

The Role of Presumption in Affirmation of Punishment for Inebriety

Sarhoşluk Suçunun Cezasının İspatında Karinenin Rolü

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Abstract: Given the tragedies and absurdities caused by inebriety, different strategies are laid by different legal frameworks to enforce rules intended to curb its negative repercussions. There is a need for approaches to affirm drunkenness. Among these approaches is using presumptions to prove or disapprove of inebriety. Therefore, this paper's relevancy lies in postulating the roles of presumptions in affirming the crime of inebriety and its respective prescribed punishment in the Islamic criminal courts. By scanning various Islamic jurisprudence literature and previous academic articles concerning presumption in Islamic law and critical analysis of them, this paper was put together to target a specific aspect of presumption effect in Islamic criminal law: inebriety. The paper illustrated that even though Presumptions may not yield irrefutable proof, they might have legal implications in the Islamic courts of law.

Keywords: Islamic Criminal Court, Role of Presumptions, The Crime of Inebriety

Öz: *Sarhoşluk tarafından neden olunan trajediler ve kazalar göz önüne alındığında, olumsuz sonuçlarını sınırlamak için kuralları uygulamayı amaçlayan farklı yasal çerçeveler tarafından farklı stratejiler belirlenmektedir. Böylece sarhoşluğu doğrulamak için yaklaşımlara ihtiyaç vardır. Bu yaklaşımlardan biri, sarhoşluğu kanıtlamak veya çürütmek için karinelerin kullanılmasıdır. Bu nedenle, bu makalenin amacı, İslam ceza mahkemelerinde sarhoşluğun suçunu ve buna ilişkin hükmedilen cezayı doğrulamada karinelerin rollerini tartışmaktır. Bu makalede, çeşitli İslam hukuku literatürü ve önceki akademik makaleler taranarak, İslam hukukunda karinenin etkisini ele almak amacıyla sarhoşluğun suçunu doğrulamada karinenin rolünü ele alan bir çalışma yapılmıştır. Makale, karinelerin kesin kanıtlar üretmese de İslam hukukunun mahkemelerinde yasal sonuçları olabileceğini göstermiştir.*

Anahtar Kelimeler: *İslam Ceza Mahkemesi, Karinelerin Rolü, Sarhoşluk Suçu*

1. Research Background and Introduction

Twenty-eight people die daily, and nearly 113,000 deaths were recorded in a decade in the United States due to drunk driving. In efforts to minimize road accidents and the

fatal deaths related to lousy driving that is sometimes caused by inebriety, drivers are warned across the globe in different countries about the dangers of driving while in a drunken state. They do this by enacting laws and framing legal procedures against drinking while driving or driving in a condition of inebriety, which affects the driver's cognitive abilities. As a result, their mental judgment about driving guidelines is impaired, resulting in an accident that might result in fatal death. However, given the addictive nature of alcohol and similar toxicants, drivers tend not to abide by the legal directives and guidelines implicated in these warnings. Therefore, to enforce these laws, different law enforcement officers' resort to applying presumptions in affirmation or disaffirmation of this crime. As Muslims under a religion famously known to be against drinking alcohol, we are challenged to query whether such presumptions conform with the legal system, especially under the Islamic criminal courts. And if they are, to what extent can a judge employ presumption to accord the respective punishment? Also, suppose such presumptions are not considered irrevocable evidence in such scenarios. What are the implications –whether a lesser sentence, as opposed to the prescribed punishment of drunkenness, can be served by the culprit? With such latter queries, this paper gains its relevancy. Different pieces of literature have been written concerning this notion. The earliest among the compiled ones was the works of Prof. Davut Yayli from Uludag university in Bursa in the article titled, the presumption in Islamic law in 1988, Both Yusuf Sen and Fatih Turan following the work of Davut have extensively written on the same topic in the year 1997, and 2011 respectively. Whereas the above writings target the broad spectrum of presumption in criminal court, this article focuses specifically on the correlation of presumption and affirmation of the crime of drunkenness plus the respective punishment. The paper will begin by shedding light on what presumption refers to, and then we will discuss the core of the topic.

1.1. Presumption concept and its categorizations

A presumption comes from the Arabic word 'Qarina,' which can also refer to an indication, clue, sign, hint, and similar meanings. In Islamic jurisprudence, the word presumption can be understood as indications that allow a deduction from a known incident due to the absence of legal facts. In other words, the Presumption is the hints drawn from a specific event for another unspecified event. The strengths of proofs deduced from presumptions vary. Therefore, they can yield weak or strong evidence for an event, just as ash or smoke indicates the existence of fire. Suppose the relation between Presumption and what it signifies is rational, if the Presumption is solely based on logical premises, then such presumptions are considered reasonable or rational Presumptions. For example, if the stolen property is found with the person accused, the rational Presumption indicates that the person seen with the property is the thief. If the

relation between the Presumption and the element it is trying to prove depends on people's customs, it is called customary Presumption (Davut, 1988). If we examine the works of Islamic jurists closely, scholars do not dispute whether customary presumptions are legally binding or not. Since almost all of them extensively utilize them in their corpora. To give an example of customary presumptions, Islamic scholars state that when a sales agreement is made, it will be perceived according to what meaning is extracted from material expressions such as money and lira, which are the means of exchange between the buyer and the seller. Therefore, all other meanings will be exempted.

Therefore, a note of 100 Lira is valued per an agreed interpretation of the reigning customs. Also, when someone says, 'I will respect and honor whoever enters my house, it is understood from this statement that the thief is out of the scope of it by applying Presumption (Mawardi, 1990). Just as a Muslim's purchase of a sheep at the time of Eid al-Adha indicates that he intends to sacrifice an animal. Physical Presumption concerns the belongings of the offender and the items at the place where the crime was committed. For example, in a theft case, the thief's fingerprints or anything belonging to the thief at the place where the crime was committed is a material presumption (Turan, 2011). Circumstantial Presumption is derived not from the speaker's words but from the circumstances related to the speaker. For example, suppose someone says, "I have seen people." Although the word "people" is generic, it refers to certain people if we apply the circumstantial Presumption because it is impossible for him to have seen everyone. In the same way, if someone says, "I learned this fatwa from the scholars," it is presumed that the term scholars refer to a limited number of scholars, even though it is a general word. Qarafi says: If a man says that I have had a conversation with all the scholars, but I have never seen a scholar more conversant than Zaydi, scholars here is not a general word. Because the circumstantial Presumption indicates that he only conversed with the scholars of his time and that he could not meet with all past and future scholars (Qarafi, 1285).

Decisive Presumptions are conclusive indications that yield strong evidence for an incident. For example, if someone comes out of a particular house with a bloody knife in his hands. Then immediately, a person is found killed with a knife from the same house, and there is a strong presumption that the person who had just exited the house is the murderer. Usually, the probability that the person may have killed himself or that someone else came, killed him, and fled somewhere else after committing the murder is not considered. However, the judge is supposed to be very careful in reaching a decision, and the case must be investigated thoroughly. Such a case took place during

the time of Hazrat Ali. It turned out that the person with the bloody knife in his hand was a butcher and went home on a need, and he had nothing to do with this incident (Davut, 1988). Hypothetical presumptions are usually the kind of presumptions that can be considered when making decisions but do not yield concrete evidence to pin the culprit. Some customary Presumptions can be categorized under these types of presumptions. They are not definitive and are not taken as a basis for the final judgments of Islamic jurists. However, judges can benefit from these presumptions. The use of these presumptions in judicial situations, as in other presumptions, depends on the judge's intelligence, knowledge, and competence (Şen, 1997). Legal presumptions are proof indications derived from the Holy Qur'an and the Sunnah of our Prophet (PBUH) based on the paradigm of Islamic law. For example, if a virgin woman remains silent in the case of a marriage inquiry, it is a presumption that she has given consent. The reason is grounded in a hadith where the prophet clarifies that; 'An Adult woman should not be married unless she is consulted, and a girl is not married unless her permission is obtained'. The companions asked: O Allah's Apostle! How the girl's permission would be? He says: 'By her silence' (Ahmed, 15/371, 2001). Under rationale Presumptions, jurists have explained that these types of presumptions arise from the principles set forth to achieve an objective. For example, children and those who possess mental deficiency are outside the legal responsibility spectrum under Islamic jurisprudence because they cannot fulfill the legal obligations as required by the law. In the Holy Qur'an: 'The pilgrimage of the House by those who can afford it is a (right) of Allah over men.' The word man mentioned here is general, but an insane person and the child are outside legal obligation since they will not fully understand the concept of pilgrimage. In addition, in the Qur'an, Allah says: 'O people! Serve your Lord, who created you and those who came before you, so that you may be protected from (Allah's) torment.' The word man here is restricted only to those who are qualified to do so by the Presumption of reasoning. Also, Allah says in the Holy Qur'an: 'Pray, give zakat, bow down with those who pray (bow before Allah)'. Another verse 'O you who believe! Fasting has been prescribed to you as it was prescribed to those before you so that you may refrain from going against Allah.' all the above verses are some of the verses we should be interpreted on rational grounds (Farrah, 1990).

Judicial presumptions are the indications that the Jurists and judges can utilize to reach a verdict by themselves concerning the details of the cases raised before them in court. In a narration during the time of Prophet David, a young woman took her child for a walk. They found a green place to rest and sat there. Meanwhile, another woman with a child came to them. The children were almost the same age. The women met. The woman who came later was older than the other woman. She was like her older sister. While they

were talking among themselves, the children were playing. The older woman's child disappeared behind the bushes. His mother was unaware of this. A hungry wolf snatched him away by his dress with its mouth. The woman heard her child cry and looked in the direction where the voice came from, but it was too late. The wolf grabbed the child and ran away. Even if the woman ran after the wolf, she could not catch up with it. The young woman was also very upset about this incident. The older woman was malicious. She immediately took the young woman's child in her arms and said, 'This child is mine,' she said. Young woman, 'what are you doing'? You know that boy is mine. Ok, you are very upset; I understand, but I cannot let you have my child, she said. The older woman insisted and kept saying that the wolf took your child. This situation stirred an argument between them that was about to turn into a fight when those present told them to take the matter to the prophet David. They went before David. The older woman did not hesitate to tell all kinds of lies. She even swore. At the same time, she was accusing the young woman of lying and slandering her. She did not stop at that. She also brought false witnesses to persuade David. She was successful. According to the information conveyed to him, Prophet David made a judgment and said that the child's mother was an older woman. The young woman felt devastated. She has lost her child. The older woman continued, 'If you want, let us go to Prophet Solomon.' She thought she could also persuade Solomon to judge in her favor. Hz. Solomon listened carefully to both women. The older woman was indeed a language acrobat. His persuasiveness was very good. She could easily disguise herself in the eyes of the person in front of her. The actual owner of the child, the young mother, was incapable of defending her right. Hz. Solomon said to the people next to him: – Bring me a knife immediately. I will divide this child in two and divide it among these two women. When the young mother heard this verdict, she immediately rushed forward with maternal affection stressing that the child should not be bisected. She thought that Hz. Solomon was going to slaughter her child. She would not want any pain for her child. She said in tears: – All right, sir. I am abandoning my claim. Do not harm the child. In this way, Hz. Suleiman understood who the birth mother of the child was. Because no situation could cause discomfort in the other woman, he gave the child to the young mother, and the good-hearted mother had her child" (Nasai, 2001). As seen in the incident above, Hz. David and later Hz. Solomon also ruled based on some presumptions. Hz. Suleiman asked for a knife to divide the child among the women for caution purposes because he wanted to see which of the women was more compassionate towards the child. In this and similar cases, Hz. David and the decisions that Hz. Solomon took and the evidence he used to reach their respective decisions are examples of judicial presumptions.

1.2. The legality of utilizing presumption in the Islamic criminal court system between proponents and opponent

There are varying opinions concerning the legality of presumptions. Some scholars argued that presumptions yield binding legal proof, while others supported contradicting opinions.

1.2.1. The proponents of presumptions in the Islamic judicial system

Some Muslim scholars, including the Shafi school of thought, clarified that presumption cannot be utilized to make adjudications in Islamic judicial law. They base their stance on several shreds of evidence from the Quran and the Sunnah. In the Qur'an, in the chapter of Yusuf, Yusuf (A.S) 's brothers stated that they brought a bloody shirt that did not have actual human blood to their father Yakub (A.S) in order to prove that they were telling the truth and that a wolf ate Yusuf (A.S.). False blood, apparently staged as kid's blood is presented as a presumption showing the truthfulness of Yusuf's (A.S.) brothers. The fact that Yusuf (A.S) 's shirt was not ripped indicates that the wolf did not eat him; He had Yakub (A.S.) say, 'What kind of a wolf eats Yusuf (A.S), but his shirt does not fall apart?' and finally concluded that Yusuf (A.S) 's brothers were lying. When we look at the practices of the Prophet (A.S), we see that he acted in line with presumptions. In another instance, according to narration, Sad ibn Abi Waqas, and Abd argued over the lineage of a boy. Thereupon, they came to the Messenger of Allah. Sa'd: 'O Messenger of Allah! This boy is the son of my brother Utba Ibn Abi Waqqas. He willed him to me that he was his son. Look at the resemblance to him!' He spoke. Abd b. Zam'a: 'O Messenger of Allah! He is my brother. He was born on my father's bed by his concubine.' The Messenger of Allah (PBUH) looked at the child's likeness and saw an unmistakable resemblance to Utba. Then: 'O Abd! He belongs to you because the child belongs to the bed's owner. From the above incident, we can induce that using the presumption of bed; the Prophet stated that the child belongs to Abd. In addition, Ibn Mas'ud, Hulefa-i Rashidin, and Imam Malik agree that judgment can be made with presumptions. Hz. Omar ruled that if a woman without a wife was pregnant, that woman committed adultery based on the apparent indication that she would not be able to become pregnant without a man. Hz. Umar and Ibn Mas'ud ruled that Hadd will be applied to someone who smells of alcohol or vomits it (Şen, 1997).

1.2.2. Opponents to the utilization of presumption as proof

Those who think that presumption cannot be a resort when searching for legal proof draw upon different pieces of evidence, among them is hadith. In a narration, Prophet (PBUH) said: 'If I were to stone someone without proof, I would stone such and such

(woman). Because she aroused suspicion in her speech, her demeanor, and the situation of those who visited her'. In this hadith, if the Prophet (S.A.V) had deemed it permissible to act according to the presumptions, he would have stoned the woman. Such a woman was perceived as not a good person and could be labeled as a prostitute in society. However, the woman's situation must definitely be proven by either concrete evidence or her own confession. The judgment of Hadd is not given only by apparent presumptions or by society's recognition of women-wrenching character. Proof or confession is required for the verdict of punishment to be given. This evidence reveals that no action would be taken against a person based on presumption. Moreover, other, Islamic jurists disagreed when a woman's pregnancy without a man is liable to summoning, whether it is irrevocable evidence. Many scholars, including the preponderant view from the Shafi school of thought, stress that pregnancy without a confession and witness is not a conclusive presumption of adultery (Mawardi, 1999).

2. Legal Presumptions for Drunkenness Punishment

The religion of Islam has strictly forbidden alcohol (Hamr) because it has considered it the source of all kinds of evils and seen it as the destroyer of health, mind, life, and property. Therefore, there are several warnings about alcohol in the Qur'an and the Sunnah. Allah says: 'O Believers! Alcohol, gambling, idols, and fortune-telling arrows are the work of the devil, avoid them so that you may attain happiness' (Quran: 5/90). 'Surely, Satan wants to stir up enmity and hatred among you because of alcohol and gambling and to hinder you from the remembrance of Allah and prayer. Now you will give up on these, right?' (Quran: 5/91). In the Sunnah, Hz. The Prophet says: 'Verily, Allah has cursed alcohol, those who drink it, distribute it, sell it, buy it, make it, have it made, carry it, and take it to desirer' (Ahmed: 10/9). According to some jurists, a small quantity of every intoxicating drink is also haram. Evidence for this view is profound from the tradition of the Prophet saying: 'Everything that intoxicates is considered Hamr. Every Hamr is also haram' (Mawardi, 1999).

Examining different details books of Islamic jurisprudence like al-Ḥavi'l-Kebîr, we can learn that the crime of drinking can be proved by only confession and binding evidence – Beyyine as the case in all illegal criminal cases. Confession is when someone states in court that he has been drinking. Beyyine is witnessing that a person is drunk by drinking alcohol by at least two witnesses. Therefore, there is no legal verdict that necessitates prescribed punishment that would be made based on the presumption of the smell of alcohol. Prophet (A.S) said, 'exonerate culprits with dubitation' (Beyhaki, n.d.). There are

also statements from the Prophet directing that 'exonerate defendants from prescribed punishments as much as you can when there is doubt in proofs (ibn Majah, "hudud", 5 (No. 2545)).

Such traditions reveal that the smell of alcohol is not concrete enough to make the defendant liable for the prescribed punishment of alcohol. In addition, there could be other smells close to the smell of alcohol that exists in nature. Therefore, in this scenario, all reasonable doubts and reservations are considered. The reason is that the person thought to be drinking may have gargled the drink or drank it assuming it was another drink or was forced to drink (Nawawi). Accordingly, all of the cases in question create doubt, and when the evidence is doubtful, the verdict is loosened. Jurists also articulate that vomiting alcohol cannot be used as irrevocable evidence in the crime of drunkenness, arguing that the person may have vomited after eating one of the fruits used in the production of liquor. In another narration reported by Ibn Abbas, when a man was drunk and walking on the road staggering, people noticed him and decided to take him to Hz. Muhammad, but when the drunken man approached Abbas' house, he somehow escaped and took refuge in his house. Later, this event was narrated to the Prophet. After hearing the incident, the Prophet laughed and said, 'So he did it' (Mawardi, 13/410, 1999). As mentioned above, the Prophet's ambivalence and lack of interest in digging into the person's case depict the weakness of presumptions in affirming such a crime.

Those who maintain that the crime of drinking can be affirmed with the presumptions state that the person will be punished for drinking alcohol after two just witnesses testify in the presence of the judge. They cite Yazid's narration as evidence for their views: 'Hz. Umar came to us one day and said, 'I found the smell of alcohol in so-and-so. He claims it boiled grapes. I am going to ask what he is drinking and investigate. If it makes him drunk, I will whip him'. He investigated the case, and when he learned that there was alcohol, he lashed him eighty. Scholars of this opinion, as seen in the narration, stated that Umar made a judgment based on the smell of alcohol. Again, according to these scholars, Ibn Masud similarly punished a man based on alcohol's smell with the penalty of lashing. According to those who hold this view, if someone is seen drinking something, it cannot be clearly understood whether it is wine or something else. However, it is better understood from his smell that he is drinking alcohol, and this presumption of smell replaces a kind of confession they expressed (Ibn Rushd; Ibn Qayyim & Turan). Some scholars under Malik's school of thought express that if two people testify that someone vomits alcohol or that there are signs of alcohol in his vomit, the person will be punished based on such testimony. They mention the following

hadith: Munzir Abu Sasan said: 'Osman b. Walid was brought to ibn Affan. Because Walid led the morning prayer with two rak'ahs and said, 'Shall I give you more?' he said. Two people testified against him. One testified that he drank wine, and the other saw him vomit. Thereupon, Hz. Osman 'If this man had not drunk wine, he would not have vomited!' He said, 'O Ali! Get up and beat him!' requested. Hz. Ali said, 'O Abdullah b. Ja'far! Get up and beat him up! While he was beating him, Hazrat Ali was counting as well. When the number reached forty, he said 'stop and said the following. The Prophet (PBUH) struck forty sticks' (Hadd) (Ibn Qudamah). These scholars express that if two people testify that someone has vomited alcohol, it is deemed evidence because one cannot vomit without drinking.

3. Conclusion

The role that presumption plays in asserting or dismissing the manifestation of the crime of inebriety and the consequent prescribed punishment is explicitly underscored through the above paragraphs. Different jurists, more especially those that subscribe to the Malik school of thought, maintained that presumptions that indicate drunkenness plays a vital role in the affirmation of crime and the resultant verdict for servicing the corresponding punishment. Indicators like smelling and vomiting alcohol are taken into account and posed as evidence for confirming such criminal cases. Although most jurists conformed with the idea that witnesses and self-conviction - witnessing upon oneself - are the core shreds of evidence that can pin the culprit in criminal courts, the scholars, as mentioned above, stressed that such presumptions mentioned above can substitute the confession of the malefactor. On the other hand, other scholars, most especially the adherents of the Shafi school of thought, disagreed with the idea of substituting confession with presumption. They maintained that under criminal cases, the misdemeanant could not be convicted on the grounds of criminal indicators. Without confession or witnesses, verdicts concerning criminal cases cannot be adjudicated towards the servicing of fixed punishment by the culprit maintaining that presumptions do not yield concrete evidence in criminal cases.

However, we can infer from the Presumption arguments and discussions raised among the mentioned jurists who adhered to varying opinions that presumptions can be legally valuable. Even though presumptions may not be used as irrevocable evidence to convict the culprit, they can help give hints and clues for further investigation of whether the crime manifested. Moreover, with the realization of these presumptions from the culprits, they may stand for further summoning, questioning, and investigation, and warnings or lesser punishments, as opposed to fixed ones, can be served.

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