

Court Authority in Confirmation by Judicial Presumption

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One of the most important duties of the judiciary is hearing all the parties for the proceedings and investigating all the facts to form its opinion and make a fair decision in the examined case. Therefore, the parties of the proceedings must provide evidence to get their rights. Because direct evidence is often difficult to obtain, most, if not all, legislations allow indirect evidence through judicial presumptions. The Iraqi project in the amended Evidence Act No. 107, 1979 discusses this topic in different articles. However, this discussion is indirect and is in different article. This causes confusion in the application of this law. In addition, some law texts need amendments to keep pace with the developments in the society. Therefore, this study aims to solve these problems and come out with recommendations.

Key words: *Judiciary, Evidence Act, judicial presumptions, presumption of law, amendments Court authority in confirmation by judicial evidences.*

Introduction

The most important rule in judiciary is to give a fair hearing to all parties in the proceedings and investigate all documents to find a just decision in the examined matter. Therefore, those parties must provide evidence to get their rights. While it is difficult to find direct evidence practically, all legislations allow courts to use indirect evidence through presumptions (Al-Suri, 1983b).

Iraqi legislation discusses in the amended Evidence Act No. 107, 1979 this topic in different articles. This discussion is indirect and unclear, which causes confusion when the rule is applied. In addition, some legal provisions need amendments to keep pace with the latest development in the society. Thus, we choose to solve these problems and make some recommendations in this study (Al-Sanhouri, 2000).

The Iraqi legislator deals with judicial presumptions in article 102, 103 and 104 of the amended Evidence Act No. 107, 1979. Confusion in the application of these articles happens for many reasons. First, these articles do not clearly and accurately discuss the judicial presumptions. Second, they are inferences of the judge or court. Third, they are discussed in many different acts. In addition, the term presumption comes in the content of the Procedure Act; the latter is a law related to the procedure issued before the valid evidence rule was issued and some of its evidence related rules were repealed. Therefore, the study discusses this topic and attempts to solve this problem to keep pace with the developments in society (Sawi, 1971).

Study Plan

Because the study aims to create an inclusive discussion of this topic, the research is divided into two parts. The first introduces judicial presumptions in two sections. The second part consists of the bases of legal presumption and court authority regarding evidence in two sections. Finally, the study ends with the conclusion, findings, and suggestions.

Part One: Introducing Judicial Evidence

In order to confirm a fact for the judiciary, it is necessary to be committed to the means identified by the legislator and litigants; judges must also make a commitment to them. For example, the judge can infer from a known truth an unknown element. Therefore, we aim (1) to clarify the meaning of the judicial presumption and its importance and (2) distinguish judicial presumption from what is similar to it in the following two branches.

The First Branch: Judicial Presumption and Its Importance

Some scholars define presumptions of law as evidence which the judge infers from the procedure details and surroundings in his opinions (Al-Suri, 1983b; Al-Wafa, 1987). Others define them as a judge's inferences from the known element to prove an unknown issue in the procedure (Al-Sanhouri, 2000). This confirms the statement of Article 102 from the amended evidence rule no. 107 in 1979. Thus, presumptions of law are what judges infer by intelligence and opinion from a procedure and its surroundings (Nashat, 1955).

The importance of law presumption lies in that it is indirect evidence used by the court to reduce the amount proof needed by the court. Presumptions are also important because they transfer this amount from one opponent to another by revealing the will of the contractors and stating their intention (E. A.-M. Bakr, 2014; Musa, 2012).

Nashat (1955) states that these presumptions are abundant and multiple and do not go under one heading because the judiciary continuously applies them in pending cases. It is rare to find

cases in the court that are devoid from these presumptions (227). The focus is not on the evidence that are required to be confirmed directly, but on other realities with a strong link to the case. If the latter is proven, the court must prove the original reality because of its direct link with it (El-Bahi, 1965). Here the main object of the Evidence Act, the positive role of the judge, is to pass a fair judgment in the case. Also, the judges are urged by the legislator in the Evidence Act to benefit from the development in information to create a judicial presumption. Also, the law obliges the judges to follow the developed interpretation of law when taking into consideration the court in the law legislation (A. Eid, 1961; Nashat, 1955).

The Second Branch: Distinguishing Judicial Presumption from Its Likenesses

Judicial presumption may be similar to other types of presumption, since all types of evidence are based on the ideas of probability and deduction of the unknown matter from the known order. Also, the judicial presumption is consistent with other evidence in that it shifts the amount of proof from the original detail to be proven to another fact close, and related, to it. If the other fact is proven, the original can be proven too. This means it is an indirect evidence method that does not focus on the same reality, but rather focuses on another fact to prove the original one (Al-Aboudi, 2003).

E. A.-M. Bakr (2007) argues that, although there are similarities between the judicial presumption and other presumptions such as the definitive and simple legal presumption and the natural presumptions, there are fundamental differences between them, including:

1. Judicial presumption is considered one of the methods of evidence. However, the legal presumption can be used as substitutes for any other evidences for whoever is benefited (Ghanem, 1967).
2. Judicial presumption comes from the judge's deduction, so this presumption derives its evidentiary power from the discretion, while the law determines the evidentiary power of legal evidence (Ghanem, 1967).
3. Legal evidence is pre-determined in the law and there is no evidence that was not provided by Sharia, at a time. The judicial presumption is not pre-determined, it depends on the circumstances and the incidences of each case (Sultan, 1984).
4. Law presumptions are not restricted by scope in terms of confirmation and are subject to the general rules while the law limits the confirmation to judicial presumptions in the scope of what can be proved with evidence.

Thus, what cannot be proved by evidence cannot be proved by judicial presumptions. Therefore, it is in accordance with the aims of the evidence in expanding the authority of the judge in directing the procedure and its related evidences to guarantee an intact application of the law in making a fair decision in the cases under investigation (Yahia, 1981). Also, judges

are obliged to make their opinions and have the authority to decide on the request of litigant. They must also take actions to discover the truth. Therefore, we suggest an amendment to article 102 –second from the evidence rule: the judge must investigate every presumption the law did not legislate in the general evidence rule (Al-Sanhouri, 2000).

The Second Section: Pillars of Judicial Presumption and Court Authority in Confirmation by It

In order to make a judicial presumption, the judge must verify that there are two important pillars in this presumption: the physical and moral. Following the verification of these two pillars, the judge's positive role arises in creating, or not creating, legal presumption, and in whether the judge has full authority to create judicial presumption, or if that authority is governed by the law (Al-Sanhouri, 2000). Thus, this section sheds light on these two issues in the following two branches:

The First Branch: The Pillars of the Judicial Context

The second branch: The court's authority to rely on the legal context to issue a ruling.

The First Branch: The Judicial Presumption Pillar

The previous section showed that judges must investigate the existence of the two pillars (mentioned in the previous section) before using any presumption. This is because their lack causes the lack of their concrete existence:

The Second Branch: The Court's Authority to Rely on the Legal Context to Issue a Ruling

1. The physical pillar of the judicial presumption:

The physical pillar of the legal presumption consists of one or more fixed evidences or proofs of the lawsuit recognised by the parties in the proceedings. This fact is chosen by the judge through the methods of evidence legally defined or by experts, as stated in Article 104 of the Evidence Act that the court can take from the report a reason for its ruling, or any other methods of evidence.

2. Moral pillar of the judicial presumption

The moral pillar for the judicial presumption are the inferences made by the judge regarding established facts in the procedure which forms the physical pillar for the presumption to reach the fact to be proved (Al-Aboudi, 2003).

According to E. A.-M. Bakr (2014), this pillar is the most difficult because the judge must exert a great effort to form a belief to make a presumption from the known fact to reach the unknown one. Thus, inferences cannot be made on anything other than hard facts in the records. The inference of the judge is based on possibility. The possibility of making mistake is high because the judge is like any other human beings with limited abilities. However, in this case s/he has to examine the case carefully by getting help from judicial provisions issued before and in similar cases to the one at hand to make the correct inference. Thus, the judge do everything to extract the right facts and arrive at a sensible ruling. The legislation directs the judge to benefit from scientific developments to form judicial presumptions. These developments are not pre-determined, and legislation allows a variety of them to be used, such as audio and video recordings or images, fingerprints, blood analysis etc. However, these uses should be accompanied by limits that do not violate personal privacy (Al-Naddawi, 1990:170).

The Second Branch: The Court Authority to Rely on the Judicial Presumption

Judges have wide authority in relation to the judicial presumptions. They may seek assistance from them if they are convinced by these presumptions or leave it if they are not. They do not have this authority with other means of confirmation. The judge can conclude the judicial presumption from any fact presented in the case, whether it is one or several fixed facts in the minutes of the case. The essential point in the case of relying on multiple facts to elicit the presumption is that it should be compatible with the evidence, because the abundance of evidence is not an indication of strength or weakness, rather it is the extent of its compatibility with its implications (Al-Aboudi, 2003).

Since confirmation by presumptions is not directly linked to a disputed fact, it is directly linked to another with a strong relation to it. Here, the judge deduces from the facts of suing and its evidences. Thus the judge may make mistakes because the evidence is not directly related to the case (Nashat, 1955). Therefore, the Iraqi legislation considered it a limited evidence which cannot be proved in all cases, and something like a witness in the confirmation so whenever it is accepted, judicial presumption can be accepted and the reverse is true.

A question arises here when the judge verifies the availability of the judicial presumption pillar, by verifying the evidence of the material pillar of the presumption and from papers of the case. Based on the correct scientific and legal principles, is the judge obliged to apply this presumption and pass judgment based on them? To answer this question, the two types of judicial presumptions must be distinguished.

The First Type: the judicial presumptions which the Iraqi legislator does not refer to. This type is not pre-determined and are of different types. The judge infers them from the circumstances and facts of each case separately and judges are not obliged to take them into

consideration. These types of presumption are subject to the judge's evaluation and his ideas. The judges can base their decisions on one presumption and issue a ruling or discard many presumptions in a case that is not convincing. The importance is not in number and abundance but in the judges belief in these presumptions to make a decision.

The Second Type: the judicial presumptions which the Iraqi legislation referred to in the Evidence and Civil Procedure Act. This type helps a judge to decide on the case and here are some of them with some notes on them:

1. In article 49 of the Evidence Act, it is stated that the litigants who dispute what is attributed to them must give a sample of handwriting, signature and thumb print on the date the court assigns. If s/he refuses for no acceptable reason, the ruling which s/he is charged is permissible. From the topic above, the legislation considered refusing to attend without any acceptable reason is a judicial presumption to charge the accused. In this case, the judge must depend on the judicial presumption. Therefore, we suggest refining the above article to make the judges use of this judicial presumption obligatory rather than optional.
2. As it is in the text, if the court is convinced by the existence of a recording or accusation at the hand of the litigant to be presented and s/he did not at the date assigned by the court or refused to take oath, the other litigant has the right to confirm the content of the recording or accusation by other methods. This means that the objection to attend or take an oath is a presumption of the existence of note and the judge is obliged to follow.
3. The ruling which is not judicial is left to the judge to decide and should be confirmed according to the general Evidence Act.
4. If the litigant did not attend the court for no acceptable reason or attend but did not respond for no legal reason or claimed not knowing or forgot, the court can make from this a judicial presumption that can help to decide on the case. Thus, confirmation can happen by the help of judicial presumptions or witnesses.

Here we can find that very clearly the legislator considers the litigant's absence for no reason, refusal to reply or forgetting clues the court to decide on the case. It would have been better not to state the above article by not limiting the cases in which confirmation by witness or judicial presumption can happen. Thus, we suggest modifying it in the conclusion.

5. In the civil procedure rule, the litigant must reply to the procedure after being informed before the court session is held to investigate it. Also, the court must infer from the denial to reply a presumption to decide on the case. In this matter, law No. 18 in 9/3/1997 was issued. This law states that frequent requests to delay the case is a presumption for the weakness of the litigant's proof which can be used by the court when ruling. From the above two texts, the frequent requests for the delay are considered obligatory judicial presumption on the weakness of the litigant's proof. It is preferable to compose third and

fourth parts of article 102 from the above law by inserting these two texts in the Evidence Act because they are judicial presumptions related to evidence and compose the third.

The court also has a great power to estimate facts, to rely on them, and to make them a basis for eliciting judicial evidence. It may rely on facts related to the two conflicting opponents, or one of them as well, even facts not related to the scope of the dispute, As long as the documents have been included in the lawsuit and were related to the facts to be proved, the court may, through deduction, be guided by it on the basis that it is required to prove (Morcos, 1981).

Therefore, the judge can derive the presumption at his discretion and not limit it due to the varied facts and the circumstances of the case, documents outside the lawsuit or information not presented in the case can be used, even if investigations are not correct in form. The judge may choose from papers outside the case as an administrative investigation or from the minutes of Algerian procedures. Even if it is decided that there is no place for filing the case, the judge does not present new evidence in the case, but rather appreciates the evidence presented to him (E. Eid, 1961).

Jurisprudence agreed that the court does not adhere to the multiplicity of clues or their congruence, as it may divide one presumption whenever it is available to the judge with conviction (Razzaq, 1948). The court is not obligated to state the reasons that led it to weigh one of the clauses and exclude others, or the personal evidence that contradicts it in its estimation. As a basis for judgment, the Court of Cassation has no control over it (Al-Mumin, 1977).

Jurisprudence agreed that the court does not adhere to the multiplicity of clues or their congruence, as it may divide one presumption whenever it is available to the judge with conviction. There is no specific rule for the court to choose the fact that makes it the basis for eliciting the context, as the door is wide open for it. It has absolute power to derive the context from any fact and does not restrict itself to the fact that it is permissible to prove with the evidence, as well as that its development is sound, justifiable, and sufficient, logical, and leading to the results it has reached (Al-Suri, 1983a).

If the court deduces the context from an indirect incident, it must abide by the side of caution and caution, in order not to make the mistake of inferring that the incident upon which the judicial context relies is weak or non-existent, especially if it was through testimony, and it came in a decision of the Court of Cassation. Here it was found that the purchase of the privileged wife, the debtor, who is in custody of the furniture and tools of the café, and the presence of the furniture and tools mentioned in her place before the sale, is evidence of the false behaviour of the claimant. Since she is the wife of the detainee, she must be aware that

he is indebted to the barrier, or knew the state of her husband mentioned, so the sale of the aforementioned is not executed against the creditor.

The Federal Court of Cassation also ruled that the legal presumption may be inferred from the moral and social status of the person and his practice in the medical profession and how he previously dealt with many insurance companies in measuring the honesty of the opponent in his claim about the stolen things in particular and in the estimate of their value that was reported at the time of the accident.

The means of scientific progress led to the creation of new methods that would help the court in deriving judicial evidence. The judiciary has stated in Article 104 of the Evidence Law that a judge may take advantage of the means of scientific progress to elicit judicial evidence. Sound recording and blood analysis devices can be used to verify its type to prove the child's parentage ratios upon denial (Al-Mashhadi, 1994).

Conclusion

The study has concluded the following:

First: Findings

- 1- Judicial presumptions are judge inferred presumptions from the procedure and its surroundings.
- 2- Judicial presumptions are distinguished from other types of presumptions. Judicial presumptions are inferred by the law. This of one of the important aspects which distinguishes them from other types in many aspects which appear in the law.
- 3- Judicial presumptions consist of two important pillars: the physical facts in the procedure; and the moral pillar which is based on the judge's inference.
- 4- Judicial presumptions are of two types: presumptions with no reference to them by the legislation and are left for the judge. The second type is presumptions which the legislation referred to in the confirmation and in the civil procedure rules.

Second: Recommendations

First, the study recommends refining the text in article 102 of the Evidence Act by modifying the second part and adding a new one as follows:

102-first-judicial presumption is a judge-based inference from a hard fact to an unknown issue of the case.



Second, the judge's inference of each presumption is not legislated by law according to the general rules of evidence.

Third, the applications to postpone the procedures frequently is an indication of the weakness of the case of the applicant.

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