

The Electronic Testimony and its Effect in Criminal Evidence: A Study of the Jordanian and Emirati Legislations

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Abstract

This research aimed to shed light on the concept of the electronic testimony. It explained the electronic testimony's general and specific conditions, and the extent of its validity in criminal proof. Moreover, it examined the obstacles facing the electronic testimony, whether legal or technical, indicating the position of the Jordanian and Emirati legislators on it. The descriptive approach was used and the findings reflected that the Jordanian legislator has permitted conducting electronic testimony in all crimes. Furthermore, it permitted hearing witnesses electronically even if they are abroad. This is based on bilateral and collective agreements and treaties concluded between member states. Significantly, the studied legislators approved hearing the evidentiary testimony of anyone under fifteen years of age. They also permitted resorting to the assistance of a translator in the event that the holder of the electronic testimony is deaf or mute.

Keywords: Electronic Testimony, Legislator, Judiciary, Competent Court, Case.

Introduction

The world is witnessing rapid development in the field of communications and information technology. This modern technology has had the greatest impact on many aspects of economic and social activity. Significantly, it extended to include the legal and judicial fields. This provoked the majority of penal legislations around the world to resort to introducing this technology into their legislation (Al-Wreikat, et al., 2023). It occurs either by developing and updating their procedural laws, or singling out special systems and laws for it. Therefore, the electronic testimony is an important legal procedure. It is used before the preliminary investigation stage or at the trial stage (Kengyel & Nemessányi, 2012). Specifically, in this final stage, the electronic testimony is considered to be evidence. The criminal judge can rely on it in order to initiate a criminal case, with the resulting judicial ruling, whether of conviction, acquittal, or non-

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responsibility. Despite the importance of this legal procedure in the event that the witness cannot appear before the court for incidental reasons, or if he is outside the geographical borders of the state in which the trial is taking place, it can be said that there is a lack of legislative regulation to control this matter. Besides, there are legal and technical obstacles that would negatively affect the conduct of the judicial procedures. Such obstacles lead to a breach of fair trial guarantees for the parties to the criminal case. (Treef, 2022)

Therefore, the problem of the study lies in demonstrating the impact of electronic testimony on the productivity of the criminal case. It is also represented in the electronic testimony's impact on the guarantees of a fair trial for the parties to the criminal case, including the defendant. This is due to the fact that it results in depriving the parties to the criminal dispute from discussing witnesses in person before the judge. It also deprives them from benefiting from body language and movements, and knowing the extent of the truthfulness of the witness in his testimony. The same applies to the judge who may find it difficult to understand the witness's words and recognize the obstacles that would affect his testimony (Wells & Olson, 2003). The problem also appears through not specifying the type of crimes in which witnesses may be heard electronically. This is applicable to all types of crimes; misdemeanors, felonies, or violations. It also lies in the presence of legal and technical obstacles that may interfere with electronic testimony during their hearing and discussion. Such obstacles negatively affect the proceedings of the trial and how the criminal ruling is constructed through it. (Bin Treef, 2022).

Thus, this research sheds light on the concept of the electronic testimony. Moreover, it explains the electronic testimony's general and specific conditions, and the extent of its validity in criminal proof. Besides, it shows the most important obstacles facing the electronic testimony. Significantly, it highlights the position of the legislator and jurist on it. Besides, it determines the extent of the electronic testimony's effectiveness in criminal procedures. It also examines whether it is possible to benefit from the electronic testimony before the judiciary. In this respect, electronic testimony is evidence that would assist the judge in forming his emotional conviction to build the criminal ruling.

The importance of the current research arises from the fact that it examines the judge's right to accept electronic testimony and rely on it in accordance with the principle of free proof in criminal matters. In this respect, the judge follows the principle of his emotional conviction, which he senses through the circumstances of the case before him (Posner, 2010). This importance also lies in clarifying the challenges faced by the electronic testimony. This is done by reviewing the legal, jurisprudential and judicial position regarding it. (Al-Khatib, 2022).

Literature Review

The changes brought by the modern technology to the judicial field have captured the attention of many researchers whose efforts varied in terms of the approaches and the findings. In this respect, Airout (2023) examined the aspects of criminal evidence using modern technology. The researcher specifically addressed the phenomenon from the lens of the Jordanian legislation. The findings reflected that criminal evidence in Jordanian courts has relied on eyewitness testimony, physical evidence (Airout, 2023).

Demydova, et al. (2023) investigated the challenges facing the utilization of digital evidence in criminal justice. The findings reflected challenges related to a lack of legislation. In a similar context, Dmitrieva and Pastukhov (2023) addressed the concept of electronic evidence in criminal legal procedure. In this respect, the study viewed electronic evidence as a system of information-technological and legal views on the criminal-procedural form.

Furthermore, El-Mahrouki (2023) carried out a research on the remote conduct of criminal proceedings by means of audio-visual communication and the guarantees of fair trial. The research concluded with stating that evidence through video conference is a great step ahead. Apart from this, Laguardia (2023) examined the adoption of virtual testimony post-COVID. It was concluded that COVID-19 changed various aspects of human. These aspects include the judicial field that began widely accepting electronic testimony.

Lasaka (2023) investigated the electronic evidence arrangement in criminal procedure law. The researcher concluded that the existence of this unclear arrangement results in legal uncertainty (Lasaka, 2023). Moreover, Murzo and Halchenko (2023) investigated electronic evidence as a means of proof during the pillage investigation. They concluded that the electronic evidence has become one of the key components of criminal investigations (Murzo & Halchenko, 2023).

Shawabkeh and Shiyab (2023) compared and analyzed the compatibility of witness testimony through videoconferences with good governance in criminal proceedings in the UAE and Jordan. Significantly, Sandoval (2024) proposed a redrafting amendment to federal rule of criminal procedure 26 to allow remote testimony. The findings reflected the necessity to amend Federal Rule of Criminal Procedure 26. The purpose is to permit remote witness testimony when a witness is unavailable (Sandoval, 2024). Furthermore, Turner (2023) studied the criminal procedure in the digital age. The researcher stated that criminal justice in the United States increasingly relies upon digital technology at allstages of the process.

Research Questions

The current study raises the following questions:

1. What is an electronic testimony?
2. To what extent is the electronic testimony effective according to the Jordanian and the Emirati legislations?
3. To what extent do the Jordanian and the Emirati legislations agree regarding the electronic testimony?
4. To what extent do the Jordanian and the Emirati legislations differ regarding the electronic testimony?

Research Methodology

This research is qualitative. Besides, it adopts a descriptive analytical approach to describe and analyze the legal texts related to the topic. It is also comparative in the sense that it compares and contrasts the Jordanian and the Emirati legislations regarding the electronic testimony. The primary data is taken from the Jordanian and Emirati legislations, while the secondary data is taken from books and journal articles relevant to the research topic. Furthermore, the primary data is taken from the Jordanian Evidence Law, Code of Criminal Procedure, Federal Law No. 10 of 1992, and UAE Civil Transactions No. 1 of 1987.

Results and Discussion

Electronic testimony is a person's informing of what has come to his knowledge and any of his senses. In doing so, she/he uses modern visual and audio technical means, which would deliver that testimony to the judiciary (Ikhlaif, 2021; Airout, 2023; Demydova, et al., 2023; Dmitrieva & Pastukhov, 2023; El-Mahrouki, 2023; Laguardia, 2023; Lasaka, 2023; Murzo & Halchenko, 2023; Shawabkeh & Shiyab, 2023; Sandoval, 2024; Turner, 2023). In this respect, the electronic witness is the person who perceives through one of his senses the facts related to the crime.

This condition is stipulated in Article 32 of the Jordanian Evidence Law, which says: "The court shall hear the testimony of every person unless he is insane or a child who does not understand the meaning of an oath. Moreover, it may hear the statements of a boy who does not understand the meaning of an oath as a matter of inference only" (Atwati, 2012. p.198). Article 158/1/Security of the Code of Criminal Procedure also stipulates that "witnesses who have not reached fifteen years of age may be heard without taking an oath as a matter of evidence if it becomes clear that they do not understand the meaning of the oath."

In UAE law, the legislator stipulates that the witness must have reached the age of fifteen years. Moreover, he must take the legal oath before taking it (Article 41/2, Federal Law No. 10 of 1992), and in accordance with Article 174 of the same law.

The researchers believe that both the Jordanian and Emirati legislators have made the age of fifteen a valid age for accepting a testimony after the holder has taken the legal oath. This is contrary to the Emirati legislator that specifically has emphasized in the Civil Transactions Law that the stage of full legal capacity in which legal actions are permissible occurs when the person reaches the age of 21 (Article 85 of the Civil Transactions Law; UAE Civil Transactions No. 1 of 1987).

In the Jordanian legislation, and based on the system of using modern media technology, there is no clear and explicit legal text that allows a witness to submit a request to testify before the competent judicial authority. This is applicable to the witness living within the borders of the country in which the investigation and trial are taking place or outside it.

Contrastingly, the UAE legislation did not specify the form of the request, whether it was oral or written. But it is credited with stipulating that electronic testimony should not be conducted except through the witness submitting a request to do so before the head of the competent authority (Federal Ministerial Resolution No. 259 of 2019).

Significantly, the two legislations make special conditions for the electronic testimony. In accordance with Article 9 of the Regulation on the Use of Jordanian Electronic Means for Civil Judicial Procedures No. 95 of 2018, the electronic testimony must be conducted in the court closest to the witness in a visual and audio manner. But it may not be conducted in an audio manner only. Likewise, the UAE legislation stipulated this condition in Article 3/2 of the Ministerial decree No. 259 of 2019, which states: “3- Trial procedures shall be initiated remotely, in the district where the competent court is located. If these procedures are intended to be taken from outside the district of the competent Emirate, coordination must be made with the competent authority in the Emirate in which the person to be heard is located.”

In UAE legislation, the legislator demands this condition before the investigation body, not the trial. Moreover, the legislator places the burden of his duties on the technical employee in accordance with Article 13 /3/ of the Ministerial Decree No. 259 of 2019. This article stipulates that “the technical employee undertakes the process of preparing the devices used in the remote investigation well before the start of the session. He must deal quickly in cases of

interruption or technical defect if either of them occurs during the investigation session.”

In UAE law, this condition was stated in Law No. 35 of 1992 regarding the issuance of the Code of Criminal Procedure under Article 174. This Article states: “If the witness apologizes due to illness or any other excuse for not being able to attend to give testimony, the court may move to him and hear his testimony after notifying the Public Prosecution and the rest of the opponents. The opponents may appear in person or through mediation.”

There are several obstacles to the electronic testimony and its validity in criminal proof (Airout, 2023; Demydova, et al., 2023; Dmitrieva & Pastukhov, 2023; El-Mahrouki, 2023; Laguardia, 2023; Lasaka, 2023; Murzo & Halchenko, 2023; Shawabkeh & Shiyab, 2023; Sandoval, 2024; Turner, 2023). The most prominent of these obstacles is the lack of legal regulation of the international electronic testimony.

The researchers believe that both legislators lack legal regulation of the mechanism for hearing testimony electronically if the witness is outside the borders of the country in which the trial is taking place. One of the legal obstacles is that the witness be deaf or mute. The Jordanian legislator stipulated this matter clearly and explicitly and dealt with it from a substantive rather than procedural standpoint (the Jordanian Code of Criminal Procedure). Contrastingly, the UAE legislation did not stipulate the testimony of a mute or a deaf person or a mute and a deaf person (Mahmoud).

Both Jordanian and Emirati legislators did not address the witness who is in another country that does not have bilateral or collective relations and agreements, especially if this testimony is necessary to resolve the case. There are also technical obstacles, the most prominent of which are digital viruses. These viruses are a group of programming commands that are introduced into computer programs and become part of them (Airout, 2023; Demydova, et al., 2023; Dmitrieva & Pastukhov, 2023; El-Mahrouki, 2023; Laguardia, 2023; Lasaka, 2023; Murzo & Halchenko, 2023; Shawabkeh & Shiyab, 2023; Sandoval, 2024; Turner, 2023). They are created by malicious individuals that cause harm to computer equipment. When the program is created via the device, computer viruses are activated and begin to work hidden within the programs. Therefore, when the program loaded with the virus is run, the virus is being copied to the files, as well as other programs on the device (Fahmous, 2021. p.96). Within the scope of the electronic testimony, these viruses may lead to the destruction of all or part of the file contents. Therefore, this weakens litigants' confidence in this electronic means (Abdel Hamid, 2020).

The electronic testimony may include acts of sabotage. These include hacking and tampering by some criminals, especially if we know that the network to which the electronic means are connected and through which witness testimony is conducted is not secure. Moreover, it can be very secure, in addition to the variation in the percentage of digital protection between applications and websites. There are unsafe applications, while others are highly safe. Therefore, most cases that constitute illegal access are able to be secured by those working to deter criminals (Mahdi, 2021).

Due to the weakness of local websites and programs, and for the sake of the importance of securing cyberspace, the Jordanian Ministry of Justice has resorted to adopting electronic websites and programs. Examples are Skype and Zoom. Through such programs, the electronic testimony is conducted. This is because these testimony, in addition to being free, enjoy electronic protection, in addition to their ease of use. It relies on visual and audio communication technology (Nazira, 2021).

Since 2004, the Jordanian courts have witnessed the implementation of projects to computerize judicial work. In this respect, the (Mizan) program is the first step towards automating the litigation process. This program allows all those working on it to view the case file electronically (Al-Sharaa, 2010).

In the Jordanian and Emirati legislations, witness testimony is among the criminal evidence that the judiciary relies on in forming his convictions and issuing rulings. In order for the court to properly relate to the case, it becomes aware of its case, and reach the truth regarding the dispute before it. Moreover, the category must hear the witnesses itself, discuss with them what they testified, and not rely on what was stated in their testimonies in the preliminary investigations.

In the Jordanian legislation, Article 3/2 of the Law on the Use of Modern Technology Means stipulates that “for the purposes of implementing the provisions of this law, modern technological means shall be used” (Tony, 2010).

The UAE legislation included the text on testimony in Articles 88 to 95 of Law No. 35 of 1992 regarding the issuance of the Code of Criminal Procedure. Article 88 of this Code stipulates that “the member of the Public Prosecution shall hear the testimony of witnesses whom the opponents request to hear unless he deems there no benefit in hearing them. Besides, he may hear the testimony of whomever he deems necessary.” Article 90 of the same law also stipulates that “the Public Prosecution member shall hear each witness in private and may have the witnesses confront each other.”

The Jordanian legislator adopted the principle of free proof in criminal matters. This is stated in Article 147 of the Code of Criminal Procedure, which stipulates that “evidence shall be established in felonies, misdemeanors, and

violations by all methods of proof, and the judge shall rule according to his personal conviction.”

Significantly, the court has the authority to estimate the legal value of the electronic testimony without oversight by the Court of Cassation. This assessment shall be in accordance with what it deems appropriate of the actions and behavior of the witness.

Electronic testimony is like traditional testimony that is performed in person in the halls and arenas of the judiciary. The difference between them is only in terms of the method used. Therefore, it is subject to free proof and the extent to which it is considered evidence upon which the criminal judge relies in proving the facts of the crime before him (Muhammad, 2021; Ben Air et al., 2021).

The Jordanian and Emirati legislators limited themselves to allowing the use of modern communication technology in judicial procedures without specifying a specific procedure. The researchers believe that the Emirati legislator initially distinguished itself from its Jordanian counterpart. This occurs in terms of allowing this technique to be used during the evidence-gathering stage, in addition to the investigation and trial stages. Despite our fear of the legal and technical obstacles that face this modern technology, especially during the investigation or trial stages, conducting it specifically during the evidence-gathering stage does not pose any difficulty. Even if it is exposed to legal or technical obstacles that would negatively affect its course.

In traditional trials, there is no problem in giving testimony. Its place is before the judicial authority, whether at the headquarters of the Public Prosecution or the competent court. But the problem arises in the place of giving the electronic testimony. Referring to the Jordanian Law on the Use of Modern Media Technology No. 96 of 2018 regarding criminal procedures, it is noted that if the witness is an inmate and within the borders of the country in which the trial is taking place. His testimony will be heard from the places specified in the law.

Conclusion

This study has investigated the concept of electronic testimony, the extent to which the electronic testimony is effective according to the Jordanian and the Emirati legislations. Moreover, it examined the extent to which the Jordanian and the Emirati legislations agree or differ regarding the electronic testimony. In this respect, it has been revealed that the Jordanian legislator has permitted conducting electronic testimony in all crimes. Furthermore, it permitted hearing witnesses electronically even if they are outside the geographical borders of the state in which the trial is taking place. Besides, it uses bilateral and collective agreements

and treaties concluded between member states. Significantly, it adopted free proof in accordance with the emotional conviction in all criminal matters, including hearing electronic testimony. But the legislator did not stipulate a specific formality for using modern technological means in criminal procedures.

The studied legislators approved hearing the evidentiary testimony of anyone under fifteen years of age. Moreover, they permitted resorting to the assistance of a translator in the event that the holder of the electronic testimony is deaf or mute, whether his testimony is within the borders of the country in which the trial is taking place or outside it.

Recommendations

This study recommends that:

- The Jordanian legislator should limit the electronic testimony to misdemeanors so that it does not include felonies. If the legislator wants to leave the matter as it is now, it is suggested to exclude electronic testimony in dealing with crimes punishable by death and life imprisonment.
- The Jordanian legislator should establish a specific organization for the mechanism of hearing testimony electronically in case that the witness is outside the geographical borders of the country in which the trial is taking place, whether in terms of places or in terms of the effective means used in conducting it.
- The legislator restrict free proof in all judicial procedures that take place via remote communication technology. These include hearing and discussing witnesses.
- The Jordanian legislator should follow the example of the Emirati legislator by stipulating clearly and explicitly that electronic testimony should not be heard except through the witness submitting an electronic request on the court's website.
- Both legislators should consider the completion of the age of fifteen years for the witness. Thus, the age of majority is adopted to give testimony legally. It is the age considered for legal actions. Before this age it is permissible to hear testimony as a matter of evidence, with or without swearing an oath.
- There is a need for the legislator to establish a legal regulation for electronic testimony, whether internal or external, if the witness is deaf or mute.

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