opción

Revista de Antropología, Ciencias de la Comunicación y de la Información, Filosofía, Lingüística y Semiótica, Problemas del Desarrollo, la Ciencia y la Tecnología

Año 34, 2018, Especial N° 14

Revista de Ciencias Humanas y Sociales
ISSN 1012-1587/ ISSNe: 2477-9385
Depósito Legal pp 198402ZU45

Universidad del Zulia
Facultad Experimental de Ciencias
Departamento de Ciencias Humanas
Maracaibo - Venezuela

Opción, Año 34, Especial No.14 (2018):1478-1510
ISSN 1012-1587/ISSNe: 2477-9385

The role of evidence in proving the crime: the perspective of Sunnis

Ali Ahmad Rezai[1]
[1]Ferdowsi Universityof Mashhad
aliahmadrezaee251@um.ac.ir

Abdul Karim Abdullahi Nejad[2]
[2]Jurisprudence and Foundations of Islamic Law, Ferdowsi University of Mashhad
abdolahi-k@um.ac.ir

Abbas Ali Sultani[3]
[3]Department; Jurisprudence and Foundations of Islamic Law, Ferdowsi University of Mashhad
asoltnai40@um.ac.ir

Abstract

The aim of study is to investigate the role of circumstantial evidence in proving the crime that should be punished in terms of the perspective of the Sunni jurisprudence by looking at the rights of Afghanistan through qualitative and data-based methods. As a result, the criterion of proof from the point of view of Afghan criminal law is the presented evidence to the court. As a conclusion, the Afghan legislator explains the credibility and proving the role of circumstantial evidence in a very clear manner, and the judiciary judges and trials use this tool and a great opportunity.

Keywords: circumstance, evidence, indications, proofs, penalties.

Recibido: 19-11-2017 •Aceptado: 13-02-2018

El papel de la evidencia para probar el crimen: la perspectiva de los sunitas

Resumen

El objetivo del estudio es investigar el papel de la evidencia circunstancial en la prueba del delito que debecastigarseentérminos de la perspectiva de la jurisprudenciasunita al examinarlos derechos de Afganistán a través de métodoscualitativos y basadosendatos. Como resultado, el criterio de la pruebadesde el punto de vista del derecho penal afganoes la evidenciapresentada ante el tribunal. Como conclusión, el legislador afgano explica la credibilidad y demuestra el papel de la evidencia circunstancial de una manera muy clara, y los jueces y juicios judiciales utilizan esta herramienta y una gran oportunidad.

Palabras clave: circunstancia, evidencia, indicaciones, pruebas, sanciones.

1. INTRODUCTION

The issue of proof of the crime is one of the important discussions of the criminal law, the most important of which is related to the Hodoud. Due to the special conditions and qualities that the holy lawgiver of Islam has considered to prove most of the limits/Hodouds,

the methods of proving houdous are one of the most complex issues of the criminal Jurisprudence. Consequently, it would be difficult to prove a Religious Had. To some extent, it is impossible to prove some of the Hodous, such as zina or stealing in some cases. The question now is whether the proving methods that have been considered by the lawgiver to prove the Houdous are relevant. That is, the judge cannot use one another way to prove the hodouds, or whether those methods have an aspect of instrumentality and the discovery of reality, not the subject matter, because the objective of the Sharia is to prove and discover the reality, so the judge can cope in any other way that shows the reality. According to the assumption of instrumentality, ways to prove theHad will be easier with respect to facilities and tools such as evidences(Ibn Asir, 2004).

2. RESEARCH QUESTIONS

1. What is the probative role of the circumstantial evidence in proving the crimes should be punished by Had, from the point of view of Sunni jurisprudence?

2. What is the look of Afghanistan's legal system on the circumstantial evidence in order to prove Hodoud Crimes?

3. Do Sunni jurisprudence and the Afghan Positive Law consider the evidence to prove or the evidences of the relevant?

3. RESEARCH HYPOTHESIS

1. It seems that Ibn Qayem(1987)and some other Hanbali and Maliki Jurists accept positive values for the circumstantial evidence.

2. It is believed that the Sunni jurisprudents of Afghanistan rights consider the instrumentality aspect for the evidence to prove.

4. RESEARCH HISTORY

The issue of proof of the crime and its traditional prooving ways are the longstanding issues of Islamic law and Jurisprudence, but jurisprudents have generally less addressed with the role of scientific evidence such as the circumstantial evidence, and the instrumentality of evidence have not been explained clearly in Afghanistan laws.There was no research on this issue based on searches on sites and websites (Abijomhor, 1985).

5. PRINCIPAL CONCEPTS OF RESEARCH

1. The meaning of the presumption: The presumption in the word means the sign, the symbol, and the representation.

And the only difference between the presumption and the sign is that the sign of the object itself cannot be defaced, such as the Alef and lam in the name but the evidence that can be separated, such as the presence of the cloud relative to the rain (Dehkhoda, 1993; Moien, 2001).

2. The legal concept is also closely related to the lexical meaning of the presumption that has an aspect of exploration, and secondly, its exploration is not decisive but supposed (Langrodi, 2014).

3. The concept of the context/evidence: It has been taken from the Gharan and refers to the accompaniment of something with something else. (Conjunction) is in the sense of being close to each other, of the same family.In the Arabic word, they say spouse (context), and is also said a friend (context); because it is with human and its sum (Qrana') (Manzor, 1994).In the term and in this discussion, the sign that signifies the true meaning is not meant. In other words, it is all that refers to the main desirability of the speaker and expresses his seriousness desire, so that if it does not, then another meaning that is not mentioned by the speaker is considered (Jorjani, 2007; Rashad, 1987; Sajjadi, 1982).

4. The Concept of context/evidence in the Laws of Afghanistan: Legislator in the Law on the Principles of Civil

Trials first categorizes the context in a rigorous presumption, and then, he writes in both definitions:"The presumption is that it implies the existence of an unknown matter. This implies that the context/evidence is convinced and its appearance is used in principle of the subject of contentious"(Sajjadi, 1982: 15).In the explanation of the presumption and its legal use, they cite to the rule of forcible detainer, which are signs and symbols of ownership in this way: Wheneversomeone observes possession of someone else for a while, and does not claim regarding his ownership, despite the absence of legal orders such as Succurate, insanity and like that if claims later, his lawsuit will fail due to the reasons of contexts and evidence.In the definition of the inferred context and evidence, he also states: An inferred context and evidence is a context that the court derives from the circumstances of the lawsuit and the trial of it and then relies on it as the basis in its ruling (same paragraph 3), and in the following, he adds that despite the explicit texts, the law of reference to the inferred context and evidence is not permitted (Principles of Civil Trials, 1989).This definition is a sentence that includes both a legal presumption and judiciary presumption, and its content is a matter of fact that proves the unknown matter. On this basis, the presumption is a proof of the claim, but it is not a definite reason, but a reason for doubt and according to the jurisprudents and the scholars of the law is a presumption. And the late Na'ini says: “presumption is something that itself has a kind of exploration of something else

in an incomplete manner, and then the legislator proclaims its defect as a definitive and considers it in the definitive ruling"(Langrodi, 2014).

5. The concept of proof: The proof is an infinitive from Asbat and Sabt in the books of the word has the following meanings: meaning to be fixed, suppressed. It means finf=ding and making something stable. (Saheb ibn Ebad, 1994)and also means judgment and issue the sentence. As in the Qur'an's narratives in the Qur'an's text, the proof is meant issuing the sentences like (RaghebIsfahani, 1992).And also it has been said in the book of al-Tarifat. Jorjani(2007) and means of claiming and presenting(SahebIbn Emad, 1994).RaghebIsfahani(1992) means the word proof for the meaning of anti-degradation and states.

5.1 Proof in the Jurisprudence

The jurists have also used the word proof in its literal sense, which is the statement of proof and reason (Barakat,2007). In its definition, it has been said that the proof is a statement of reason and proof as a position of the judges, the party designated by the Shari'ahfor the purpose of achieving the right or fact that the religious effects are related to it.

5.2 Proof in Law

Definition presented in the language of law has a general and specific definition.

It has been presented in the general definition, and in the criminal caseBarakat(2007)Proof is anything that leads to the emergence of the truth. In a criminal case, proof is that which leads to the conviction of the crimes of the accused.It has been said in the specific definition of the proof.

6. NATURE OF CRIME

6.1. Crime in the qord:

Crime from the Arabic root J R M has been used to mean the cutting, picking up of fruit from a tree, carrying, gaining, committing sin, and forcing a bad deed. Also, it means to sin, crime and error, and it is interpreted from the crime of rebellion and sin.

6.2. Crime In the legal juristic term:

In the term of jurists and lawyers of Islam, two terms have been stated for the offense and crime:

6.2.1. General terms:

It means committing any prohibited act or abandoning an act that is prohibited by the lawgiver and who makes it deserves worldly punishment, including punishment or retaliation, or the payment of a money.

6.2.2.Specific term:

It has been interpreted as a crime on the life or member of the body, which is any kind of harm and wrongdoing in relation to another's body and soul, or an offense against the dead, which is punishable by an act of retaliation retribution or member retribution or blood money should be paid (Validi, 1994; Mavardi, 2007).

6.3.The concept of crime in Afghanistan law:

In the new Afghan Penal Code (Criminal Code, 2017), the legislator has defined the offense and crime as a crime, is a commission or refusal of a person who, in accordance with the provisions of this law, is known the crime, its elements to be clear and for that, the punishment or security measures are set (Criminal Code, 2017).

In the case of an act contrary to the law and refusal to enforce a lawful act, it states: "An act contrary to the law is a current act that committing or initiating it is known as a crime and it is prohibited by law" (Criminal Code: 2017).Refusing to pursue legal action is the action that the law determines it or it is not performing the act by the people that the law requires them to enforce it (Criminal Cod,2017).

7. DEFINE THE HAD

The Had/limit in the word means the distance between the two objects in order not to mix one of the two with each other so that one of them does not inflict on the other. Limit/Had is also meant for repatriation and forbidding, and the purpose of a person's limit of one thing is that which prohibits or imprisons him, then it is said that means I prohibited a person of evil. And the sentence means that it is forbidden and forbidden that its commission is not lawful (Khatib, 1995). It also means the discipline of the guilty person as a thief and an adulterer to prohibit them from re-committing sin, as well as forbidding others (seeing the guilty limit/had) from committing a sin. A person's limit, namely the imposition of a limit on him and the imprisonment, is permitted in a manner that prohibits him from leaving.

7.1 Definition of the Had/limit in the term jurists:

The limit/Had in terms of shari'a means a determined punishment which is obligatory from the law of God, such as the limit of adultery and the limit of qazf, and limits/Hodoud are named the limit/Had, because God has identified and limited them and violating them is not permissible (Khatib, 1995).

8. KINDS OF PRESUMPTION AND ITS DIFFERENCES

The circumstances and indications that can be recognized as a cause for presumption may sometimes be the rule of law (the legal presumption), or if maybe the reason according to the judge (judicial presumption).Therefore, the source of the presumption is the assumption of the legislator or, in the opinion of the judge and the judiciary, that the can be deduced and inferred by the examination of the contents of the case, and can reasonably lead the court to the reality of the matter in relative terms.In view of this division, the context/evidence is, in fact, the judicial presumption, which is the conditions of the cases, which, in the opinion of the judge, are consistent with the statements of each of the parties.The legislator intends to use the phrase circumstantial evidence as the source of the same laws and judgments.A judicial or evidence presumption is like a legal presumption, based on the possibility and probity, with the difference that the possibility and probity that is gained for a judge is

personal in judicial presumption (contrary to the legal presumption, the suspicion of which is of a kind), that is, the judge makes himself near to the truth by the use of evidence and recognizes the truthfulness of the party's claims and statements, which the evidences are in his favor, in a true and fair way.

I. Legal and Judicial presumption's differences: Legal and Judicial evidence, although both are useful to the suspicion, there are differences between them that are mentioned in several important matters:

II. Legal presumption. It is based on the suspicion of a kind that the legislator considers being; if the Judicial presumption is based on personal convictions and considerations and judgment of the judge. And thus, the value of the belief in it is greater in the opinion of the judge.

III. Legal presumption has generality and is valid and authoritative in all cases where there are fixed and unified circumstances; in the case of the Judicial evidence has no description of the totality and cannot be used in both of them and their conditions are uncertain and varied and varied, and so cannot be generalized in other cases.

IV. The judge is required to comply with the law of the jurisdiction, that is, if in a fair comparison, the lawsuit is applicable to the

legal presumption, acceptance of the sentence is inevitable, and the issuance of the sentence on the basis of which for judge is inevitable, although the judge personally does not believe in the accuracy, but in the evidence of judge, the freedom of the judge is reserved and respected, that is, he is free in the validity and thelack of validity of the evidence, or in the interpretation and assessment of them, and the criterion of action is his belief.

V. legal presumption has been stated in the law. Therefore, the number of them is limited. However, the judiciary evidence is not conceivable and limited, and cannot be counted depending on the circumstances of each case.

VI. In the legal presumption, the claimant has the right to prove that the subject of the dispute is unnecessary. But the judicial presumption does not essentially require anyone to prove their claims (Tavakoli, 1990).

The examination of the Perspective of Sunni Jurisprudents: The Sunni jurisprudents do not have a single position in the performance of evidence in the proving of certain crimes. However, Ibn Qayem(1987) in his book named al-Toroq-al-Hekmieh claims that the Sunni jurisprudents in some crimes have known the evidence valid and have considered as causes to prove the crimes. But there are two general perspectives among the Sunni jurisprudents, the Sunni jurisprudents typically do not value the proofs for circumstantial evidence. But some

of the jurists, who are typically Maliki and Hanbali scholars, know circumstantial evidence valid to prove the Had crimes.Now, we examine both the views and the causes and theory.

The perspective of the Jurists : Followers of this ruling, which are the Shafi'a , Hanafieh and some of Hannabalah Jurists, consider that they are not allowed to judge according to the evidence in the Hodoud crimes. (Abedin, 1966) And these are, in fact, proofs consider this type of crimes as confusing and confidential, in other words, they consider the subjectivismaspect in proving the evidence. For the sake of the Jurists, it has been stated from the documents based on the traditions and writings of the Companions:

9. PROPHETIC TRADITION (PBUH)

9.1. Ibn Abbas has narrated from the Prophet (PBUH)(Shokani, 1993; Bukhari,1989).This narration implies a lack of adherence to adultery by means of testimony and evidence, since the Prophet (PBUH) did not give any Had to the woman in spite of many indications and evidence, and did not provide any evidence indicating that she would commit a crime against adultery.For this reason, we see that the Prophet (PBUH) has neglected and not relied on these indications and evidence, which is a sign of the weakness of the evidence for judgment, and therefore the evidence does not go as far as reason enough

to comply with the limit/Had of adultery, and are not like confess and witnesses.

9.2. In another narration, Ibn Abbas has quoted the Prophet (PBUH) (Bukhari, 1989). This narrative also implies a lack of compliance with the Had and limit of Drink by evidence. Because the drunk is a symbol of drinking wine, however, the Prophet (PBUH) did not give any limit and Had on it, though the drunken state seems to be the result of drinking the wine. And this narrative also implies the lack of attention to evidence in proving offenses.

9.3. In another narration, Ayesha has quoted the Prophet (PBUH) said:(Shokani, 1993). If there is to be action in the circumstantial evidence , there will be no possibility to act in this narrative.

9.4. The works of the Companions to refuse to judge according to the evidence:

- Narrated: A woman who was not married and was pregnant was brought to Umar ibn Khattab, and Umar asked her the reason for the incident, and the woman replied that I am a woman who is heavy in my sleep and in a state of sleep, a man got intercourse with me and I did not wake up until the end. With this explanation, Omar took the limit/Had from her.

- In another narrative, Bra ibn Sebareh narrated from Hazrat Omar: The pregnant woman was brought to the caliph, and the woman claimed to have been forced, and the caliph ordered to release the woman and ordered the commander of the army not to kill someone without his permission.

- It has been also narrated from Imam Ali (as) and Ibn Abbas that when (perhaps) and (possibly) reaches the limit and Had and should delay the execution of the sentence until they are certain (Bukhari, 1989).

The followers of the promise of not allowing the judging according to the indications and evidence of adultery have also argued for an intellectual reason, and have said that the Islamic religion has tightened the proof of adultery and has provided the presence of the four witnesses in adultery, and even confessed against herself has also considered credible four times. Because the severity of the retribution for adultery is considered to be all that is cautious in proving it (such as Rajm).Now, for example, context and evidence on committing a crime like adultery, for example, is a weak point because there is doubt and probability, and the reason for a sentence cannot be argued when exposed to probability and doubt. With this explanation, then, how is it possible to rely on such symbols? And where it became known that the evidence of becoming pregnant in adultery was not compelled, or that the intercourse with the woman occurred between her legs, but that had not reached her womb and that she was pregnant without loss of her

virginity. And the likes of this type of doubt that the validity of the testimony and evidence is not valid. But the controversy in the jurisprudence, in the promise of not allowing the trust in the evidence.

The first reason why the jurisprudence had argued that the same Prophetic narrative (pbuh) was, there are a few objections that are:Their argument to this narrative is denied to the action of evidence, since this narration does not imply that it does not limit the judgments by evidence in proving the crimes, because these circumstantial evidence appearing in this hadith are not among the evidence that implies of committing a crime of adultery, nor are they do notsuppose to prove adultery.Those who accept the judgment by evidence do not trust on the weak evidence, but have conditioned strong evidence, and there is no doubt and probability in them, such as the evidence of a pregnant woman who has not married and has not claimed compulsion.The perpetrators have determined, in accordance with the criteria, the criteria and conditions for evidence that these conditions should be included in the evidence so that they can be relied upon them in proving crimes.

The narration in which the Prophet (PBUH) did not determine the Had of drinking the wine on a drunken man (Bukhari, 1989). also can not be a good documentary because;Drunkenness is a strong and decisive evidence that implies drinking the wine and is stronger than testimony, and even in some cases, it is stronger than a confession because it cannot be drunk unless the wine has been drunk.It may not

have been proven the man's drunkenness with the Prophet (PBUH) to set him among drunken men, and determined the Had of drinking the wine on him, and if his drunken state appeared and emphasized that this drunken state is a sign of drinking the wine, the Prophet (PBUH) was running the Haf on him. It is possible that drinking the wine is other than action related to the truth of wine and there is the wrong thing in it, and it is different also with reluctance and coercion to drink the wine. So, in that narrative, there may have been something other than drinking the water.

The Hadith also has no way of indicating lack of permission to rely on evidence; Hadith means non-compliance of Hodoud where there is no strong and definite evidence of committing a crime. It is imperative that theHad exclusion of the Muslim from the time when the crime evidence is weak and there is doubt in the argument and reasons and, as it was said before, valid proofs in Hodoud, are strong and definite evidence that means that affairs are determined by them.But when the evidence is presented and the judge is convinced, then the implementation of the limit and Had is required according to the indications and evidence, especially at this time when there is very little direct and definite reasoning, and the person who commits a crime usually does it far away fromthe people so that someone does not testify against him and he himself does not confess against himself except in very rare cases. Hence, there is nothing but trust in the strong and definitive evidence that if the same evidence is not relied on and trusted, the whole scope of Hodoud is finished.

The narration, which was stated in a kind of judgment by the Khalifa regarding a woman who was not married and was pregnant, but he did not determine the Had for her (Bukhari, 1989), cannot rely the documentary evidence of a lack of permission on evidence. Because the woman responded to the Omar's question that the man was in a state of sleep with her, which is an example of reluctance, and the woman has to be and with all the jurists when her reluctance is proved, the adulteration cannot be matched and the thing that would depart him of Had was the same reluctance, and if he was not reluctant, he would not leave the Had and limit. Because Omar had stated in the pulpit that anyone who appears to be pregnant without a husband should have an adultery (But here, the reluctance is banned her from the limit and Had).There has been also the narrations from Imam Ali (as) that, if and when they are due, they cannot determine the Had (Bukhari, 1989), also cannot document the sentence of this group. Because Imam (AS) has stated that it is necessary to adultery against a woman who has pregnancy effects without being married and there is a reluctant.But the rational reason for this group cannot be the reason for this group, because the jurists who give permission to judge according to the evidence, have set conditions and criteria for it, which must be that conditions in the same evidence, in accordance with which they judge and they rely on the evidence that are strong and definite, and they refer to committing a crime.But the weak evidence in which there is uncertainty and doubt then nobody has accepted the permission to judge according to them in the crimes.The followers of this theory,

which give permission to judge according to the evidence for the offenses, are divided in two ways:

First Method: Firstly, this category recognizes the permissibility of judgments according to the evidence in all offenses, and have not differentiated between the adherents' causes, such as confessions, testimonies, and indications, and consider all evidence of crime as equal. Among these people are Ibn Jouzi Josie and like him.In the introduction to the book of Al toroq Al hekmiyeh, Ibn Qahimwrites:expression is the name for everything that expresses and explicitly the right. There is no particular difference either in two or four witnesses. Therefore, in the Qur'an, the meaning of Bayneh is not just the meaning of two-term witnesses, but the meaning of Bayneh in the Qur'an is the proof and the reason for it.As the Prophet (PBUH) said it means anything that is right in the case to be ruled out, and the two or four witnesses are examples of Bayneh, not monopolistic meaning (Ibn Qayem, 1987).Then he refers to a lot of things that are proved on the basis of the evidence. Including;

In adultery, she says:If a woman who is not married and does not have a doubt, she will be pregnant, they will disagree with the jurisprudents in the proof of the limits of adultery.Some, such as Imam Abu Hanifa and Shafei, believe that the limit is not proved, but Imam Malik (1984)says: the limit is proved, of course, if he is a resident and there is not a sign of her reluctance.If it has been also narrated of Ali (AS) a narration that he divided adultery to two kinds, secret and

publicly: secret adultery lies to witness of the witnesses and in fact the witnesses are the first ones to attribute adultery to her. And the public adultery is that becomes proven by the advent of her pregnancy or confession, and in this case, the first person who attributes adultery is the person of the Imam.

According to the first point of view, Sunni jurisprudents, circumstantial evidence are cited in terms of Had crimes, which we typically refer to some cases.The role of evidence in proving the crime of theft: the primary and main method is to prove the crime of robbery with statement and confession. But when there is no witness on this event and, the burglar does not confess too. But at the same time, the property that is stolen to be found with him, even though it claims to be its own property, and denies the embezzlement, it is itself a sign of robbery, and imams and lawyers constantly perceive the Had of robbery in this case, because the nature of the confession is news and there is the probability of truth and false. While there is no doubt about the defendant, despite the property of the accused. The role of evidence in the proving of drinking the wine: The basic rule is confess still in the proof of drinking the wine. But in the place where there is a symbol of wine smile or wine puke, it is also proven the drinking the wine and the had of drinking the wine is adjusted accordingly. Because there is a clear indication that has been taken into consideration by the caliphs of Rashidin, then Imam Malik (1984) and Ahmad (in most cases) are in favor of the implementation of the limit and Had (Ibn Qayem, 1987). The Role of evidence in proving the Murder crime: Although the

principle is the corroboration of the testimony and confession of the crime. But can it be proved with the circumstantial evidence? Some people, like Ibn Qayem (1987), believe that the crime of murder can be proven by the fact that there is blood in murderer, while someone with a bloody knife is standing in his head, there is no doubt that he is a murderer, especially if there is a history of sharp animosity between them. The role of evidence to prove the charge for accusing another one to the false accusation of adultery or sodomy: false accusation of adultery or sodomy is another had a crime that can be proved by the evidence. In the book;Aldesoughi Ala AlsharhKabir, has brought that the practice of evidence is permissible in a false accusation of adultery or sodomy. Ibn Qayem(1987) narrats that jurists consider permissible the right of solemn malediction for the person who view the an unfaithful person has intercourse with his wife. Second method: This category of jurisprudents are those who believe in evidence in some offenses, not in all of them. Among the followers of this promise, are the jurisprudents of Maliki and the likes of them, and have argued for adage to prove their promise, including:

10. NARRATIVE OF THE COMPANIONS

Malek has narrated of Ibn Shahab from Saeb IbnYazid, that has said that Omar IbnKhattab went to them one day and has said: I smelled the smell of wine from that person and asked him what he was drinking if he was drunk. Whipping him off and, since it is proved then

determine the Had on him (Malik, 1984). AbdollahIbn Abbas has said that he has heard from Omar IbnKhattab, who said: The punishment (stoning) in the Qur'an is a right to Allah for anyone who has committed adultery whether it is male or female, if it is an adjective and an make a statement or confess. A Muslim has narrated from HassinIbnManzar al-Reqash, who has said:I have witnessed that Valid Ibn Aqabeh was brought to Usman and testimony was presented against him that he has produced the wine. The other person testified that he had drunk the wine and another person testified that he had seen him in a state of wine puke, and Usman said that Valid did not puke the wine unless he had drunk, so he ordered a limit and Had on him, and the limit and Had was done and he was beaten(Qashiri, 1987).Other narrations have also been narrated from the Companions, which in general imply the permission to judge according to the indictments and evidence in the offenses and crimes of Had (Terhoni, 1993).

11. CONSEQUENCE

Owners of this view have claimed that the Companions have judged the crimes in accordance with the indictments and evidence, and their judgments samples are well-known, and no one has objected to them in the era of the Companions, and this is a consensus on the practice of evidence and judging according to them in offenses and crimes of Had. Maliki jurisprudents also have considered this act,

according to testimony, as the promise of the leaders of the Companions, who have not objected to their age, and this consensus is based on the permission of judgment according to the evidence (Avaz, 2010).

Ibn Qayemhas said:

> The purpose of the act, according to the indications and evidence is that the lawgiver has not ceased to preserve the rights on the testimony of the two men (of course in non-life and property and honor), but caliphs and companions in Adultery in appearance and in wine, to smell or puke, or to steal to someone who the property is with him, who are all pieces of evidence and contexts, have trusted and judged based on the testimony (1987: 16).

When there is a doubt for a problem, there is the same probability of doubt in the testimony of the witness, but the likelihood of mistakes, illusion, and lie is more than a doubt about the evidence and context. Therefore, if the limit and Hadare closed due to a doubtful suspicion, then the limit and Had will be closed due to the possibility of doubt arising from the testimony through the first method. The dispute between the Jurists on the evidence of the promise of a judge's judgment according to the indications and evidences:The jurists have said that what has been narrated by Mr. Omar IbnKhattab, who determined the drinking the wine's Had to the smell of wine, cannot be a good reason to order a judge according to the evidence, because Omar did not determine the Had of drinking the wine due to the smell of wine, but he asked him, and when he confessed, he determined and

implemented the Had to him.And the rejection of this promise is that Hazrat Omar questioned by the wine smell about wine, whether does it make people be drunken or not? And when he found out that it was drunken then, he set the limit and Had and did not put the smell of the wine for drinking it. Because the discovery of the crime had been due to smell, and if it was not a smell of wine (Omar could not figure out whether he had been drunk or not? However, the reasoning of the permission, according to Omar ibn Khattab regarding the verdict of adultery cannot be due to the pregnant evidence, nor can it be based on the permission of the judge, according to the evidence, since it is narrated from Omar that he has not considered being pregnant due to the condition of the Had. Even if we consider the same amount as the reason for Had, then this narrative is in conflict with what has been narrated from the Prophet (PBUH), which has not done the Has based on the mere existence of the evidence of execution. While the sentences must be taken from the owner of the Shari'ah, which is the Prophet (PBUH), and his actions are not allowed to be closed, and promise and action of somebody else to be done. But what has been narrated from . Usman, who considered the limit and Had of drinking the wine according to the evidence (puke), is not the proof of the promise of the ruling according to the indications and evidence. Because Usman determined the Had through the testimony of witnesses who had seen Valid in making the wine and drinking it and his puke. Because the puke evidence was turned into a decisive reason through witness testimony, which could be judged according to it. The promise of the consensus of the Companions in the permission of the

judge according to the testimony cannot be justified in terms of the opinion of the jurisprudents. Because when this opposition consensus, as the jurisprudent, has no credibility, because there has been no consensus at all. The argument for rational reasoning according to the evidence is not a good proof for the judgment according to the evidence. The reasoning of the steward, such as confession and testimony, is stronger than the evidence, since the evidence is subject to doubts and probabilities, and when the doubt is brought into a reason, it cannot be documented in a religious sense and it is not permissible to issue the sentence by trusting on them in crimes, Trust (Terhoni, 1993).

After the perspective of the Jurists, which stated that they did not have the permission to issue the sentence on the indictment and evidence in the crimes, and then we discussed the views of the jurisprudents of Maliki and HanbaliIbn Qayem(1987) with their citation, it is clear to us that there is the better idea that can trust it, and reason also likes it, it is the same opinion of the jurisprudents of Maliki and Hanbali who give permission to judge according to the indictments and evident in the offenses. The reason for their preference is that their perspectives is a few things, including:The reasons in which the perpetrators have argued that they have been cited are stronger and less exposed to criticism, while the arguments from those who do not consider the lack of permission have no competence and are weaker than their arguments.Judgment according to the indictments and evidence in the crimes had been a matter of common concern with the

Companions and Caliphs.If we accept the promise of all of them that they are not authorized to issue the verdict according to the indications and evidence, we should close the adherence to the offender, as well as the Hodouds in the present day, because there are fewer crimes in the cases of the persecutors such as confessions because the little one confesses against himself, he is trying to commit a crime in secret and acts beyond the eyes of the people so that no one can testify against him.As a result, there is no way but to judge and trust them according to the evidence, and in criminal sentences in Hodoud crimes, the base of the Hodous are subject to compliance with evidence.

Evidence have been known as one of the strong and definitive proofs of a crime, and there is no doubt about them, except in very rare cases. But the arguments that they find in doubt are not considered. Therefore, the jurisprudents who have given permission to judge according to the testimony have trusted definitive evidence. In addition, there is the same amount of doubt as to the evidence of confession and testimony, but in some cases the testimony is even stronger than confession, because evidence is a tangible reason that is perceived to be apparent, but it is a testimony and confession of news, which is suspected to be false about them, because sometimes confession is due to a cause (for example, due to the caring of a person), or testimony sometimes is due to force.

In the legal system of Afghanistan, the provisions of Article 33 and the Code of Criminal Principles of Article (19), the circumstantial

evidence have been placed in the ranks of the evidence of proving the dispute and the legislator, because of its importance and its high status in the field of the right to claim and move from the stage of verification to the stage of proof, has set the legal rules governing the issue, along with the articles; (983-1034), though incompletely.And what is meant is any knowledge of which the discovery of what the unknown subject that is claimed is done.The circumstantial evidence is the exploring the reality; for the judge, there is a relative science contrary to the principles of operation (the principles of the intellect) that they do not discover the fact in any way, and the adherents are not proven and are only decisive in the case. Therefore, in other words, in the case of being the circumstantial evidence, it does not come to the principles of operation, because it is well known that he is considered to be the cause of reason, which is beyond any other reason.

Given the fact that Afghanistan's law, especially the criminal law, appears to prove to be proven in Afghan law, not subjectivism. This claimant has proven some of the legal articles can be proved relating to crimes and proofs, as well as the quality of providing and verifying proofs.In 272 article Principles of Civil Trials, the following have been cited as proofs:

> The means of verification that make up the sentence are a confession, statement (documents, witnesses, evidence, and context, and inferred evidence). Inferred evidence and contect is one of the proofs that a judge acquires from the circumstances of the investigation and searching of the place, contrary to

> evidence and context what has been mentioned in the law and is not relevant (1989: 13).

In paragraph13, Article 37 of the Criminal Procedure Act (2003), evidence of proving the crime has been introduced: intuition, confrontation, identification of the defendant in the presence of a guardian, an inspection of the place, an attempt, a record of the objects, a special assessment and examination, and an interrogation.As it is clear, this legal article has not been just mentioned in the Shari'a, but also a new scientific evidence has been mentioned, which itself indicates that the rights of Afghanistan do not require the evidence of proof solely for the particular number in order to make suspicion and subject to the need to prove evidence in mind.Article 5 of the same law also has talked about the value of positive reasons and its value depends on the fact that the defendant or his attorney is present at the time of the testimony of witnesses and that he has the power to defend himself that the mentioned article was quoted equally: (The witnesses' testimony and expert examinations, that have been collected during the investigation, can form the basis of the decision, provided that the results indicate that the defendant and the defense attorney had been present at the time of the current investigation and have been in a position to be able to ask or protest. Otherwise, the above documents will have a context aspect. What is understood by the legal article is that the legislator looks at various types of proofs of evidence, whether religious or otherwise, as a means and method of discovering the truth. The reasons and evidence of proof are in the form of a positive value that the truth and the reality of it are discovered precisely because it is

defended by the defense and his lawyer is conditional upon the statement and proof of reason, because it is likely that the witness or any other evidence to be false or fake.

The presence of the accused and defense attorney in defense and the questions posed by the defendant and the defense attorney may reveal the falsehood of the evidence. In this case, the criminal judge will not have the right to vote against the guilty person, but will be forced to issue a not being vote to charge to the accused.Article 53 of the same law states: The court can, in any case, ask questions from witnesses and defendants in court sessions, and they will ask them to oppose the views. The above article is well illustrated in the context of the argumentation, since it would not be useful for judges and trials to ask the witnesses other than to ask the witnesses, the court can better understand the facts of the matter, to determine whether the testimony is correct or not. If witnesses are only allowed to testify, witnesses may collude before the testimony session with a statement in front of the court.The article states: "The court can hear a testimony of witnesses and expert opinions that have already been stated in the primary court, and search for new reasons for the issuance of the sentence." From Article 69 and the above-mentioned cases is concluded that, the criterion of proof from the point of view of Afghan criminal law is the presented evidence to the court.The judge, based on his own research, finds guilty or innocent of any presented allegation or evidence. Based on the same belief, he makes the necessary decision.

12. CONCLUSION

In the study of jurisprudence and law, in particular Sunni jurisprudential texts and Afghan legal rules, we conclude that the circumstantial evidence is very important among the evidences to prove the dispute. In our time and era, one of the best and easiest ways to help bring justice and right to justice is through the use of circumstantial evidence in criminal and legal cases.Of course, this should not be overlooked, which circumstantial evidence role in proving crimes means judicial evidence and the ability to prove evidence, because: respect for justice and judicial fair, respect for the rights of the right holders, and safeguarding security and order, in line with it that judge and magistrate must be free in his discovery to make a fair ruling by using any indications and evidence based on discovering the fact.The community of the Sunni Jurists (in the contrary of jurisprudence) and the Afghan legal system have confirmed the legitimacy of the permission to use the circumstantial evidence in summary in proving the Hodud crimes. They consider the perspective of the president to be rejected by criticism and wisdom. Finally, the Afghan legislator explains the credibility and proving the role of circumstantial evidence in a very clear manner, and the judiciary judges and trials use this tool and a great opportunity to make the decisions and implement their votes.

REFERENCES

ABEDIN, M. 1966. **Red Al-Mukhtar Ala al-Dar al-Mukhtar**. Hashiyeh Ibn Abedin. al-Nashir. Mostafa al-Halabi. secondedition. Cairo.Egypt.

KHATIB, S. 1995. **Mani al mohtajelamarefat al manialfaz ala menhaj. dar Al kotob Al elmiyeh**. al-Muhtaj. First edition. Beirut.Lebanon.

QASHIRI, M. 1987. **Ezuddin Institute**. Beirut.Lebanon.

SHOKANI, M. 1993. **Nil al-Atur, Dar al-Hadith**. al-Tabat al-Avali. Egypt.

TERHONI, M. 1993. **Hajiyah al-Qaryenn al-Fi esbat ala jenaie.**Qarinos community. First print. Egypt.

AVAZ, M. 2010. **Derasat fi al-Fiqah al-jenaie al-Islami**, **Al-Matboat al-Jammeieh**. Alexandria.Egypt.

BARAKAT, M. 2007. **Alyamin al-Qazaie'yah Fi al-Asbat. Dar Al zava**. First Printing. Damascus. Syria.

BUKHARI, M. 1989. **Sahih Bukhari, Maktabeh al-Islam. Lanshir and tozih**. Istanbul. Turkey.

DEHKHODA, A. 1993. **Dehkhoda Dictionary**. Tehran University Press. First Edition.Tehran.Iran.

ABIJOMHOR, M. 1985. **Avali al-Leali al-Aziziyat fi al-Hadith al-Diniyeh**. Mojtaba Iraqi. Qom.Iran.

IBNALQAYEM, M. 1987. **Al-alam al movaghein an-Rab al-Alamin, Al-Maktabat al-Asiriya**. Beirut.Lebanon.

IBNASIR, M. 2004. **Alnehayat fi Garib al Hadith Valasar**. Taher Ahmad Zawie and Mahmoud Mohammad Tanahi publication. Cairo.Egypt.

JORJANI, A. 2007. **Al-Tarafiyat. Dar al-Neghash**. Beirut.Lebanon.

LANGRODI, M. 2014. **Terminology of Law**. Publisher:GanjDanesh. Tehran. Iran.

MALIK, A. 1984. **Al-Mawta, Dar al-Nafayes**. Vol. 8. Beirut.Lebanon.

MANZOR, M. 1994. **Lassan al-Arab, Dar sader**. Third Edition. Beirut.Lebanon.

MAVARDI, A. 2007. **Al-Ahkam al-Soltanieh**. Dar al-Fakr. Cairo.Egypt.

MOIEN, M. 2001. **Farsi dictionary**. Amir Kabir Publication. 18th Printing. 1st edition.Tehran. Iran.

RAGHEBISFAHANI, H. 1992. **Al-Mofardat. Dar Al-Alam**. First V. Beirut. Lebanon.

RASHAD, M .1987. **Principles of Law**. Iqbal Publications. Bijar. Iran.

SAHEB IBN EBAD, I. 1994. **al-Mohit fi al-laqah. alam al ketab**. Beirut. Lebanon.

SAJJADI, J. 1982. **Islamic Culture**. Komosh Publishing. Bijar. Iran.

TAVAKOLI, S. 1990. **The Position of circumstantial evidence on the Road to Reconnaissance**. Journal of Dadresi, Legal, Cultural and Social Monthly. Ninth Year. Iran.

VALIDI, M. 1994. **General Penal Laws**. Second Edition. Tehran. Iran.

UNIVERSIDAD DEL ZULIA

opción
Revista de Ciencias Humanas y Sociales

Año 34, Especial N° 14, 2018

Esta revista fue editada en formato digital por el personal de la Oficina de Publicaciones Científicas de la Facultad Experimental de Ciencias, Universidad del Zulia.
Maracaibo - Venezuela

www.luz.edu.ve

www.serbi.luz.edu.ve

produccioncientifica.luz.edu.ve