The Criminal Judge's Power in the Assessment & Acceptance of the Electronic Evidence

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ABSTRACT

The Scientific and technological development has always had undeniable effects on criminal law, in particular when it is related to criminal proof theory. The main pillar of this theory is based on the principle of freedom of proof to allow a wide use of scientific evidence. Therefore, criminal proof based on electronic evidence is one of the most prominent developments of the modern era in all legal systems, which moves in accordance with the current scientific and technical revolution, where criminal thought has also strongly developed. Cybercrime is one of these developments where it is inappropriate to rely on traditional systems and rules in proving these crimes. The situation has necessitated reliance on evidence that is compatible with the nature of these crimes, which is electronic evidence.

However, such use is also considered as a real challenge when it affects some of the procedural guarantees that are strongly related the fair trial. To what extent does freedom of proof allow resorting to modern scientific means in proof and what is the authority of the criminal judge in assessing and accepting electronic evidence, and this matter is related to the extent and the limits of the freedom of the criminal judge in this area.

Key Words: Criminal judge, self-conviction, electronic evidence, Assessment of evidence, acceptance of evidence.

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INTRODUCTION

The new technological revolution, that we are now living today, has brought about an urgent need for the development of the information systems to keep pace with the technological, social and economic developments that growing day by day in order to benefit from the favorable effects of such revolution. [1]

However, the emergence of this scientific revolution has been accompanied by new challenges of the field of law. The revolution has contributed to the change of the nature of the whole human life. That has affected the people's behaviour negatively and positively. As consequence, new kinds of crimes that surpassing the known traditional ones in their forms and images as the perpetrator in such new crimes is featured with intelligence, professionalism, skills and good command of using the Modern technology methods. This kind of crimes is called "cybercrime". The most danger thing in such crimes is its characteristic as they go beyond the geographical boundaries of the countries because the crime is committed in an unlimited virtual space. Crime of this kind is difficult to detect or trace except by complicated technical and technological means that require professional experience in addition to the specificity of the evidence which is considered as the determinant factor to decide whether crime is committed or not.

The cybercrime has posed a major challenge to the society, individuals and the justice agencies including the Security officers, the Public Prosecution, the judiciary and experts. Today's crime is committed in a virtual space unlike the traditional medium of familiar crimes. The countries, for a long time ago, have recognized the importance of maintaining the privacy of the

[1]- Dr. Hazem Mohammed Hanafi – The electronic Guide and its role in the criminal field, Al Nahda Arabian Home, 2017 P153

information for various reasons 2. Therefore, a series of actions that contribute to confronting and combating such new kind of crimes had to be taken.

Accelerated advancement of technology and information systems have posed major challenges to the criminal law, both substantive and procedural ones. So, it was necessary to keep pace with such development by making amendments to the substantive law or separate new legislations to face the evolving new pattern of crimes. [3] This pattern has been reflected in the procedural law as more advanced means had to be sought in the detection & evidencing process of such new crimes. Being one of the major subjects of the Criminal Procedural Law, the criminal evidence, in turn, has been affected by the dramatic development of criminal evidence due to the considerable development of methods used to commit the crimes. In return, this has brought about a remarkable development in the view of the criminal evidence methods and the need to bring the scientific truth in its current reality close to the judicial truth. The criminal; evidence aims at showing how compatible between the legal form of the crime and the case before the criminal judge with diversity and multiplicity of the means of proof4 i.e., an activity directed to reach out to the judicial certainty. Therefore, the Therefore, the use of the most advanced methods of criminal proof has become an imperative to enable the lawmen to properly perform their functions and make the evidence process renewable and evolving according to the developments in this area. This new world based of the technology sciences had to be recognized as it relies on sophisticated electronic means5.

The Importance of the subject:

The scientific evidence in these recent days is becoming increasingly important and has become at the forefront of the criminal proof. Scientific evidence is not limited to evidence but it covers all the evidence including the electronic ones which place the technical expertise at the forefront in the field of the criminal evidence. The development of the means for the accomplishment of the crime has been accompanied by further correspondent advancement in the methods of proof. The electronic evidence as one of the newly-developed scientific evidence, may be derived or extracted from Hardware, equipment, media, electronic pillars, information system, computer software or any information technology tool6. Such evidence may be in form of paper output produced by electronic printers, electronic outputs such as tapes, CD-ROMs, video and other untraditional electronic forms, displays of the processing outputs on the computer screens or the projectors which be used of the purposes pf the international Information Network (Internet).7 The importance of studding this subject and the extent of the extent of the judiciary's power in the assessment and the acceptance of the electronic evidence in the proof has arisen with the diversity of the legal proof systems, the deference in the applicable judicial system, the variety in the jurisprudence and the cognitive abilities of the judge abilities in respect with the electronic part.

Thus, the proof with the electronic evidence has become one of the main development aspects of the crime-fighting and the technical and technological development in all legal systems in the present age. Such deployments have emerged to keep pace with the tremendous scientific and technological revolution of our present time which is also witnessing a parallel

[2]- Dr. Hilali Abdul Al Elah Ahmed, the Authenticity of the computer output in the Criminal Matters – Comparative Study, Al Nahda Arabian Home, Cairo 2nd Edition – P6 – 2008.

[3]- The Issuance, by UAE Legislator, of the UAE Federal Law No. (2) of 2006 on The Prevention of Information Technology Crimes which was revoked under the UAE Federal Law No. 15 of 2012. The latter has been recently replaced by the UAE Federal Law No. 34 of 2021 on combating Rumors and Cybercrime which was come into effect as from January 2, 2022.

[4]- Dr. Hazem Mohammed Hanafi – The electronic Guide and its role in the criminal field, op. cit., P153

[5]- Dr. Aisha bin Qarah Mustaffa - The authenticity of the electronic evidence in the criminal proof – Al Jama'a Al Jadeeda Publication Home- Alexandria – 2010 – P150.

[6]- Article No. 65 of the UAE Federal Law No. 34 of 2021 on combating Rumors and Cybercrime

[7]- Dr. Hilali Abdul Al Elah Ahmed, the Authenticity of the computer output in the Criminal Matters – op. cit., P14.

development in the criminal thought. As consequence, a new type of cybercrime has emerged and the traditional regulations and rules, whether in the procedures of both criminal investigation and criminal proof, are no longer adequate to prove those crimes. That requires more reliance on the electronic evidence which fits with the nature of those crimes that need special evidence of proof that is the electronic evidence. So it was necessary to deal with this important subject.

The problem of the Research:

Undoubtedly, the special nature that characterizes the electronic evidence from the other criminal evidence, poses several problems with regard to its legitimacy, validity, reliability and judicially acceptability as one of the criminal evidence means. Therefore, the research will answer the following questions:

- What is meant by free criminal proof?
- The criminal judge's power in accepting or rejecting the electronic evidence.
- The extent of the electronic evidence's authenticity in the criminal proof.

The Research Objectives:

The main aim of this study is to find out how the law keeps pace with technological development and deal with the new evidence specifically the electronic evidence by focusing the light on the present development on the criminal proof means as well as the modern legal procedures. The issue of the proof in the electronic crimes raises many difficulties for investigators and significant problems have arisen in gathering evidence and proof related to crimes. The basic aim of the research is to identify the criminal judge in the assessment and acceptance of the electronic evidence, access to the legal system and come up with the necessary recommendations and results aiming at developing the legal system to suit the reality and its requirements in such a way as to incorporate new amendments that facilitating the process of gathering the evidence.

The Research Methodology:

The Researched has followed the descriptive methodology which includes several research procedures assisting in describing specified subject by gathering the facts and data classified as per the nature of the problem of the research and its objectives. We have also followed the analytical methodology for the purpose of analysing the subject matter from a procedural legal point of view. The Electronic evidence is one of the pieces of evidence that require deep investigation for its facts in order to reach to the required standard which can be relied upon to assess the authenticity of the electronic evidence, the subject matter of the study, in the field of the criminal proof.

Breakdown of the research Plan:

First Chapter	: The Criminal Judge's Power to evaluate the electronic evidence
First Topic	: The concept of free criminal proof
Second Topic	: The Criminal Judge's Power to evaluate the electronic evidence
Second Chapter	: The Criminal Judge's Power to accept the electronic evidence
First Topic	: The principle of the electronic evidence's legality
Second Topic	the criminal electronic evidence should discussed.
Third Topic	: The principle of the electronic evidence's certainty

First Chapter

The Criminal Judge's Power to evaluate the electronic evidence

Introduction &Breakdown:

The scientific and technological development had undeniable effects on criminal law, especially when it comes to the theory of the criminal proof. The fundamental pillar of this theory is the principle of the proof freedom which in present era allows the wide use of the scientific evidence in the criminal proof. The importance of the modern technology has stemmed very clearly to reveal the evidence that a crime has been committed.

However, the use of such scientific evidence also poses an important challenge when certain guarantees, from fair trial guarantees are prejudiced. The essence of applying the principle of freedom of proof lies the balance between

society's interest in combating crime and interest of the individual that his/her rights shall remain safeguarded and not undermined.

Therefore, upon applying the proof freedom's principle, there should be a correlation that cannot be ignored, between the criminal judge and the supporting evidence. The latter one of the means used to show the truth which does not reveal on their own but need to be drawn by the criminal judge by assessing the value of evidence brought before him during the hearings. This matter related to the extent and limits of freedom that the Criminal Judge enjoys in the field of proof.[8]

Therefore, the utilization of the modern scientific means poses a considerable challenge and raises several questions within the scope of the procedural criminal code about the possibility pf applying the principle of proof freedom to accept any evidence based on a modern scientific or technical discovery and to what extent the proof freedom allows the use of the scientific means when use of such means infringes certain fundamental human rights?

Consequently, the Theory of the Criminal Proof has become the axis around which the rules of criminal procedures revolve from the time that the crime was committed to the issuance of the verdict in the case. A criminal sentence is the practical and logical result that reached by the criminal judge within the discretion afforded to him in assessing the evidence which vary as per the proof system followed by the legislator in each country.

The discretion of the judge to assess the evidence is governed by the principle of the judge's freedom to form his own doctrine. In order to find out what is the personal belief of the criminal judge, we should show what is intended by the term "the criminal proof" because such matter is closely linked with the judicial process conducted for the aim of revealing the truth and reaching to the final judgement[9].

It has been established that the criminal judge forms his/her doctrine from any of the case's elements insofar as such element is valid unless the element is derived from an illegal procedure. This rule is with no exception as it represents one the fundamentals of the criminal trials as general. The legitimacy of the criminal evidence is one of the guarantees of the public freedom as invocation with invalid evidence is not acceptable even if such evidence in in consistent with the truth [10] .

Accordingly, it is inconceivable that the evidence in not subjected to the law in a state governed by law and order. Therefore, the principle of the proof freedom should be compatible with another principle, equally important, that is the legitimacy of criminal evidence obtained with the use of the modern scientific means11 .

We therefore, we will divide this chapter in two topics, the first one is titled (The concept of the free criminal proof) and the second one (The Criminal Judge's Power to evaluate the electronic evidence).

The First Topic

The concept of the free criminal proof

The criminal proof is of particular importance in the criminal litigation. This importance lies in the subject matter of the criminal case which its procedures aim at scrutinizing all evidence whether for the favor of or against the accused for checking the actual and legal fact relating to the criminal lawsuit brought before the Judge then determination of the same based in which the conviction of the accused or his/her innocence of charges against will be confirmed.

Thanks to the huge recent scientific advances, the criminal proof system has undergone a huge revolution in the proof means previously unknown. This revolution has erupted on precise scientific origins and managed to provide the criminal judge with decisive and conclusive evidence connecting or denying the relationship between the accused and the crime. The judiciary has become increasingly reliant on such

[8]- Dr. Hazem Mohammed Hanafi – The electronic Guide and its role in the criminal field, op. cit., 228

[9]- Dr. Essam Mahmoud Abdul Haleem – The Criminal Liability of Patients with neuropsychiatric diseases - doctorate thesis – Faculty of Law – University of Cairo – 2014, P326.

[10]- Dr. Omer Al Farouq Al Husseini, Torture of the accused to induce him to confess – Modern Arab Press – Cairo – P159.

[11]- loeme ed, 2001, p.681, no, 785. pradel (J.), procedure penale, cujas.

evidence as technical and scientific on which sentence of guilt or innocence is based .

What is meant by the proof in the criminal matters: It's all that leads to the truth, establishing the supporting evidence in substantiation of the commission of the crime, attribution of the same to the accused and the facts charged against him/her12. In order to judge the perpetrator who committed the crime in the criminal matters, the proof of the commission of the offence charged against him/her should be firmly established and that the accused himself/herself has committed such crime i.e., establishment of the prof that has been committed and by the accused who charged with the crime. That means the proof is the result achieved by using the various means of the evidence as specified by the law[13].

A part of the jurisprudence defines the criminal proof in the criminal matters as the establishment of the proof, before the competent authorities of the criminal matters, of a reality with legal importance by the means specified by law and as per the relevant rules [14]. On the other hand, another part defines the criminal proof as the arrival with the proof presented in the various stages of the criminal lawsuit, whether the prosecution or the defense, with valid means, to the degree of the judicial certainty15 . That means the evidence in the criminal proof is not used for Proof of charge against perpetrator only but its effect occurs on the denial of charge against the accused also. Thus, the criminal proof covers both aspects of the lawsuit, denial and proof of charge against the perpetrator with valid means in Consistent with the validity of the law. This proof should be a certainty i.e., established on valid evidence by law and presented for discussion in the hearings because origin in the human being is innocence. So, if the charge is not established, the court shall adjudicate that the accused is innocent[16].

The principle of the proof freedom is based on several justifications. The principle achieves the interest of the accused. On hand it allows the accused to defend himself with various methods[17]. On other hand the nature of the criminal facts does not match the subject of proof with prior evidence on the grounds that the criminal lawsuit in its reality is just a litigation between the society and an individual. Therefore, two procedural principles have emerged in the criminal proof which distinguish it from the civil proof. These principles are the presumption of innocence and the proof freedom[18] . It follows the proof freedom the following tow results: The first result is that no specified evidence shall be excluded. It means that the judge should not exclude any prior evidence before examining the same as long as such evidence may contribute to the proof in the lawsuit brought before him/her and has fixed origin the file of the criminal lawsuit.

The Second result is that no specified evidence shall be imposed. That means all evidence in consistent with the conditions of acceptance such as the legitimacy of obtaining such evidence shall accepted. Such imposing is incompatible with the freedom of the proof. On this base, the judge may resort to any valid evidence or means as he/she deems necessary to reach to the truth and the valid judgement with which he can rest assured that he has made very possible effort to reach to the targeted truth in his judgment. The Egyptian Court of Cassation adjudicated that it is not permitted to ask the Judge adopt certain evidence as the point is his profound conviction with the evidence presented before him[19]. The

[12]- Dr. Hassan Mohammed Rabeia – Protection of Human rights and the Moder means of investigation- a doctorate thesis – Faculty of Law – University of Alexandria – P12.

[13]- Dr. Mohammed Zaki Abu Amer – The Proof in the Criminal Matters – Technical Printing & Publication - Alexandria – P17-24.

[14]- Dr. Mahmood Najeeb Hosnim – the Explanation of the penal procedures law – Dar Al Nahda Alarabia – Cairo – 1988- P767.

[15]- Dr. Abdul Hafiz Abdul Hadi Abid – Criminal Proof with Evidence - Dar Al Nahda Alarabia – Cairo – 2003 P65.

[16]- Dr. Essam Mahmoud Abdul Haleem – The Criminal Liability of Patients with neuropsychiatric diseases-op. cit., 228 P328.

[17]- Dr. Mo'atasim Khamis Mosha'asha'a – Proof of the crime with scientific evidence – a research published in the Magazine of Sharia & Law – the University of United Arab Emirates – Year 27, Edition 56 October 2013 – P8.

[18]- Dr. Hazem Mohammed Hanafi – The electronic Guide and its role in the criminal field, op. cit., P231.

[19]- Cassation February 20, 1986 – Set of Sentences, Y 36, No. 46, P273, January 8, 1987 – cassation No. 6143, YJ56

judge is free to determine, for himself, the truth he believes in by deriving the from the evidence presented in the case. He may reject any request from the expert if he finds out that he may eliminate his need for the same when he becomes satisfied with fact firmly established before him[20].

The original rule in law that the Judge shall enjoy absolute freedom of proof the criminal matters. The restriction of such freedom of proof by the legislator is considered as a departure from such rule. Therefore, the restriction here should be interpreted narrowly. The French Court of Cassation ruled that the determination of certain evidence for the proof of any crime by the legislator does not necessarily mean the refrain from using other evidence to prove the crime unless in the cases where the law expressly prohibits the same[21].

The criminal judge has broad power to assess evidence. He may investigate the reality by using various methods and collecting the evidence without being obliged to prefer any evidence over another one. However, of the type of the evidence has been predefined to be only used (the legal evidence)[22]. If the evidence is scientific one such the electronic evidence, the Criminal Judge when taking such evidence shall take into his account the controls of the legitimacy which should not be contrary to the general principles of proof otherwise such violation will lead to the illegitimacy, non-acceptance and nullification of such evidence[23]. These controls constitute a security valve that prevents any deviation by the judge upon taking such evidence. The judicial acceptability of the electronic evidence varies from one legal system to another[24] .

Based on the above, the free proof means that the Judge is free in assessing the proof evidence without any restriction in terms of its sources for the proper discharge of his judicial duty. He may derive his conviction from any evidence he can rest assured of without adhering to certain evidence in forming his conviction as all methods of proof before him should be the same. In the light of this principle, the judge has wide freedom in assessing the proof, balancing and evaluating the evidence in order to enable him to form his doctrine in the criminal lawsuit brought before him[25]

The second Topic

The Criminal Judge's Power to take the electronic evidence

The Criminal Judge, based on the principle of the proof freedom, enjoys a great deal of the discretion and wide range of freedom so he can play a positive role to get to the truth. He may use all available valid methods of proof provided that such methods shall be valid and permitted by law otherwise it will be judicially deemed as null and void. The new criminal legislation granted the trial judge wide freedom to satisfy himself with the evidence and form his doctrine from such evidence because such evidence is the main pillar in the process of criminal proof. Therefore, the personal conviction of the judge is the general principle that governs the criminal judge's power in assessing the evidence[26].

The principle of the judge's freedom is based on exclusion of the government's intervention in

[20]- Cassation December 2, 1986 – Set of Sentences, Y 19, No.211, P1042.

[21]- Cass.Crim. 28 nov. 2001, Juris-Data no.012603 – Referred to by Dr. Hazem Hanafi -, op. cit., P325

[22]- The legal evidence is meant that system constraints the judge with the conviction as per certain legal conditions prespecified by the legislator. In this case no convincing in the freedom of the proof in a mental process will exist. However, the judge elicits the evidence through a process contingent to certain rules specified by the legislator. his is done through the legislator's predetermination of the legal evidence deriving from which the judge get his conviction. The Judge should any other evidence from another resource for his personal conviction. The Judge's role is merely to verify the establishment of such predefined evidence and rest assured of the same. Please refer to Al Wasit in the criminal procedural Law, Al Nahda Arabian Home, Cairo. 2016. P606.

[23]- Dr. Aisha bin Qarah Mustaffa - The authenticity of the electronic evidence in the criminal proof – Al Jama'a Al Jadeeda Publication Home, Egypt – 2010 – P186.

[24]- Dr. Nidhal Yasin Al Haj – The Role of the Electronic Evidence in the Criminal Proof – Magazine of Takreet University of Legal Sciences – Magazine1, Edition 19, P38.

[25]- Dr. Mohammed Zaki Abu Amer – The Proof in the Criminal Matters - op. cit., P104.

[26]- Dr. Hazem Mohammed Hanafi – The electronic Guide and its role in the criminal field, op. cit., P247.

determination of the evidence to be either used or eliminated by the judge in his judgement. The door of proof is open to him. That means he free to search, investigate, discuss and assess the evidence as per his personal conviction in order to get to the truth. The principle of the judge's personal conviction is one of the distinctive features of the new procedural system. Even it is one of the most important and prestigious principles established in the modern procedural criminal laws. The Judge does not comply with any restriction or condition imposed on him from outside. He is only bound by his own conscience. He is free to assess the evidence brought before him by the litigants[27], because this system has empowered the judge with wide discretion in forming his own conviction on the basis of the evidence that he rests assured of. He is not obliged to pass a verdict of guilty unless he is fully convicted and satisfied himself with the sufficiency of the evidence justifying this verdict even there is evidence against the accused. On other hand he is not obliged to pass a verdict of innocence even there is no sufficient evidence for verdict of guilty if he perceives from one evidence that he is guilty and that evidence has convicted him that he is not guilty[28]

That is, the self-conviction system is the system on which the judge freely assesses the value of the evidence of whatever facts or sources. The legislator does dictate to him any certain authenticity for application. The judge should freely check the necessary evidence whatever its origin and evaluate the same in complete freedom[29]. However, this free assessment should not amount to full control. The criminal judge's conviction should be governed by the mind and logic on the ground that the ultimate goal of the judicial process conducted by the criminal judge is to go to the factual truth, However, such factual truth cannot be reached without research and proof by evidence. He cannot get the truth unless he's convinced of it and form certainty that has happened in line with the principle of the personal conviction. If the judge has reached a certain state of mind in which he managed to gather all elements and aspect of factual truth and the formed mental image about such truth has firmly settled in his conscience, here we can say that the judge has reached to a state of conviction[30].

Under this principle, the criminal judge enjoys a wide discretion in terms of the acceptance of the evidence or his personal assessment of each evidence. However, the does not necessary mean that the legislative systems supporting principle are devoted to the idea of the judge's totalitarianism and oppression as such systems adopt certain conditions for each evidence and specify the methods to be followed in order to extract the evidence and present the same to the relevant authorities. Therefore, the concept of the criminal judge's freedom in forming his doctrine should not be understood the freedom of the criminal judge to be released in order to replace the affirmed evidence with the judge's guesses and perceptions whatsoever their validity[31]

The freedom exercised by the criminal judge in forming his self-belief is governed by the law under the procedural legitimacy. It is unacceptable and irrational that such freedom results in convicting an innocent pr violates guarantee prescribed by the law to protect the principle that the accused is originally innocent. Ascertainment of the truth is different from the totalitarian control. The free ascertainment means that the judge is free to assess the evidence without any restriction other than taking into account his judicial duty. That does not mean that he may judge whatever he wants as such will be the totalitarian control itself. He may not rule as he likes or merely on the ground of his passion. On the contrary, he is obliged to investigate the accurate logic of his thinking which led to his belief32.

The above rule has been adopted by the UAE law as the Article No. 209 of the UAE Code of

[27]- Dr. Ahmed Yousif Al Tahawi, The Electronic Evidence and their Role in the Criminal Proof- Comparative study -Al Nahda Al Arabia Home – Cairo, 2015, P258

[28]- Dr. Hazem Mohammed Hanafi – The electronic Guide and its role in the criminal field, op. cit., P246

[29]- Dr. Ahmed Fathi Surroor, Al Wasit in the criminal procedural Law, op. cit., P607

30- Dr. Kamal Abdul Wahid Al Jawhari, Establishment of the Judicial Conviction and the Fair Criminal Trial – Mahmood Publication and Distribution Home -, 1999, P14.

31- Dr. Ahmed Fathi Surroor, Al Wasit in the criminal procedural Law, op. cit., P607

32- Dr. Mahmood Najeeb Hosnim – the Explanation of the penal procedures law, op. cit., P77 and next pages,

Criminal Procedure No. 35 of 1992 and its amendments which stipulates that: (The judge shall decide the case according to his personal conviction; however, he may not base his judgment on evidence that was not submitted by the parties during the hearings)33 . It is established under the Egyptian Court of Cassation that the trial court may draw a picture of the incident as drawn in its conscience by conclusion, extrapolation and all mental possibilities which are in conformity with the mind and the logic34.

It is clear as per the above facts indicate, that the criminal judge enjoys a great deal of the discretion in forming his conviction from the evidence that reassures him. Thus, he can decide to convict or acquit according to his conscience and belief. The criminal judge shall necessarily abide by what was recorded in the Investigation report or the record of reasoning unless he finds in the law provisions otherwise stipulate[35]. The UAE law highlights the important role of the Criminal Judge as the Article No. 179 of the federal law of the criminal procedure stipulates that: "The court may of its own accord, during the examination of the case, order the producing of any evidence deemed necessary to reveal the truth". Thus, the UAE legislator recognizes this freedom to enable the selection of adequate means to confront the newly developed crimes such as the cybercrime.

Therefore, the Criminal Judge has become forced to deal with the electronic evidence for being necessary to reveal the new types of the newly developed crimes. It follows the freedom of proof that the criminal judge now plays a vital role in searching, accepting and assessing the criminal evidence including the electronic one. The judge also may order the service provider (Internet) to search for evidence from the websites and platforms used by the accused or the chats, communication or electronic messages received or sent by him/her.

The judge also can order the service operator to provide the necessary data/information to break through the service systems and disclose of passwords, cods and pins used to access the various software. The judge may order the inspection of any PCs or systems and their accessories to search for any evidence that reveals the truth.

The Second Chapter

The Criminal Judge's power to accept the electronic evidence

Introduction &Breakdown:

We have shown above that originally the judge is free to derive his conviction from any evidence that reassures him/her. There is no power over him/her other than his/her conscience. He is not obliged to show the reasons of his personal conviction, however, he is obliged to state the grounds of the verdict concluded by him. He should mention all evidence on which he has relied as source of his conviction. However, such origin is also associated with certain regulations which have to be adhered by the Judge while he is selecting the evidence from which he can derive his personal conviction. He can only draw his conviction from evidence that meets the requirements and regulations laid down by law whether the traditional or electronic evidence. Such regulations are mainly based in the legitimacy of evidence.

However, the legal rules are not the only ones that govern the means of searching for the evidence. Besides these rules, there is a principle of the integrity and fairness of the criminal evidence. In practise, some matters that may influence the will of the accused in one way or another may arise with the principle of the integrity of the criminal evidence. The principle may initiate any method that does not conform to the basic principles of the judicial system in order to obtain the evidence. It also contributes to the determination of the frames within which the process of searching of the evidence takes place. The integrity is the principle which governs the work of the justice agencies in searching the newly developed crimes. It differs

[33]- Correspondent by the Article No. 302 of the Egyptian the Law of Criminal Procedure and the Article No. 427/1 of the French Law of Criminal Procedure.
[34]- Established judgements. Please see the Cassation No. January 17, 1982, Group of verdicts, Y33, P29, April 20,1982, Y33, No. 104N, April 14,1982, Y34, No. 106, P515K March 17, 1985, Y36, No. 70, P409.
[35]- Please refer to Article No. 208 of the UAE Code of Criminal Procedure No. 35 of 1992

from legal rules by source and relays on rules with source of ethics[36].

The doctrine of the criminal judge and his personal conviction of the evidence should be derived from electronic outputs that raised in hearing during the trial and seen by the parties of the criminal lawsuit because the rule is that the judge should judge in accordance with the evidence that were discussed in the hearings of the trial and not based on his own knowledge. It follows that the evidence should have a fixed origin the papers of the case and all litigants should be given the opportunity to see and discuss such evidence.

Accordingly, most legislations are keen that the acceptance of evidence should associated with the availability of certain requirements and regulations supporting the legitimacy of the electronic criminal evidence which should be discussed during the trial hearings in addition to the principle of the certainty of the electronic criminal evidence. This aspect will be explained in the following three topics.

The First Topic

The Principle of the Legitimacy of the Electronic Evidence

The right to maintain the human dignity is one of the most important rights and freedoms protected by the UAE constitution. The UAE under its constitution ensures guarantees the inviolability of the human person and prohibits torture and cruel, inhuman or degrading treatment or punishment[37]. The constitution contains provisions regulating the basic rules of inspection and searching for the evidence. On this basis, the UAE ensures that homes shall be inviolable. They may not be entered without permission from their inhabitants except in accordance with the provisions of the law, and in circumstances laid down therein[38]. The freedom of assembly and the freedom to hold meetings shall be guaranteed within the limits of the law[39]. These rights may not be infringed in any way without the competent judicial authorities and violation of these rights is punishable by law.

The above provisions of the UAE constitution have forced to the legislator to strictly abide by the same upon drafting the rules and regulations of the Criminal Procedural Law. Similarly, as per the law, the procedures for obtaining any criminal evidence including the electronic evidence should be taken within the framework stipulated under the UAE constitution, otherwise, any evidence derived by methods not conforming with provisions of the constitution shall be deemed as null and void as the same is related to the public order and ant interested person may uphold it. The Court to adjudicate it on its own initiative. The UAE has made emphasis on protection of the personal data / information saved in any electronic information systems or networks under UAE Federal Law No. 34 of 2021 on combating Rumors and Cybercrime[40] in addition to the general regulations stipulated under the Federal Decree-Law No. 31/2021 on the 'Issuance of the Crimes and Penalties Law.

All the means of the criminal proof used in particular during the pre-trial stages should be valid and legal. This does not mean that the legitimacy of the methods of searching the evidence is not applicable during the trial stages. On the contrary, the judge himself shall verify the legitimacy of every evidence brought before him. Searching for any evidence should be subject to the provisions, the applicable rules and regulations stipulated and provided for under the law as well as the legal procedures to be followed to reveal the truth[41]. Any inspection made by the investigator in searching the electronic evidence, not in conformity with the conditions and requirements prescribed by the law should be deemed absolutely null and void. It is not permissible to adhere to the inspection

[36]- Dr. Mo'atasim Khamis Mosha'asha'a – Proof of the crime with scientific evidence, op. cit., P11

[37]- Please refer to the Article No. 26 of the Constitution of UAE.

[38]- Please refer to the Article No. 36 of the Constitution of UAE.

[39]- Please refer to the Article No. 31 of the Constitution of UAE.

[40]- The Federal Decree-Law No. 5 of 2012 on Combating Cybercrimes was issued by the UAE legislator and recently replaced by the Federal Law No. 34 of 2021.

[41]- See the provisions of the Article No. 53 of the UAE Criminal Procedure Code No. 35 of 1992.

record and the court, in its determination, should not considered any evidence obtained under such inspection. Therefore, any evidence reached through invalid and illegal means should excluded.

The legitimacy of the electronic evidence, in general, requires that the criminal judge should drive his conviction in any condemnation from legal and valid evidence as the prevailing law. Therefore, the judge, at first, should verify and make sure pf the legitimacy and fairness of the evidence because the fairness in conducting any procedures is integral part of the legitimacy of such evidence. Such legitimacy should be adhered to in their spirit and intent and not in form only[42].

The legitimacy of the electronic evidence is one of the important guarantees of the personal freedom. The use of unlawful means of obtaining electronic evidence results in the invalidity and invalidity of the proceedings as valid evidence of condemnation in the criminal items. One of the examples of such illegal means is the use of fraud and deceit cybercrimes for decoding the access to his system in order to obtain evidence from his electronic means[43].

The Second Topic

The Mandatory Discussion of the Electronic Evidence

The Criminal Judge may only build his conviction on evidence raised in the trial hearings and subjected to free discussions by the parties to the criminal lawsuit. The evidence presented in the hearing are those evidence with a source in the case papers presented before the judge. It is not different for the electronic evidence as being fixed evidence. The judge shall put such electronic evidence forwards for discussion by the parties. This condition is firm guarantee of a fair trial the result of the same is that the electronic evidence will have a fixed source in the papers of the criminal lawsuit and the litigants will have the opportuning to access and discuss the same. The Article No. 2009 of Federal Law No. (35) of 1992 Concerning the Criminal Procedural Law provides for that: "The judge shall decide the case according to his personal conviction, however, he may not base his judgment on an evidence that was not submitted by the parties during the hearings".

Therefore, the electronic evidence in whatsoever form, whether in form of data displayed in PC screen, saved in diskette, magnetic tape or computer paper outputs generated by electronic printers or visual photo discs (video) or in other non-traditional electronic forms or just display of processing outputs by computer on its screen or any other projectors. The International Internet Information Network may be used for such purpose. All such aspects of proof shall be subject to the discussion in the event the same taken as evidence of proof by the court.

The discussion of the electronic evidence is mainly based on provision of the litigants with the opportunity to have access to the electronic in order to make their comments on the same. In such way, Court respects the principle of defense right which is considered as one of the important guarantees of the fair trial in the modern procedural regimes. The discussion of the electronic evidence also embodies of transparency and confrontation which is one of the major principles that govern the UAE procedural system. Such principle perpetuates the guarantees secured by law to the accused which include the right of the accused to be acquainted with the offense with which he charged, grant him enough time to prepare the adequate defense and enable him to have access to a lawyer. Each party of the criminal litigation is allowed to present any defense or supporting documents or raise any question to the expert in deliberation.

The second element is that the electronic evidence shall have a fixed origin in the papers of the criminal case in order that the judge's conviction shall be based on such evidence. The judge may not adjudicate according to his personal information or what himself has seen or achieved at the judicial council without the attendance of the litigants because such information were not presented in the hearing and were not discussed or evaluated. Therefore,

[42]- Dr. Ahmed Fathi Surroor, Al Wasit in the criminal procedural Law, op. cit., P516.

[43]- Dr. Ali Mahmood Hamoodah - Evidence obtained from electronic means in the Theory of Criminal Proof, a paper presented at the 1st Scientific Conference on the Legal and Security Aspects of the Electronic Operations- Dubai Academy of Police, 2003, PA1, P38.

the dependence on such information will be in contradictory with the rules of transparency and confrontation which prevail in the criminal courts[44]. That is due to the importance the role played by the discussion in forming the conviction of the judge with the evidence he sees before him or hears with the support of several discussions on the same as the mere access to the criminal inspections record is not enough. Any prejudice to the principle of discussion will deprive the parties to the criminal lawsuit from their right to have access to the evidence and raise the defense. That is contrary to the rules of fair trial as the result, the court which do not hear any discussions of the evidence derived from the electric means shall have no right to adjudicate due to its incapability to assess the value of such evidence.

Therefore, the legislator obliges that court hearing transcripts to be recorded to demonstrate the court procedures and prove that the electronic evidence has been discussed so that any trial judge or one of the litigants may refer to such transcripts to clarify the facts established in the same[45]. The subjection of the electronic evidence to the discussion enables the judge to form his own conviction either to take or exclude the evidence

The Third Topic

The Principle of the Certainty of the Criminal Electronic Evidence

All criminal procedure legislations aim at organizing the proof process on the criminal matters, revealing the truth and enabling the judge to decide whether guilt or innocence in his judgement. The truth can be attained by the certainty only. The reasonableness of the conviction required from the criminal judge varies depending on the contents of the criminal conviction. In case of innocence verdict, the conviction shall be based on certainty and assertion. However, in the verdict of innocence, it is enough that the judge gets suspicious in the validity of the charge. The certainty required is not the personal certainty but it is the judicial certainty which reaches to the judge through the mind and logic[46].

As general, the certainty is a state of mind or rationality affirming the existence of the truth. This result is reached by what the means of perception has concluded for the judge as well as the prospects and perceptions stuck in his mind with grade of assertion[47].

AS regards to the certainty in the field of the electronic criminal evidence, similar to the other criminal evidence, it is required the evidence should be unsuspected for any guilty verdict because there will be no chance to refute the presumption of innocence and presume the contrary unless when the judge reached to level of certainty and assertion[48].

Therefore, the electronic evidence should be irrefutable as the doubt should always favors the accused by virtue of the rule that origin in the human being is innocence until proven guilty as per a constitutional rule stipulated in the Article No. 28 of the UAE's Constitution.

Thus, the judge, through the electronic evidence brought before him as well as the perceptions and prospects stuck in his main, may determine whether the charge of Cybercrime attributed to any person is true or not and whether the assertion of the commission of the Cybercrime will require another kind of knowledge. The judge with his legal culture can only realize the facts related to the origin of the electronic evidence when he owns the necessary knowledge of the electronic and informative matters with taking into account that the judge plays an important role in the proof process while the ignorance in these matters leads to question the value of the electronic evidence. This suspicion leads to the acquittal of the accused who committed the crime and thus he escapes justice. The Article No. 65 of UAE Federal Law No. 34 of 2021 on combating Rumors and Cybercrime stipulates the following

[44]- Dr. Mamoon Salama – The Criminal Procedure law on view of doctrine and jurisprudence – Dar AL Fikr Al Arabi -1980, P108.

[45]- Dr. Aisha bin Qarah Mustaffa - The authenticity of the electronic evidence in the criminal proof, , op. cit., P171 and the next page

[46]- Dr. Ahmed Fathi Surroor, Al Wasit in the criminal procedural Law, op. cit., P906

[47]- Dr. Nasr Al Din Mabrook – The General Theory of the Criminal Proof- First Part – Dar Harmah – Algeria – P191.

[48]- Dr. Ali Hassan Mohammed – The Criminal Inspection on the Internet & computers systems – Comparative Study – First Edition – Books World Modern – Jordon – P190

on the authenticity of the evidence of the criminal electronic evidence: The evidence taken or derived from electr4onic devices, equipment or media or IT systems, software or any other IT means shall have Authenticity of forensic evidence in criminal evidence. Part of the jurisprudence[49] goes on to say that the electronic evidence are the best evidence in terms to its proof power which may reaches to the limit of certainty. The electronic evidence as regards to the proof, fulfilling the conditions of certainty. Therefore, the judge's practice of his power cannot be accepted in affirming the proof of such evidence.

However, the above does not deny the fact that the electronic evidence is always under suspicion in terms of its safety against any tampering in one point and the validity of the procedures followed to obtain such evidence on other point. The safety of the electronic evidence is always under suspicious for the following reasons[50]:

1. The electronic evidence may be subject to tampering in contravention of the truth. Nevertheless, the evidence is presented to the court to prove certain event for which it mainly was made to express it in contrary to the truth. However, the non-specialist cannot reveal such tampering. Thus, the mew technology easily enables tampering with the electronic evidence and the tampered evidence appears as an original one reflecting the truth.
2. The existence of the technical error in obtaining the electronic evidence is very rare however it is possible[51] due to any mistake in using the adequate means in obtaining the electronic evidence. That is due to any defect in using the code or password, using the wrong specification or any error in using deriving the evidence. That may be also sue to the reduction of the data or processing the date in a different way. The acceptance of the electronic evidence may be relatively different from any other system wither the Anglo-Saxon system, Latin system or any mixed system.

The Anglo-Saxon system applies the specified proof system or the legal evidence system where the evidence are limited and pre-specified by the legislator. The judge may not get out of the same or establish his judgment on another evidence in breach of the pre-specified. Of the countries in which this system is applicable, England, USA, Australia and South Africa[52].

On other hand, the Latin system which called the persuasive evidence system or the free proof system. It is based on the freedom of conviction as under this system the legislator does not specify any evidence or means of proof but it leaves the judge free to establish his judgment on his personal conviction with any available evidence before him without imposing any specified evidence. The criminal judge may also decide to accept or reject any evidence provided that his conclusion should be in conformity with the truth and should goes out the requirements of mind and logic[53]. Of the Legislations in which the above system is applicable the systems of French, Egyptian and UAE legislations and most Arab legislations as explained above.

The mixed system is that system that bring together both above systems. It depends on the specification of the evidence by law to prove some facts but not on others or sometimes it requires that the evidence shall meet some conditions or grant the judge the freedom to to assess the legal evidence. Of the legislations that adopt this system the Japanese Procedure Law which restricts the acceptable means in (the statement of the accused, the statement of the witnesses, the presumptions and expertise). AS

[49]- Dr. Ali Hassan Mohammed – The Criminal Inspection on the Internet & computers systems –op. cit., P8

[50]- Dr. Tareq Mohammed Al Jamali – the Digital Evidence in the field of the Criminal Proof – A paper presented at the First Conference of the Information & Law during the period October 28-29, 2009 which was organized by the Academy of the Higher Studies – Tripoli –P32

[51]- Dr. Mamdoouh Abdul Hamid and others- the proposed draft for the Rules of Adoption of the Digital Evidence of the proof in the computer Crime - A research published with the papers of E-banking Business Conference _ Volume 5 – organized by the Faculty of Law & Sharia – University of UAE and Dubai Chamber of Commerce & Industry – P2253.

[52]- Dr. Shama Abdul Al Ghani Mohammed –The Criminal Production of the Electronic Transactions- Al Jam'a aBew Home – Alexandria, 2007, P8.

[53]- Bashir Seedi Mohammed- the Role of the Digital Evidence in proving the Cybercrimes – Master Thesis – Naif University of Security Science – Saudi Arabia, 2010, P 88/89.

for computer and internet evidence, the Japanese jurisprudence states that the Electro-magnetic records are invisible on its own. Therefore, they should not be used as evidence in the court unless they were transferred to audio and visual photos by printer outputs of such records, then such evidence produced by the Computer or Internet whether origins or copies from the origins may be accepted[54].

CONCLUSION:

In our research, we looked through the subject of (The Criminal Judge's Power in the Assessment and Acceptance of the Electronic Evidence) by illustrating the concept of the free proof and how to be judicially adopted and applied. We also highlighted the fact that the UAE legislator has recognized the importance of this kind of evidence by working on development of substantive rules and regulations under the law issued on combating Rumors and Cybercrime as well as procedural rules in conformity with the specificity of the cybercrime and its evidence.

In our research, we have concluded a set of conclusions, which we summarize as follows:

- The Criminal Judge enjoys a high degree of discretion and wide freedom in the countries which apply the Latin System in which the Principle of the Free Assessment of Evidence prevails. Under this system, the judge plays a vital role in getting to the truth.
- The electronic evidence has authenticity of criminal evidence in criminal proof as per the law.
- The Electronic Evidence does not raise any problem in the view of the jurisprudence insofar as the basis is the freedom of the judge in assessing the evidence. The Electronic Evidence has become very important in revealing the newly developed types of crimes i.e. cybercrime.
- In order to be authentic in the criminal proof, the electronic evidence should be derived as per the requirements and conditions stipulated under the law otherwise the evidence will be deemed as null and void.
- The Electronic Evidence are subjected to the same conditions of all other evidence. Such conditions include the legitimacy in obtaining the electrical evidence, attainment of the judicial conviction to the stage of certainty and the fairness of the electronic evidence as the need to apply the principle of the fairness increases with the use of the scientific means in searching the evidence.
- The electronic evidence should be openly discussed in a public hearing with attendance of all parties of the criminal case in application of the principle of transparency and confrontation.
- Due to the sort of novelty of the electronic evidence, the person who deals with such evidence may requires special experiences to assess the evidence and assess how it is powerful, valid and authentic on proving. Therefore, the competence of the criminal lawmen including the judicial officers, investigators, judges and experts should be raised to enable them to deal with the different nature o the electronic evidence.
- It is advisable that the international cooperation in combating the cybercrimes should be enhanced and the technological expertise in the field of the extraction of the electronic evidence as well as the relevant treatment processes should be shared due to the fact that the cybercrime is one of the cross-border crimes.

Concluded with Help of Allah

[54]- Dr. Hilali Abdul Al Elah Ahmed, the Authenticity of the computer output in the Criminal Matters-op. cit., P62