

The Amendments to the Criminal Procedures Code by Decree 28 of 2020: Codification of Judicial Practice or Introduction of New Guarantees?

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The amendment of the Criminal Procedure Code which were brought into force by Decree 28 of 2020 is the first of what will inevitably be many further steps to come, where the United Arab Emirates (“UAE”) will gradually align its criminal justice system with international standards, and will eventually pave the way for introduction of further guarantees, and safeguards such as speedy trial and custody time limits.

When looking at the wording of the new amended articles of the Criminal Procedures Code, a person familiar with the provisions of a number of international human rights treaties will readily recognize the parallels. It is clear from the wording of the amendments that the draftsman intended not only to codify elements of procedures which, although available in practice, were not expressly stated in the previous provisions of the Criminal Procedures Code, but also ensure that the procedures are brought in line with common international standards.

Some legal commentators greeted the amendments as the ushering in of practices that have hitherto been unknown to the UAE criminal justice system. Such a conclusion would portray a misunderstanding, or occasionally, misrepresentation of the significant protections that have always been afforded to suspects in the UAE. The fact that they were not expressly codified does not deny their existence in full. The previous non-codified customary procedures were akin to Judge’s Rules in the UK prior to the introduction of the Police and Criminal Evidence Act in 1984 (“**PACE**”).

As with other jurisdictions, police officers or prosecutors departing from customary procedures was not alien even before the introduction of the new articles. As in any other jurisdiction, such departures are exceptions and not the rule. To ensure that such exceptions are eradicated under the threat of legally enforceable sanctions, the UAE has embarked on a process of codifying those customary procedures and brought in new fair trial guarantees in a way similar to UK’s enactment of PACE in the wake of a number of high-profile miscarriages of justice scandals. Although the amendments to the UAE Criminal Procedures Code are not as extensive, they nevertheless represent a significant first step to codifying the minimum standards that must be applied to the investigation process. In this article we will focus on the two most important amendments, discuss the previous customary practice, and the potential future impact of the changes.

Prohibition on Evidence arising from Torture, Inhuman or Degrading Treatment

The prohibition on the use of torture, inhuman or degrading treatment has been a longstanding constitutional guarantee and present in Article 2 of the Criminal Procedures Code since its enactment back in 1992. The old wording of Article 2 broadly reflected the wording of Article 3 of the European Convention of Human Rights (“ECHR”), and Article 7 of the International Covenant on Civil and Political Rights (“ICCPR”). However, the new wording of Article 2 brought about by Decree 28 of 2020, now goes beyond

the provisions of ECHR and ICCPR which are silent on the consequences of such violations, and punishes such a breach by excluding *'all evidence obtained through the use of any of those means'*.

Unlike the provision of the aforementioned international treaties the provisions of the amended Article 2 of Criminal Procedures Code imposes a blanket ban on the use of evidence obtained by the ill treatment of a detainee. The amendment codifies the customary practice of delegitimizing anything arising out of illegitimate action, which has been strongly enforced by the UAE Courts since the advent of its constitution in 1971. An observer of proceedings before the UAE Courts would, on occasions, have noticed counsel making submissions requesting the exclusion of confessions or other evidence on the grounds that it was obtained by the use of inhuman treatment or illegal/unconstitutional methods, and therefore anything consequent to the illegitimate action used by the authorities renders the subsequent process illegitimate and cannot be relied upon.

Even before the enactment of the new provisions, the UAE Courts did not refuse such applications on the grounds that they are contrary to the applicable UAE legal principles, but based on the lack of evidence substantiating the allegations such as independent medical evidence. In cases where such evidence existed, the UAE customary practice permitted the Courts to exclude the evidence, or acquitting the accused. However, now this practice has explicitly been codified in the Criminal Procedures Code.

What is Founded upon Illegitimate Actions, is Itself Illegitimate

This customary principle and the pre-existing protections have now been codified by the amendment to Article 2 of the Criminal Procedures Code, which sets out the consequences of such violations in mandatory terms and obliges the Courts to exclude the evidence irrelevant of its nature, the party against whom it is being used, or its reliability. Unlike many other jurisdictions such as UK, the blanket ban on evidence obtained in violation of the prohibition of Article 2, makes its use illegal per se, and not a matter for the discretionary assessment of its reliability or procedural fairness by the Courts.

The protections provided by the amended Article 2 of the Criminal Procedures Code go beyond the current protections as applied by Common Law Courts or the European Court of Human Rights. For decades the UK and other common law jurisdictions have debated what if any use can be made by illegally obtained evidence. With varying degrees, the different Common Law Courts have often looked at the subject from the perspective of the nature of such evidence, its reliability, and the fairness of proceedings, if used. Some jurisdictions have approached the prohibition more strictly and imposed a prohibition on the use of such evidence on the grounds of preservation of the rule of law, other jurisdictions, such as the UK, the rule of law as grounds of excluding such evidence has not been as prominent as reliability of the evidence and overall fairness of the proceedings.

Historically, UK Courts have excluded confession evidence when obtained by torture or degrading treatment but did not extend the principle to the physical evidence arising therefrom, such as in the case of *R v Kuruma* [1955] A.C 197 where the Privy Council drew a distinction between the use of the confession evidence, and the physical evidence found as a result of information given by the suspect under torture, ruling that the latter was admissible. It is reasoned that information corroborated by finding of physical evidence was proof of its reliability. Even the exclusionary provisions of Section 76 of PACE for the most part applies to confession evidence when used against the person subjected to unlawful treatment. However, there is no express prohibition on the use of physical evidence or facts arising from such confessions. On the contrary, Section 76 of PACE states that *'The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence— (a) of any facts discovered as a result of the confession'*.

In the UK, to exclude other evidence obtained through illegitimate means, one would have to resort to the discretionary powers which the Courts possessed under the common law principles and enforced by Section 78 of PACE which states that *'In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'*. The UK Courts have used this particular provision when ensuring that the Prosecution are punished for their illegal or unethical behaviour, however, only when the fairness of the proceedings are adversely affected.

In deciding whether what is referred to as the *'fruit of the poisonous tree'* Common Law Courts often look at three issues: reliability of the evidence, the fairness of the proceedings, and the safety of the conviction. The use of elastic terms such as reliability, fairness and safety which affords Common Law Courts what the European Court of Human Rights calls a *'margin of appreciation'* depending on the circumstances of the case. The blanket prohibition introduced by Article 2 of the UAE Criminal Procedures Code takes the issue out of the discretion of the Court. It obliges Judges to strictly apply the law and exclude all evidence arising from a violation of its provisions irrelevant of its nature or connection to the illegally obtained confession. The UAE Courts are obliged to do so without regard to the reliability of the evidence or the fairness of the proceedings or the safety of the conviction, preferring to strictly enforce the principle of the rule of law which mandates that the authorities should have not break the law to enforce it.

The amendment unequivocally obliges the investigative authorities not to violate the law under any circumstances even if motivated by good intentions. The clarity in prohibiting all illegally obtained evidence avoids the occasional risk of some Courts making irrational decisions as happened in the case of *A and Others* [2004] UKHL 56 when the English Court of Appeal decided that the use of evidence obtained from torture was permissible as long as the it was not carried out by representatives of the UK authorities and its reliability was not in doubt. The decision was unsurprisingly overturned by the House of Lords but not before it attracted large scale derision from jurists and undermined the credibility of the UK justice system. The clarity of the amended Article 2 of the Criminal Procedures Code removes such a risk.

The codification of the existing protections may not lead to a significant change in approach by the Courts when faced with an application for the exclusion of evidence on grounds of the use of illegal means. They will continue to demand that the defence to substantiate such allegations by the presentation of satisfactory evidence. However, codifying this basic requirement for obtaining evidence will hopefully result in the investigating authorities moving away from building their cases on the testimony of the accused and documents provided solely by the complainant in general, and introducing new efforts to more proactively direct the investigation and collecting evidence on the matter.

Right to Silence

The amendments to Article 47 of Criminal Procedures Code appear to have also introduced a suspect's right to silence when questioned by the Police or the Public Prosecution, however to varying degrees such right already existed in practice. Prior to the newly amended right, when faced with questions about the offence an accused had the right to give a blanket denial of the allegation without the requirement on his part to put forward a defence or give any details in response to questions. Previously it would not have been unusual for Police or Prosecution interviews consist of officers putting certain parts of the complaint to the accused and him giving a blanket denial without any further requirement for elaboration on his part or an attempt by an investigator to probe any further.

Silence in the face of allegations, or blanket denials, were of no probative value to the Prosecution and no use could be made of them, not even for the purposes of drawing adverse inferences. The UAE has had no

custom equivalent of the UK prosecuting authorities' ability to use silence for purposes of allowing the tribunal to draw adverse inferences, especially when he later gives evidence in Court. The amendment of the wording to Article 47 merely emphasizes to the investigative authorities that the duty to prove the offence is upon them, and that the defendant is under no obligation to testify against his interests. If he wishes to do so, he can maintain complete silence without any inference being drawn from such silence.

Obligation to Provide the Suspect with Information on the Offence

A more important amendment is the introduction to Article 47 of an obligation upon the authorities '*to provide the suspect with information about the offence*' for which he has been detained. That wording is a reflection of the wording of Article 9(2) of the International Covenant on Civil and Political Rights which states that '*Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him*'. It is not clear at this stage how the obligation "*to provide the suspect with information about the offence*" will be interpreted by the Courts. Currently on arrest the suspect is told about the offence for which he has been detained, and the details of the person making the complaint. Therefore, at its face value, the amendment merely codifies the existing practice.

What has hitherto been left to the discretion of the investigative authorities is the degree to which the accused is given access to the evidence against him for the purposes of responding to the complaint. In jurisdictions such as the UK, the Police are obliged to provide the suspect's lawyer with advance information detailing the allegations and outlining in summary form some of the evidence they have prior to questioning the suspect. In the UAE, under the old Article 47, there was no obligation on the Police or the Prosecution to provide such information, and rarely, if at all, did defence lawyers ask for such information either.

The amended wording of Article 47 of the Criminal Procedures Code will force the Prosecution to provide this information. There are reasons to believe that the amendments are intended to expand the extent of the information provided to the suspect and provide details that go beyond the brief summary that the Police currently confront the suspect with. As such the new provisions would lead to rights not too dissimilar with the current practice of the Egyptian investigative authorities, where experience shows that if an advocate insists on maintaining his client's right to silence unless and until the disclosure of detailed information and the summary of the evidence against him, the investigating authorities will adjourn the questioning and provide the information requested.

Walking the Talk of Rule of Law

The new amendments addressed above are significant, as they aim at ensuring the quality of the justice system in the UAE by giving what was previously a customary practice the force of law, enforceable by the punitive sanction of rendering the evidence inadmissible and invalidating the entire proceedings in the event of non-adherence. The amendments will provide the long-awaited procedural guarantees for suspects in the course of criminal investigation in the UAE, aligning the jurisdiction with international human rights standards.

In addition to the human rights related aspects, the amendments will encourage the investigating authorities to develop and update their investigative procedures forcing them to seek alternatives to solely relying on a confession, the cooperation of the accused or documents provided by the complainant. Article 2 exposes the Prosecution to the risk of having their entire case dismissed if the accused is deemed to

have been inhumanely treated in the process of obtaining a confession or information upon which their case is based. The safest way to avoid that risk is a reduction in the extent to which Prosecutors rely on the testimony of the accused, and seek alternative sources of evidence such as making use of data from financial institutions, in line with relevant data protection and privacy regulations, authorities in other jurisdictions, retrieval of electronic or eye witness evidence. These investigative steps, although potentially available already before the amendments, have so far been somewhat overlooked. The express clarification that the accused is under no obligation to assist the investigative authorities further supports the onus of building the case resting firmly upon the shoulders of the investigation team.

In the future, it is foreseeable that amendments could lead to the introduction of the tape recording of the interviews of all suspects, and a more active role of legal representation during all stages of detention, not only to protect the rights of the suspects, but also to safeguard the investigators from unwarranted and unfounded allegations of mistreatment by detainees.