting of the legislative and social affairs report- The Egyptian Parliament- on 22nd of June 1949.

4 See Court of Cassation Appeal dated at 29th of January 1978- Magmo’a Al-Qaw’ad Al-Qanonya -C6 - number 30- P.85. Also See, Court of Cassation Appeal dated at 1st of March 1990- Magmo’a Al-Qaw’ad Al-Qanonya - C41- Number 74- P.446.

ships)....Is there a difference?

The scope of criminalization in Al-Fasq differs from Al-Bagh'a, as Al-Fasq criminalizes a wider range of activities. The lawmaker viewed Al-Fasq, as any forbidden sexual action outside of marital relation. These actions have to be public as the lawmaker saw it fit not to criminalize it in the private life of citizens. As such Al-Fasq is any public sexual action that can undermine public morals. Even married couples who commit a sexual act in public can be punished, as their actions happened in the public and can corrupt the morality of others. In addition to this, The Court of Cassation has defined Al-Fasq from article No (270) of the canceled penal code of 1937, as every act committed by a man or a woman that considered to be immoral and this definition accommodates all sexual acts and is not limited to sexual pleasure. It may also include corrupting morals in other ways, such as a father sending his daughter to a nightclub to dance in⁵.

Finally, Al-Mokhadna is a relationship between two persons based on passion or interest for a specific period and it is considered to be legal under the law, as the Egyptian lawmaker did not address this kind of relationship. This relationship can be criminalized if it is made public, then it would constitute Fasq, and if it happens indiscriminately⁶ then it is Bagh'a⁷.

2. What are the criminal elements of Al-Bagh'a?

The law does not require full sexual contact (virginal or anal) for the crime to materialize, as any sexual act that aims to satisfy the lust of others is enough for the actus reus (material) element of the crime to happen. As such, a virgin can be prosecuted for Al-Bagh'a and her virgin hymn cannot be used by the defense, as evidence of her not committing Al-Bagh'a⁸.

2.1. The Crime of Practicing Habitual Debauchery or Prostitution:

Legal text: Article 9(C) of Law 10/1961: Punishment by imprisonment for a period not less than three months and not exceeding three years and a fine not less than 25 LE and not exceeding 300 LE in the Egyptian administration and not less than 250 Lira

5 Cassation Appeal dated at 23rd of December 1940- Magmo'a Al-Qaw'ad Al-Qanonya – C.5 – P.432

6 Indiscriminately in the legal context of law 10/1961, means that the person committing the crime offers himself/herself to people indiscriminately without distinguish among their clients.

7 Al-Mowagah Al-Tashira'ia w Al-Amenya l Gar'am Al-Bagha- Dr. Ahmad Salah Darwish - Dar Al Nahda Al Arabiya - P.13

8 See the committee consisting of the legislative and social affairs report- The Egyptian Parliament- on 22nd of June 1949- P2. In Which the word "Amra'a" (woman) was replaced with "Ontha" (Female) to expand the scope of criminalization to virgins working as sex workers.

and not exceeding 3000 Lira in the Syrian administration or one of these two punishments applies in the following cases:

(C) Whoever habitually engages in debauchery or prostitution⁹.

This crime has three constitutive elements that cumulatively need to take place:

A- The habituality element.

B- Actus Reus (committing the act of prostitution or debauchery)

C- Mens Rea (the criminal intent)

A- The habituality element:

As we can notice from the legal text, the scope of criminalization targets sex workers and not individuals who have non-marital sexual relations; as such, the habituality element is one of the core elements for this crime to happen. The Court of Cassation applied the following logic for this crime: **“(t)he basis of punishment in this crime is to achieve ‘habitual’ practice of debauchery, so the punishment is based on a condition or circumstance existing in the person and not just a material fact,”** i.e. the punishment of the crime is only applicable on individuals who are known to habitually engage in debauchery or prostitution and not on the action of debauchery or prostitution¹⁰. Legally, the habituality condition occurs when the person commits the criminalized act on at least two different occasions at different locations. Thus, habituality does not occur if the action is only repeated at the same time and the same location au cours d’une scene unique, as a change of the circumstances (time and location) of the action is required to fulfill the habituality element¹¹.

The application of this rule can be seen through the following Court of Cassation judgment: **“The habituality element requires for the action of debauchery or prostitution to take place in different events and with different circumstances. The application of the law, in this case, is faulty, as the prosecutor failed to prove that the accused has committed this action in different events and with different circumstances. The lower courts rallied in its convention of the accused on the fact that she had committed prostitution with different men in the same location and at the same time. Which is wrong, as the habituality element is only fulfilled when the action takes place at different location and time.”**¹²

⁹ “Egypt: Law No. 10/1961, On The Combating Of Prostitution - Cairo52”. 2020. Cairo52. <https://cairo52.com/egypt-law-no-10-1961-on-the-combating-of-prostitution/>.

¹⁰ Cassation Appeal dated at 8th of October 1984- Magmo’a Al-Qaw’ad Al-Qanonya – C.35 – Number 139- P.632

¹¹ Gar’am Al-Bagh’a – PHD Thesis- Cairo University – 1961 – P.90

¹² Cassation Appeal dated at 7th of May 1962- Magmo’a Al-Qaw’ad Al-Qanonya – C13- Number 110 – P.437

B- Actus Reus (committing the act of prostitution or debauchery):

Committing the act: Article 9(C) is only applicable to individuals who are proved beyond reasonable doubt that they have committed the act of prostitution or debauchery. An application on this rule from the Court of Cassation: **“The arrest, in this case, was faulty, as the police officer relied on the fact, that the accused is known to engage habitually in the acts of prostitution to make an arrest. This knowledge is not enough to prove beyond reasonable doubt that the accused have committed the act of prostitution at the time of the arrest.”**¹³

Satisfying the lust of others: The law has stipulated that for the crime to be realized, the purpose of practicing debauchery or prostitution is to “satisfy the lust of others” and not “satisfy one’s own lust.” The Court of Cassation has confirmed this principle in its application of the law: “as long as the appellants intended to commit fornication with the two women and did not intend to incite them or help them to engage in prostitution with others indiscriminately or to facilitate that for them, then the criminal intent for the crime does not exist, as the appellants committed the act of fornication for his own lust.”¹⁴

Satisfying the lust of others indiscriminately: This principle refers that satisfying the lust of others occurs with different individuals, in different locations at different times. The individual must be committing the action indiscriminately for commercial gains i.e. sex working if the individual only having sexual relations with one person the crime is not fulfilled. The Court of Cassation ruled in the application of this principle: “A man committing adultery with a woman at a house does not consider a crime; only actions where the individuals commit sexual relations with others indiscriminately fall within the scope of the law.”¹⁵

Thus, those aforementioned elements are essential to fulfill the actus reus of the crime.

C- Mens Rea (The criminal intent):

This crime can not occur without the criminal intent behind it; the intention of the individual is a constitutive element in this crime. The mens rea is considered fulfilled

¹³ Cassation Appeal dated at 9th of June 1980- Momga’at Ahkam Al-Na’ad - C31- Number 142 – P. 737

¹⁴ Cassation Appeal dated at 21st April 1988 - Momga’at Ahkam Al-Na’ad – C39- Number 94- P.637. See also the same principle at Cassation Appeal dated at 1st of March 1990 – C41- Number 47 – P.446, Cassation Appeal dated at 5th of December 1994- C45- Number 169 – P 1079 and Cassation Appeal dated at 14th of November 1996- C47- Number 171- P.1189.

¹⁵ Al-Gar’am Al Gensya- Edward Ghaly Al-Zahby – 3rd edition- Dar Ghreeb for publication – 2006 – P.224

when the accused commits the crime intentionally, knowing that what he/she is doing

is illegal, i.e. the accused is willingly committing an illegal act with an intent to cause an illegal outcome. There are two core elements to fulfill under the mens rea of the crime: knowledge and willingness.

Knowledge: The offender must be aware that she / he is committing the criminal acts, which fulfill the actus reus element of the crime i.e. having sexual relations with others indiscriminately to fulfill their sexual lust. Thus, a woman working in prostitution sleeping with her husband, who divorced her without her knowledge, is not considered to have committed the crime, as she did not know that she was divorced.

Willingness: The offender must commit the act out of his own free will, which fulfill the actus reus element of the crime i.e. the occurrence of the act must be without any coercion by another person. Thus, a person who is coerced into committing the acts of debauchery or prostitution is not considered having committed the crime, as he/she did not do the act based on their own free will¹⁶.

2.2. The Crime of Inciting Debauchery or Prostitution:

Legal text: Article 1(A) of Law 1961/10: Whoever incites a person, be they male or female, to engage in debauchery or in prostitution, or assists in this or facilitates it, and similarly whoever employs a person or tempts him or induces him with the intention of engaging in debauchery or prostitution, is to be sentenced to imprisonment for a period not less than one year and not more than three years and a fine between 100 and 300 LE in the Egyptian administration and between 1000 and 3000 Lira in the Syrian administration.

Contrary to some beliefs, the legal text here does not criminalize sex workers who promote themselves to others, rather those who supervise them i.e those in charge of managing, facilitating, assisting, encouraging, and inciting sex workers. The acts criminalized by this provision simply cover the crime of pimping. Thus, the scope of criminalization of this article applies to those who manage sex workers, even if they themselves are not engaging in the acts of prostitution or debauchery.

A- Actus Reus (Committing the Act):

The actus reus element of this article includes different actions e.g. instigating, aiding, facilitating, using, luring, seducing, retaining in the place of prostitution,

¹⁶ Al-Mowagah Al-Tashira'ia w Al-Amenya l Gar'am Al-Bagha- Dr. Ahmad Salah Darwish - Dar Al Nahda Al Arabiya - P.43

assisting a female to engage in prostitution, and advertising that includes temptation to prostitution. In this part we will cover the major two charges individuals receive under this section: **Aiding and facilitating and Incitement.**

Aiding and facilitating is to enable those who wish to engage of prostitution or debauchery through giving them means of help and assistance. Through this help, individuals can overcome the obstacles they would face in their efforts to commit these actions. Unlike incitement, the act of aiding and facilitating requires positive outward appearance i.e. providing the means and equipment, which enable others to commit the acts of prostitution or debauchery. Thus, aiding and facilitating take place when the accused by saying or doing helps others to commit the illegal acts¹⁷.

Incitement is to influence someone's decision and convince them to commit the illegal act. Thus, a female who works in prostitution and offers herself to other is not committing the crime of incitement. The Court of Cassation stated in its application of this article: **"The judgment of the lower court is correct, as the accused did escort the second accuse to meet customers. The accused offered the second accused to the customer to commit sexual relations for a fee and a specific period."**¹⁸ Thus, incitement is essentially consisting of two elements: influencing the other to commit the crime and guiding the other towards the crime. Those two elements must occur cumulatively to consider the actus reus element of the crime to be fulfilled.

Influencing means that the accused influenced the other into committing the illegal action through means of conviction e.g. threat, speech, or promising a reward. This influencing can be through speech only or accompanied by actions that would convince the other to commit the crime.

Guiding means that the accused has revealed the ways of prostitution or debauchery to those who did not know it. This guidance is often taking place by individuals who have more experience in doing those illegal actions and wish to share their experience with others through guiding them to the ways of prostitution or debauchery¹⁹.

B- Mens Rea (Criminal Intent):

This crime can be committed only intentionally, i.e. inciting or aiding others with the intent and knowledge of committing the acts of debauchery or prostitution. As we

17 Al-Gar'am Al Gensya- Edward Ghaly Al-Zahby – 3rd edition- Dar Ghreeb for publication – 2006 – P.260

18 Cassation Appeal dated at 9th of January 1956- Momga'at Ahkam Al-Na'ad – C7- Number 4- P.09

19 Al-Gar'am Al-Moklha B Al-Ad'ab Faqhan w Qada'n- Jurist/ El-Sayed Hassan Al-Baghal- 1962 – P.204

mentioned before, the mens rea requires two core elements to be fulfilled: knowledge and willingness. Thus, a car driver taking a prostitute to her place of work without knowing of her profession or her action after her arrival to her detention is not committing a crime, as he did not know of her actions²⁰.

Knowledge: the knowledge element of the crimes of incitement, aiding, or facilitating requires the accused to intentionally guide others to commit debauchery or prostitution while knowing the illegality of those actions.

Willingness: This element is considered fulfilled when the accused wants the result that is criminalized under this provision. The accused must be legally liable i.e. committing the acts out of his/her own free will.

2.3. The Crime of Violation of Public Morals:

Legal text: Article 178 of the Penal Code: Whoever makes or holds, for the purpose of trade, distribution, leasing, pasting or displaying printed matter, manuscripts, drawings, advertisements, carved or engraved pictures, manual or photographic drawings, symbolic signs, or other objects or pictures in general, if they are against public morals, shall be punished with detention for a period not exceeding two years and a fine of not less than five thousand pounds and not exceeding ten thousand pounds or either penalty²¹.

This crime consists of three core elements:

- A- Violation of Public Morals
- B- Actus Reus
- C- Mens Rea

A-Violation of Public Morals:

The Court of Cassation defined violation of public morals as actions that undermine public order i.e. actions that undermine the dignity of the public and its decency and morality.

B- Actus Reus:

According to the legal text of article 178, there are three constitutive elements: publishing, making, and possessing. Publishing is the publication of illegal indecent material e.g. pornographic materials to the public, whether through telecommunication

20 Gar'am Al-Bagh'a – Phd Thesis- Cairo University- Dr. Neyazy Hetata – 1961 – P.215

21 Law No. 58 01 The Year 1937 Promulgating The Penal Code: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/57560/111585/F1337119832/EGY57560.pdf>

or media means. Making is to create something from scratch or copying and modifying others' work. Possessing is to establish control and demonstrate ownership over something²².

C- Mens Rea (Criminal Intent):

The crime of violation of public morals is an intentional crime and the mens rea element is thus indispensable for the crime to take place i.e an individual who publish illegal material on the public, knowing that these materials are illegal and with the intent of inciting sinful lusts and disturbing public orders is considered to have committed the crime²³.

2.4. The Crime of Advertising of Prostitution or Debauchery:

Legal text: Article 14 of Law 1961/10: Whoever publicizes by any form of publicity an invitation which includes inducement to debauchery or prostitution, or draws attention to this, is to be punished by imprisonment for a period not exceeding three years and a fine not exceeding 100 LE in the Egyptian administration and 1000 Lira in the Syrian administration, or one of the two punishments.

This crime consists of core two elements:

A- Publicity in Advertising

B- Mens Rea

A- Publicity in Advertising:

Advertising here means offering oneself to others and extending an invite with the aim of seducing others to commit debauchery or prostitution. The advertising here needs to be public and as such can happen through all available public advertising means e.g. newspapers, publications, broadcasting, television, the internet, or posters. This provision applies to whoever advertises for debauchery or prostitution, whether it is for themselves or others²⁴.

B- Mens Rea:

22 Al-Gar'am Al Gensya- Edward Ghaly Al-Zahby – 3rd edition- Dar Ghreeb for publication – 2006 – P.409

23 Cassation Appeal Number 17759/ 64 YJ

24 Al-Gra'am Al-Gensya- Second Edition- Dar Al-Ra'ay for publishing- Dr. Edward Ghaly Al-Dahby – 1997 – P.271

The criminal intent in this crime is fulfilled whenever the individual's intention was to publish or broadcast on the public material that would tempt the public to commit prostitution or debauchery; the accused must intentionally publish or broadcast illegal material publicly²⁵. Like other crimes that we discussed there are two core elements that together make the mens rea element: knowledge and Willingness.

Knowledge: When the offender knows that he/she is advertising prostitution or debauchery publicly. Thus, denying knowledge of the content of books that the offender is publishing because it is written in a foreign language that he/she does not understand is accepted, if the circumstances indicate that their ignorance of the content is credible.

Willingness: This element is considered fulfilled when the will of the accused covers committing actions, which fulfill the actus reus element of the crime. The accused must be legally liable i.e. committing the acts out of his/her own free will.



القاهرة ٥٢
للأبحاث القانونية
CAIRO 52
LEGAL RESEARCH INSTITUTE

2021