

THE LEGAL NATURE OF SIMULATED INCITEMENT AS A MEANS OF INVESTIGATION AND INQUIRY IN CRIMES ACCORDING TO LEGISLATIVE AND JUDICIAL PROVISIONS

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Abstract

This research delves into the legal ramifications of simulated incitement as an investigative tool in criminal cases, according to both legislative and judicial frameworks. It scrutinizes the effects of simulated incitement on the integrity of criminal proceedings, further elaborating on its definition, variations, and constituent elements. The methodology encompasses both analytical and comparative approaches, evaluating legislative and judicial practices in Egypt, Jordan, and Iraq.

The findings reveal that, unlike most criminal legislation that tends to address ordinary incitement, the Palestinian Criminal Procedure Law No. 3 of 2001 lacks specific provisions for simulated incitement. Establishing the authenticity of motives behind a simulated inciter's actions poses significant challenges. Nonetheless, the judiciary systems in Iraq and Egypt have recognized the use of simulated incitement, contrary to Jordan where it remains unauthorized. The study advocates for the urgent formulation of specific regulations concerning simulated incitement by Palestinian lawmakers, aimed at equipping judicial officers with clear guidelines that discern between crime exposure and crime creation.

Keywords: *Simulated Incitement, Crimes, Legal Nature, Investigation, Judiciary.*

INTRODUCTION

Judicial officers are sometimes empowered to extend beyond their legal boundaries in the fight against crime by adopting deceptive tactics that are generally not sanctioned by society. This is particularly pertinent in cases involving crimes shrouded in secrecy, such as drug trafficking and violations of public morality, where traditional investigative methods falter due to the absence of tangible evidence.

The paucity of legislative provisions on the legality of simulated incitement within the Palestinian context, coupled with its implications for both the judicial officers' and the alleged perpetrators' accountability, has prompted this inquiry (Al-Jadba, 2018: 7).

The notion of simulated incitement finds its roots in France, notably under autocratic regimes, where covert operatives were integrated into groups suspected of dissent against the monarchy to expose any antagonistic sentiments towards the authority, thereby paving the way for their prosecution.

Over time, this practice evolved from mere espionage to active incitement. Initially, the secret police were primarily involved in surveillance, which alone proved inadequate for corroborating criminal behavior. Consequently, simulated incitement was adopted, serving not only to provoke but also to facilitate the capture of suspects by sustaining engagements such as pacts, assistance, or direct involvement. The operation extends beyond mere agreements between the inciter and the suspect to include actions like holding contraband until the culprits are apprehended by law enforcement (Saleh, 2018: 95).

Some scholars refer to simulated incitement as "official incitement to crime," to distinguish it from ordinary incitement, considering that the inciter in such cases is usually a public authority figure. However, it is predominantly seen that simulated inciters are from public authorities, whereas some English legal scholars describe it as incitement intended to trap or ensnare (Al-Jadba, 2018: 8).

Jurist Mahmoud Najib Husni defines simulated incitement as: "The act wherein the will of a person is directed towards arresting a criminal in the act or testing how diligently a person adheres to the law by apparently encouraging the criminal act, only to prevent its completion or the realization of its criminal outcome once the action is initiated" (Husni, 1996: 151).

It can also be described as: "The intervention of a judicial officer in committing a crime not with the intent of committing it, but rather to apprehend the perpetrator red-handed, or in other words, an act aimed at inducing a person to commit a crime from a legal perspective, by a judicial officer disguising their identity and presenting themselves as involved or complicit in illegal drug trafficking or psychoactive substances" (Saleh, 2018: 95).

Additionally, a part of the legal doctrine defines the simulated inciter as: "A person whose will is directed towards capturing a criminal in the act, or to test how much a person is willing to comply with the law, by appearing to encourage the criminal act until, once the execution begins, it is prevented from being completed, or its criminal outcome is not realized" (Nabih, 2008: 22).

These definitions offer a broad insight into the tactical, yet controversial, use of simulated incitement by law enforcement to uncover and address hidden criminal activities, where the line between detecting and creating a crime is finely drawn.

PROBLEM STATEMENT

The impetus for employing simulated incitement stems from the imperative need to address certain crimes that, due to their covert nature, such as drug trafficking and prostitution, are rarely detected through traditional surveillance and reporting mechanisms.

Conventional investigative techniques often fail to produce tangible results, allowing such criminal activities to fester and potentially contribute to societal degradation. Consequently, simulated incitement serves as a critical tool for uncovering and capturing perpetrators. This methodology permits judicial officers to engage comprehensively in the phases of criminal negotiation, from orchestrating deals to dismantling extensive networks involved in illegal drug and mental stimulant trafficking, and apprehending key smugglers.

In the context of Palestinian society, where reported criminal activities in 2023 tallied to 31,365 incidents, there exists an acute need to refine investigative techniques to effectively uncover criminal acts. This study is primarily concerned with elucidating the legal dimensions of simulated incitement as an investigatory and inquisitorial tool.

STUDY QUESTIONS

The objectives of this study are to explore several key aspects of simulated incitement:

- What is the concept of simulated incitement?
- What are the elements that constitute simulated incitement?
- What are the various types of simulated incitement?
- What is the impact of simulated incitement on the integrity of criminal procedures?

STUDY IMPORTANCE

The theoretical relevance of this investigation stems from a noticeable deficiency in scholarly works that delve into the legal dimensions of simulated incitement as a means for probing crimes. While the focus of prior research predominantly centers on conventional investigative approaches, this study endeavors to theoretically augment the Palestinian legal discourse on this subject.

From a practical standpoint, the findings are poised to guide specialists and inform policy-making by Palestinian legislators, particularly within the realms of judicial policing. The insights derived will aim to fortify the integrity of criminal procedures against any forms of invalidation, ensuring robust legal processes.

Study Objectives

The primary goals of this research are:

- To clarify the concept of simulated incitement as a tool for investigation and inquiry.

- To delineate the distinctions between simulated and ordinary incitement within investigative contexts.
- To articulate the elements that define simulated incitement in investigative scenarios.
- To classify the various types of simulated incitement utilized in criminal investigations.
- To assess the influence of simulated incitement on the uprightness of criminal proceedings.

STUDY METHODOLOGY

The analytical method employed in this study involves scrutinizing jurisprudential and judicial interpretations to unravel the legal nuances of simulated incitement as an investigative instrument. Furthermore, a comparative method was utilized to juxtapose the judiciary decisions and mandates across Egypt, Jordan, and Iraq, providing a broader understanding of the practice's legal recognition and application.

First Section:

Elements of Simulated Incitement

Simulated incitement distinguishes itself from ordinary incitement through several nuanced elements. It is characterized by a broader range of activities attributed to the simulated inciter, particularly noting their affiliation with judicial police forces and the underlying motives behind the incitement (Al-Ghanimat, 2010: 44). This section elucidates the following foundational elements:

First Subsection:

The Element of Activity of the Simulated Inciter

Scholars are divided in determining the nature of the activity of the simulated inciter. The first approach holds that the activity of the simulated inciter is limited to moral activity, while the second approach considers that the simulated inciter includes both physical and moral activities. The third approach views the activity of the simulated inciter as being revealing of the crime. The researcher will present these approaches as follows:

First: Perspective emphasizing moral activity

Certain legal scholars posit that the realm of simulated incitement is restricted to moral engagement in criminal acts. This view argues that the simulated inciter's involvement is purely motivational, aimed solely at inducing the commission of a crime to facilitate the perpetrator's apprehension in the act. According to this interpretation, the simulated inciter's role is confined to moral complicity without extending to physical actions (Bani Odeh, 2017: 33; Al-Ghanimat, 2010: 176).

This perspective does not distinguish between activities that create or encourage the idea of a crime as long as they fall within the realm of moral participation. However, if the activity is physical, then the one who incites is not merely a simulated inciter but could be considered an original actor or a simulated assistant, depending on the nature of the physical activity undertaken. According to this view, simulated incitement differs from ordinary incitement only in the motive of the simulated inciter, which is to apprehend the perpetrator before the completion of the crime in preparation for their prosecution and punishment (Al-Saeed, 2009: 470).

Secondly: The Perspective that Simulated Incitement Involves Both Moral and Physical Activity

Proponents of this view believe that the activity of a simulated inciter can involve providing physical assistance with the intent to apprehend the perpetrator during the crime's execution. Therefore, the simulated inciter is referred to as an "assistant in disguise," and is considered a simulated inciter in this role (Sorour, 1996: 445).

Supporters of this view argue further that the activity of the simulated inciter is not limited to incitement in its narrow or broad legal sense, nor to physical activity such as assistance. Instead, it extends to include all means of participation in the crime, termed "ancillary participation." Thus, a simulated inciter is someone who induces others to commit a crime with the intention of apprehending the perpetrators red-handed, whether through physical acts or psychological maneuvers to achieve this goal (Najm, 2020: 76).

This approach has faced criticism for considering assistance, whether physical or moral, as incitement, which exaggerates and broadens the definition of incitement both technically and linguistically.

Providing any type of assistance by a police officer to a perpetrator does not render him a simulated inciter; because, whether the assistance is facilitative or complete, it merges with the material element of the crime and sometimes makes the provider a principal contributor to the crime. Moreover, it starkly contradicts the role of a public authority officer and is considered a form of criminal participation.

While the activity of a simulated inciter is primarily moral, involving incitement of an individual to commit a crime with the intention of catching them in the act, the simulated inciter may become involved in the crime to the extent of engaging in physical acts of assistance to divert suspicion from themselves, thereby materially contributing to the crime in most cases (Al-Jadba, 2018: 14).

Thirdly: The Perspective that Simulated Incitement Represents Activity That Unveils the Crime

This perspective on simulated incitement centers on activities that are designed to gather evidence of pre-existing crimes without initiating new criminal acts. According to this view, the critical distinction lies in whether the incitement serves to create or merely uncover a crime. The essential criterion is that the crime should not be directly attributable to the actions of the authority figure involved (Sorour, 1996: 253). For instance, it is considered improper to classify activities as simulated incitement if the crime had already occurred and the police's role was solely to coax perpetrators into revealing incriminating information.

An illustrative example is when authorities, knowing that perpetrators possess drugs, send an informant to coax them into selling these drugs. Although this approach uncovers the crime, it crucially does not instigate the perpetrators to commit a crime they had not previously considered; the fact that they possessed the drugs already demonstrates their intent to engage in drug trafficking.

Some legal analysts argue that when a simulated inciter, posing as an ordinary buyer, attempts to purchase a controlled substance, the police officer's concealment of identity and interaction with drug traffickers should not be deemed incitement but rather a legitimate strategy for crime apprehension (Anid, Al-Shammari, 2019: 100).

This stance is widely regarded as more precise than others because it confines the simulated inciter's role to eliciting information useful for proving the crime, thereby revealing the perpetrator's pre-existing intent without coercing them into new criminal behaviors.

Second Subsection:

Element of Status

The role of simulated incitement is often restricted to individuals linked with public authority, either directly as members of the judicial police or indirectly as informants or facilitators. It is critical to differentiate between this and other forms of incitement that may be motivated by personal vendettas or financial incentives. Such non-official incitements do not produce the same legal effects as those initiated by public authorities.

The legitimate concept of official incitement should only apply when the intent is to prevent the crime's completion at its inception, or to engage the perpetrator in a detectable criminal act to facilitate their subsequent apprehension and prosecution.

Extending the scope of official incitement to include individuals acting out of personal or financial motives could potentially lead to abuses, where individuals are entrapped into criminal activities that they might not have otherwise engaged in, thus subverting the justice system's foundational objectives (Glob, 2022: 85).

Some scholars also argue that simulated incitement does not prevent the punishment of the inciter for participating in the crime committed by the perpetrator, even if the inciter belongs to public authorities. This leads to the invalidation of the procedures initiated to detect the crime, and they cannot be relied upon to convict the accused, as incitement by public authorities for individuals to commit a crime in order to apprehend them during or after the crime is considered unlawful and inconsistent with their duty to ensure proper application of the law (Hassan, 2020: 56).

The researcher, through the above statement, believes that the simulated inciter must be one of the public authority officials among the judicial police officers tasked with tracking crimes, gathering evidence, and searching for perpetrators.

The law has defined the functions and qualifications of the judicial police officers, as stated in Article (19) of the current Criminal Procedure Law No. (3) for the year 2001; the functions of the members of the judicial police are as follows: "1. Members of the public prosecution undertake the tasks of judicial police and supervise the police officer within their jurisdiction. 2. Police officers conduct investigations and inquiries about crimes and their perpetrators and collect the evidence required for the investigation of the case."

Their qualifications are exclusively defined according to Article (21) of the same law, which states: "The following are considered judicial police officers: 1. The police director, his deputies, assistants, directors of police in provinces, and general administrations. 2. Police officers and non-commissioned officers, each within their jurisdiction. 3. Captains of maritime and air vessels. 4. Officials who are granted judicial police powers by law."

Third Subsection:

Element of Objective

The motivation behind simulated incitement is generally considered valid if it directly contributes to the apprehension and subsequent prosecution of the perpetrator. Secondary motives such as personal revenge, financial gain, or the elimination of a competitor are deemed irrelevant, provided the primary intent remains focused on the lawful capture and judicial processing of the offender.

The distinctive aspect of the simulated inciter's motive is that unlike an ordinary inciter, their involvement is specifically aimed at catching the perpetrator in the act, thus facilitating the legal proof of the crime (Aliya, 2013: 44). This principle underscores that judicial police officers should operate under good faith, adhering strictly to their official duties with the ultimate goal of preempting criminal activities, securing arrests in flagrante delicto, and gathering sufficient evidence for prosecution.

Second Section:

Types of Simulated Incitement

Legal discourse recognizes the necessity to differentiate between two primary forms of simulated incitement: one that instigates the idea of committing a crime and another that merely unveils ongoing criminal activities. The distinction between these types hinges fundamentally on the conduct of the simulated inciter.

The first type originates from the inciter's actions, effectively planting the idea of the crime in the mind of someone previously uninvolved in criminal thought or activity. Conversely, the second type involves the simulated inciter only to the extent necessary for legal investigation, prompting the perpetrator to disclose information that substantiates and evidentially supports the existence of the crime (Behnam, 1997: 843).

First Subsection:

Crime-Creating Simulated Incitement

This category encompasses scenarios where the simulated inciter actively implants the concept of a crime in an individual who had no prior intention or inclination towards criminal behavior, aiming to apprehend them during the crime's commission or initiation.

Such practices contravene the ethical duties of judicial officers, which encompass the detection and prevention of crimes rather than inducing them. The legitimacy of actions taken by public officials under the guise of simulated incitement does not extend to probing individuals' predispositions towards criminality or their susceptibility to engage in illegal acts.

Legal ramifications arise particularly in cases where the incitement fosters a crime; such scenarios render the investigative and evidentiary procedures questionable. The validity of these procedures hinges not on the nature of the incitement (whether it is crime-creating or merely facilitative) but on the legality of the simulated inciter's actions.

This legality forms a foundational requirement for all exercises of authority and must align with strict legal standards. Should a judicial officer resort to illicit or unethical tactics such as fraud, deceit, coercion, or undue incitement that results in the exposure of a crime, any evidence procured during such compromised stages lacks legal sanctity, thus invalidating the procedures and, by extension, the evidence collected through these means (Behnam, 1997: 843).

Second Subsection:

Crime-Revealing Simulated Incitement

Crime-revealing simulated incitement is limited to merely encouraging a criminal idea already present in the perpetrator's mind who is preparing to commit it. In this scenario, the behavior of the authority figure plays no role in creating the idea of the crime, nor does it suggest or imply the crime since the perpetrators had already intended to commit it. The crime would have occurred even without the involvement of the simulated inciter, thus absolving the simulated inciter of responsibility (Glob, 2022: 78).

Article 19/2 of the current Criminal Procedure Law states, "Judicial officers are responsible for investigating and inquiring about crimes and their perpetrators and gathering the necessary evidence for the investigation." Any action taken by judicial officers in this regard is considered valid and effective unless they engage in creating the crime or inciting its commission, as long as the perpetrator's will remains free and uncoerced.

Third Section:

Impact of Simulated Incitement on the Integrity of Criminal Procedures

Scholars have debated the impact of simulated incitement on the validity of procedures, with some distinguishing between the effects of simulated incitement on procedural integrity based on the type of crime. If the crime committed is murder, theft, or breach of trust, both the actor and the simulated inciter are punishable.

However, if the crime pertains to threats to internal or external state security, the simulated inciter is not punishable, given the goal of uncovering the crime and preserving state security. Another school of thought sees the procedures as invalid if simulated incitement strengthens the idea of the crime or leads to its commission. Yet, if the incitement leads to the discovery of a crime that has been committed, it does not invalidate the procedures (Glob, 2022: 78).

Second Subsection:

Egyptian Judiciary

The Egyptian judiciary has established the validity of criminal procedures in cases of simulated incitement, as evidenced by a decision of the Egyptian Court of Cassation, which stated: "When an officer enters as a regular person with a confidential informant, who had previously visited the accused in his residence, based on his permission for entry, which was not followed by arrest or search and was not intended for either, but rather the arrest of the accused and the seizure of the substances found with traces of drugs occurred after the felony of drug selling had been completed in flagrante delicto, and the officer had pretended to buy drugs from the accused, who was known by the informant to possess them for the purpose of selling and injecting some addicts, and even when the felony of possessing those drugs occurred in flagrante delicto as the accused committed it voluntarily to deliver the sold goods, the judgment is sound in its conclusion of rejecting the defense of invalid arrest and search."

According to a decision by the Egyptian Court of Cassation, the court confirmed the validity of criminal procedures when simulated incitement is used for the purpose of uncovering a crime, provided that the incitement does not create the idea of the crime in the mind of the accused (Hassan, 2020: 59).

Second Subsection:

Jordanian Judiciary

The Jordanian judiciary has expressed its stance on the actions taken by a simulated inciter in inciting a perpetrator to commit crimes. Explicitly, in Appeal No. (3536) of the year 52 judicial

session dated (12/8/1982), it was decided not to accept the act of incitement to commit a crime by the perpetrator if incited by public authorities.

The reason being, it is not the duty of public authority officers to incite crimes; on the contrary, their duty is to combat them. Resorting to deceitful and fraudulent methods to uncover crimes is not permissible, and if public authority officers engage in such actions, they are responsible for the crime committed and are punishable, along with the perpetrator. The task assigned to the simulated inciter involves uncovering the crime, not inciting it, hence simulated incitement is not acceptable.

Third Subsection:

Iraqi Judiciary

The Iraqi judiciary has authorized the use of simulated incitement as a method of investigation deemed necessary for combating organized crime, especially crimes related to terrorism, drugs, and corruption. In a decision by the Federal Supreme Criminal Court, Expanded Criminal Panel Second, under decision number (13548/54613) for the year 2011, the Rusafa Criminal Court convicted the accused because he solicited a bribe of seven hundred US dollars from a client in exchange for facilitating procedural matters, given that he was a judicial investigator at the Muthanna police station.

The complainant filed a complaint against him, and it was agreed with the complainant to give him the amount after recording its serial numbers at the anti-corruption authority. They instructed the complainant to go to the accused and deliver the agreed amount, and a trap was set for the employee. After receiving the bribe, he was arrested red-handed, and the necessary procedures were followed to detain the accused, with the procedures being legally valid as they had been approved by the competent investigating judge.

In a notable ruling by the Karbala Criminal Court, First Panel, case number (767/H1/2018) dated December 27, 2018, an individual implicated in drug trafficking was apprehended. Upon arrest, he revealed the involvement of a wider network in the drug trade. This disclosure led to a coordinated effort with a confidential informant, who set up a purchase from one of the identified dealers.

A meeting was organized to facilitate the exchange of drugs for the agreed monetary amount, during which the accused was arrested in possession of the narcotics at the moment of transfer to the informant.

This case exemplifies the Iraqi judiciary's commitment to leveraging simulated incitement as a potent and legitimate tool for tackling severe organized crimes such as terrorism, corruption, and drug offenses. It underscores the practice of recording financial transaction serial numbers and instructing complainants to hand over specified amounts to judicial investigators under supervised conditions.

This method is endorsed by judicial surveillance and the approval of investigative judges to ensure the capture of suspects during criminal acts and to uncover corruption. Nonetheless, the Iraqi legal framework still lacks precise guidelines to clearly differentiate between activities that merely reveal crimes and those that might instigate them, as well as the stipulations for judicial officer involvement and the utilization of informants and confidential guides in such operations (Hassan, 2020: 179).

CONCLUSION

Upon reviewing the concept, types, and elements of simulated incitement and its implications for the integrity of criminal procedures, the following insights have been derived:

- Simulated incitement is a tactic employed by public authorities to entice individuals into committing crimes, facilitating their apprehension in the act.
- The Palestinian Criminal Procedure Law No. 3 of 2001 does not currently include provisions specific to simulated incitement.
- While most criminal legislation predominantly addresses ordinary incitement, the nuances of simulated incitement remain less regulated.

- Establishing and validating the motives behind a simulated inciter's actions presents significant challenges.
- The judicial systems of Iraq and Egypt have sanctioned the use of simulated incitement, in contrast to Jordan, where it remains unauthorized.
- The Egyptian judiciary has set forth criteria to ascertain whether simulated incitement aims to uncover ongoing criminal activity or to implant the idea of committing a crime in the mind of a potential perpetrator.
- Simulated incitement is frequently applied in the investigation of drug-related offenses and corruption.

In response to these findings, it is imperative that Palestinian legislators promptly introduce regulations governing simulated incitement as a crucial investigative tool for judicial officers. Moreover, establishing clear criteria to distinguish between actions that expose crimes and those that might provoke them is recommended to ensure the integrity and effectiveness of legal procedures.

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