IIUM PRESS
Copyright (C) 2020
IIUM Press
International Islamic University Malaysia

eISSN 2600-8408
http://journals.iium.edu.my/al-fiqh
Pp. 62 - 72

Study of Donation of Debt in Islamic Jurisprudence with Emphasis on Imami and Hanafi Schools of Law

Abbas Mirshekari(1), Alireza Fattahi keti late(2), Ali Abedi (3), Ramin Ghasemi (4)

Abstract

Could a debt also be the subject of a donation? Some jurists believe that such a donation is not appropriate due to the impossibility of a debt acquisition. This group of jurists believes that donating debts is a payment to the debtor not in the form of a donation but in the form of a release, since the result is the same: the fall of a debt. The donation of debts to a third party is also considered to be void by this group. In contrast, it is argued by another group of jurists that the acquisition should not solely be interpreted as material possession since the objective of the acquisition is to donate the property that is the subject of the acquisition. This also occurs in debt acquisition. In addition, as we know, if the subject of a donation is in the possession of a donee, no acquisition is required. In this regard, the debts also become the debtor's acquisition since it is his obligation. Although both the donation and release lead to the same result, their initial effects are different: a donation results in the possession of a debt, and the release leads to the fall of a debt. Such a difference would raise further differences. Regarding the donation of a debt to a third-party, the same happens as the third party possesses a debt after donating it, so that he can be referred to as the debtor, resulting in both domination and acquisition. Accordingly, the donation of a debt to a third-party should also be considered appropriate. This paper focuses on the views of Imami and Hanafi Schools of law in this regard.

Keywords: Donation, Debt, Third Party, Acquisition, Imami School of Law, Hanafi School of Law.

دراسة هبة الدين في الفقه الإسلامى مع التركيز على المذهبين الإمامي والحنفي

ملخص البحث

هل يمكن أن يكون الدين أيضًا موضوعًا لعقد هبة؟ يعتقد بعض الفقهاء أنه باطل لعدم إمكان قبض الدين. هذه المجموعة من الفقهاء تعتقد أن هبة الديون هو دفع للمدين ليس على شكل تبرع بل على شكل إبراء، لأن النتيجة واحدة: سقوط الدين. كما تعتبر هبة الديون لطرف ثالث باطلة. في المقابل، احتجت مجموعة أخرى من الفقهاء بأن القبض لا ينبغي تفسيره فقط على أنه حيازة مادية لأن الهدف من الحيازة هو التبرع بالممتلكات موضوع القبض. يحدث هذا أيضًا في قبض الديون. بالإضافة إلى ذلك، كما نعلم، إذا كان موضوع الهبة في حوزة الموهوب، فلا حاجة للقبض. في هذا الصدد، تصبح الديون أيضًا في حيازة المدين لأنها التزامه. على الرغم من أن كلا من الهبة والإبراء يؤديان إلى نفس النتيجة، إلا أن آثارهما الأولية مختلفة: ينتج عن الهبة حيازة دين، بينما الإبراء يؤدي إلى سقوط الدين. مثل هذا الاختلاف من شأنه أن يثير المزيد من الاختلافات. أما فيما يتعلق بهبة الدين لطرف ثالث، فإن الأمر نفسه يحدث لأن الطرف الثالث يمتلك الدين بعد التبرع به، بحيث يمكن الإشارة إليه على أنه المدين، مما ينتج عنه كل من السيطرة والقبض. وبناءً على ذلك، فإن هبة الدين لطرف ثالث يجب أن تعتبر صحيحة أيضًا. تركز هذه الورقة على آراء المذهبين الإمامي والحنفي في هذا الصدد.

كلمات مفتاحية: الهبة، الدين، الطرف الثالث، القبض، المذهب الإمامي، المذهب الحنفي.

(1) Assist. Prof., Department of Private and Islamic Law, University of Tehran, Tehran, Iran. Mirshekariabbas1@ut.ac.ir
(2) Master Student, Department of Private Law, University of Judicial Sciences and Administrative Services, Tehran, Iran. Alirezafattahi1997@gmail.com
(3) Master of Law, Department of Private and Islamic Law, Karaj Brach, Islamic Azad University, Karaj, Iran. Amir.h20769@gmail.com
(4) Master of law, Department of Private and Islamic Law, University of Science and Culture, Tehran, Iran. r.ghasemi121@gmail.com

Contents

1. Introduction 62
2. Literature Review 63
3. Donation of Debt to Debtor 64
3.1 The Juridical Review of the Subject 64
3.1.1 Inaccuracy of Donation of Debt 64
3.1.2 The Correctness of the Donation of Debt 65
3.2 Legal Review of the Subject 67
4. Donation of Debt to a Third Party 68
4.1. The Jurisprudential Review of the Subject 68
4.1.1 Inaccuracy of Donation of Debt to a Third Party 68
4.1.2 Accuracy of Donation of Debt to a Third Party 68
4.2. Legal Review of the Subject 69
5. Conclusion 69
References 70
Endnotes 71

1. Introduction

The commitment in a debt is twofold: it is an obligation for the debtor and a right of the creditor and thus it is called a debt from the side of the debtor and a claim from the side of the creditor.[1] A claim is the creditor's financial right, and each right holder has the possession of his rights; he can either request the rights to be implemented, transferred, or disregarded. The traditional and pre-fabricated form of transferring debts is sale and transfer (Katouzian, 2002: 246). The term "release" is also used to refer to remitting a debt (Katouzian, 1991: 353). The question now is whether the creditor can use the donation form to transfer his right. In other words, can he include his will in the form of a donation contract when he is to transfer his right to another party? Or can he donate his debts to debtor, instead of the well-known form of the release, when he is to remit the debt? That is, can the debt also be the subject of the donation contract, or can the creditor donate his debt to the debtor or someone else?

This issue can be considered in two aspects. First, if the accuracy of the donation of debt is believed in, given that the donation is a bilateral contract, the acceptance of the transferee is necessary. But if release instead of donation is believed in, since release is a unilateral contract, the determination of the transferee has no effect on it.

Secondly, considering that the function of the bill in debt donation will not be like other types of donation, so how the bill is done in the donation of debt should be demonstrated, especially since there are many differences of opinion among jurists in this regard. To answer these questions, some jurists believe that the acquisition of the subject is required in a donation. However, a debt cannot be acquired since it is by credit. As such the donation of a debt to the debtor is considered as a release since the same result is obtained: the fall of a debt. Accordingly, the condition of the donation of the debt to a third party is also clear: the subject of the debt cannot be acquired and thus it cannot be donated. In contrast, another group of jurists prefer to consider the donation of the debt appropriate by changing the approach to the interpretation of acquisition. Hanafi jurists also consider it to be appropriate if the donee is considered as the representative of the donor.

2. Literature Review

This study is novel as no previous study has reviewed the donation of debt in the publications of Islamic jurists from different viewpoints. It should be noted that our findings with regard to Imami school are as follows:

In his book, *Rules of Jurisprudence*, explaining the donation of debt, Mostafa Mohaghegh Damad has stated that the donation of debt is a unilateral contract and is considered as release, although it was concluded as donation literally (Mohaghegh Damad, 1987, 2: 269).

Mirza Qomi believes that although the donation of debt is concluded as a donation, it is considered as a kind of unilateral contract of release so the donation rules would not apply (Qomi, 1819:156).

In this regard, Dr Katouzian considers donation of debt as a release that could be a specific unilateral contract (Katouzian, 1991), while donation is a bilateral and not a unilateral contract in the jurisprudential publications. In Iranian legal system, according to Article 795 of the Civil Code, "donation is a contract in terms of which a person gives someone else the possession of something under no obligation." The former party is called the donor and the latter is called the donee, and the donated money is called given property. On the one hand, regarding the use of the term "property" in the article, it can be argued that any property, whether real or in debt, can be the subject of the contract of the donation. Logically, there should be no difference between the real property or the debt in terms of the possibility or impossibility of donation. In addition, according to Article 806 of the Civil Code, "if the creditor forgives his debt to debtor, he has no right to refund". The inclusion of this article in the chapter on donation and the use of the word "forgiveness" indicate that the donation of debt is acceptable as the result of both is the fall of the debtor's commitment. Now, what is required for the existence of this form of donation to fulfill the demands of the creditor? Moreover, the problem of the impossibility of acquiring a debt still exists. However, some other jurists prefer to consider the donation of debt to the debtor or a third party to be appropriate with regards to the liberty in contracts, the interpretation of the domains of acquisition to encompass credit assets, and the detection of differences between the donation of debt and release. Considering the doubts concerning the donation of debt as well as the above-mentioned justifications to validate the donation of debt, it would be significant to address its various dimensions. Accordingly, this study examines the validity of the donation of debt to the debtor (first topic) and the donation of debt to a third party (second topic) according to the different schools of Islamic jurisprudence in general and with emphasis on the two schools of jurisprudence, Imami and Hanafi, in particular.

3. Donation of Debt to Debtor

Whenever a creditor is to release a debtor from his obligation, it is natural to go to look at the release form; however, the question is whether a donation contract can be used for this purpose. In other words, can the creditor donate his debt to the debtor? In order to answer this question, the juridical views are first reviewed, and then the subject is discussed in the positive law.

3.1 The Juridical Review of the Subject

The donation contract is a property agreement. For there to be a donation, the willingness of the two parties involved as well as the subject of the donation to be given to the donee is important. In this regard, it is necessary for the subject to have an acquisition capability. If we interpret acquisition in its material sense, *hibah* (donation) is exclusive to the real properties. As such other properties such as interests as well as claims that do not materially have acquisition capability are removed from the realm of donation. For this reason, a group of jurists does not consider the donation of debt to be appropriate. However, they would prefer to interpret the creditor’s intention for the donation of debt as release. In contrast, a group of other jurists does not limit acquisition to material properties and considers acquisition to be dominant in the subject of property donation. Accordingly, credit assets also have acquisition capability; therefore, they can be the subject of a donation. In the following sections, these two points are presented and criticized separately.

3.1.1 Inaccuracy of Donation of Debt

Different schools of Islamic jurisprudence define donation as the “gratuitous possession of a property with no return” (al-Ḥaṣkafī, 2002: 255; Ibn ʿĀbidīn, 1992: 685-688; Helli, 2008: 410-411; Khazem, 1994: 70; al-Suyūṭī, 1997: 312 - 313; Golpaygani, 1994: 132-134). Given this definition, donation is exclusive to the real properties. Accordingly, other properties, which are not considered as real properties, including debts (and interests), are not included in donation cases since debt is in credit and intangible in contrast to real properties, which are material and tangible (Khomeini, 1999: 563). Due to such different natures, the famous jurists consider the donation of debt to debtor not to be a donation but a release.

The same opinion exists in the Shafi'i School (al-Shirwānī & al-Ibādī, 1707: 305-306; al-Shirbīnī, 1997: 400; al-Dimyāṭi Bakrī, 1998: 174; al-Anṣārī, 1998: 446-477); Hanafi School (al-Ḥanafī al-Qadirī, 1998: 483; al-Kasānī, 1989: 29-30; al-Sarakhsī, 1986: 83-86); Mālikī School (al-Ḥaṭṭāb, 1996); Zaydiyyah, (al-Mahdī, n. d.: 451) and Imami School (Rouhani, 1994: 273-279; Helli, 2009: 410-411; Shahid I, 1994: 286; Rouhani, 1998: 229; al- Faqa'ani, (n. d.): 176; Khoyi, 1991: 204).

In Imami and Hanafi schools, this opinion goes so far that even if the word "donation" is used by the creditor, it is still release and not donation (e. g., Helli, 1995: 276-277; al-Khansarī, 1987: 161-164; *Al-Hanafi Al- Qadiri*, 1998: 483; Ibn ʿĀbidīn, 1992: 684; Al-Bahūtī, 1999: 36-370). On the other hand, if the creditor only wished to give a donation, his will cannot be interpreted as release as he did not mention release. According to this group, donation also cannot be realized because in their opinion, the subject of donation must be a real property (Al-Bahūtī, 1998: 367-370). Consequently, there are doubts whether or not donation can be interpreted as release.

Anyway, the result of this analysis is that the perception of donation as release does not require the acceptance of the donation to fulfill the release; rather a release, which occurs with the creditor's unilateral will, is enough for a creditor to realize that there is only a creditor's will (al-Sarakhsī, 1986: 83; *al*-Khansarī, 1987: 161-164; Helli, n. d.: 416-417; al-Mahdī, (n. d.): 433; al-Faqa'ani, n. d.: 176; Yazdi, 2003: 242-243; Shahid I, 1994: 286).

To justify this opinion, two important reasons are mentioned below:[1]

First reason: The subject of donation is giving possession. In other words, in a contract of donation, the donee is owner of the donated thing. However, with the donation of debt to debtor, he is not the owner of the debt and he is no longer committed to pay the debt. The jurists of this viewpoint believe that the person's ownership of the property, which is his obligation, is canceled and ineffective (al-ʿAynī, n. d.: 125; al-Sarakhsī, 1986: 84; Rouhani, 1994: 273-279; Ibn Qudāmah, n. d: 257).[2] Also, the debt will be abolished from his obligation. This result is the same as the donation of the debt; because in release, debt is also lost without ownership (Baḥr al-ʿUlūm, 1983: 50-52; al-Mahdī, n. d.: 243; Ibn Qudāmah, 1990: 137-139; Rouhani, 1994: 273-279; Al-ʿAynī, n. d.: 125). Thus, this group of jurists attempts to consider the result of the donation (*hibah*) as the "release" from debt and see no difference between them. This is because practically both legal entities lead to the collapse of debt. Therefore, there will be no difference between these two legal acts. In addition, as we know, release is irreversible (Al-Soghdi, 1998: 518). In contrast with the donation of debt, the donation of corporeal property is reversible. This indicates the difference between release and donation clearly. One is irreversible and binding, and the other's fate is in the hands of the donor. However, according to Article 806 of the civil Code, "whenever the creditor forgives the debt of the debtor, he has no right to ask for it again". Hence, in this regard as well, there will be no difference between the release and donation. Now, it is an important question to ask, what is the difference between the donation of debt and the release of debt that the legal system requires both? Due to this doubt, in the Imami School and also the Hanafi school, some jurists consider the result of the donation of debt the same as the release of debt (Al-Najafi, 1949: 161-164; Khomeini, 1989: 56-57; Safi, 2000: 173 – 174). In the positive law, some professors also believe that "in our opinion, acquisition from the creditor to the debtor which is given the title of donation of debt to debtor, which we see in Article 806 of the civil code, is nothing but fantasy. In the subsequent amendments to the Civil Code, Article 806 should be completely removed, and this historic difference should be left out" (Jafari Langroudi, 2009: 4).

Second reason: It's an axiom in Imami and Hanafi schools that the bill is the vital element to conclude a donation so that without a bill, the donation cannot be concluded (al-Samarqandī, 1994: 161; al-Qudūrī, 1998: 124; Helli, 2008: 410; Helli, n. d.: 416-417); as stated in Article 798 of the Civil Code "a donation does not take place except with the acceptance of the receiver and with his taking possession of it, whether the receiver himself takes over the donation or his representative does and receiving without the permission of the donor has no effect." Thus, due to the need for a gift to be received and considering that this is one of the constituent elements of the contract, it is necessary to understand how the gift can be received. With regards to the donation of debt, if we consider receiving as material possession, due to the credibility of the debt, naturally receiving it will not be possible.

3.1.2 The Correctness of the Donation of Debt

Against the first group in which some of Imami and Hanafi jurists consider the donation of debt as release, other jurists prefer to consider the donation of debt true, and place it in its well-known domain, called donation. Some of the Hanafi jurists (Ibn ʿĀbidīn, 1995: 177; Group of authors, n. d.:163; al-Kasānī, 1989: 119), as well as some Shia jurists (such as Sheikh Tusi, Ibn Zohreh, Ibn Idris, quoting: 1969: 410-413; Yazdi, 2003: 242-243; Khazem, 1994: 70; Khomeini, 1989: 56-57; Mohammad Amin Zainuddin, 1993: 226-227; al-Najafi, 1949: 161-164) adhere to this opinion.

To justify[3] this opinion, first we must prove the originality of the "donation of debt" against the "release of debt". Due to this, in this perspective, there is emphasis on the fact that, with the donation of debt, the ownership of debt is transferred to the donee, and after the donation happened, he becomes the creditor (Al-Mahdī, n. d.: 434-435). On the other hand, he is also the debtor at the same time; the result of the concurrence of two titles (creditor and debtor) in one person is the passing of the ownership, and since a man does not become the owner of the debt which is his obligation, the extinguishing of debt occurs. However, this coercive result should not cause ignorance of the voluntary effect of the donation of debt. The direct and voluntary effect of donation (gift) is the possession of debt, but as a result of this action, the extinguishing of debt also occurs secondarily and coercively, while the direct effect of release is the extinguishing of debt. Thus, although both of them lead to the same result, the direct and initial effect of each one is different (Khomeini, 1989: 56-57; Muḥyi al-Dīn al-Nawawī, n. d.: 436-437; Safi, 2000: 173-174; Muhammad Amīn Zayn al-Dīn, 1993: 226-227; al-Sarakhsi, 1996: 166-167; in Iran's law, Katouzian, 2001: 65).

In addition, there is a theoretical and practical difference between the release of debt and donation. For example, the release is a unilateral contract, and donation is a contract. Consequently, for the former to happen, a unilateral will of the creditor is sufficient, but for the latter to happen, in addition to the creditor's will, debtor's satisfaction is also necessary. In the Imami School, in justifying this difference (that with the donation of debt, the debtor becomes the owner) it becomes necessary for the debtor to be satisfied with possession of debt for the ownership to happen (Jaafari Langroudi, 2009: 11). This is because, in possession, a property enters the assets of the debtor, so his property is also seized. Meanwhile, in release, the creditor only seizes his own property: he waives his debt without transferring the debt ownership. Therefore, the debtor's assets are not seized; hence, there is no need for his satisfaction[4] (Safi, 2000: 173-174; Helli, 2008: 410-413).

In the hypothesis of how many people have joint liability for paying a debt, if the creditor releases one of the officials, the released official will not have the right to return to others. However, if the creditor transfers his right to one of the debtors, the debtor, due to the occurrence of the passing of ownership, is rid of his debt, but, because of receiving the debt from the creditor, he becomes his deputy and can refer to other authorities (Article 321 of the Civil Code, Dr. Katouzian, 1991: 353).

Some Hanafi Jurists, who consider a donation of debt to be correct, have the opinion that the donation has two types: possession and waiving. The donation of debt would be of waiving donation (Ibn Nujaym, 1726: 284). In addition, in the context of the contract of guarantee, if the one who is guaranteed to, is to donate (gift) the debt to the guarantor, from now on, he is the owner of the debt. On the other hand, due to being a debtor, passing of ownership will occur. This should be considered as payment (Article 712 of the Civil Code). Therefore, the guarantor can be referred to as the guaranteed (Article 719 of the Civil Code; and to see the opposite opinion see Jafari Langroudi, 2007: 313). But, when the release of the guarantor occurs, the debt will be void without a right transferred to the guarantor. Therefore, the guarantor will not have the right to be referred to as the main debtor; as stated in Article 718 of the Civil Code, "whenever the guaranteed releases the guarantor from debt, both the guarantor and principal debtor are forgiven" (See also: Article 719 of the Civil Code; for the analysis of these materials, see: Dr. Katouzian, 2003: 353).[5]

Also, the impossibility of referring in the donation of debt is analytic with respect to the features of the donation: after giving possession to the debtor, passing of the ownership happens and the debt is extinguished, so, as if the subject of donation had been wasted. As a result, due to the loss of the subject of donation, it will be irretrievable, as also the donation is irretrievable by losing the subject of donation in the donation of the corporeal property (Article 803 of the Civil Code). Hanafi and Imami jurists have the same point of view on this issue (Group of Authors, n. d.:167; al- Soghdi, 1998: 518; al- Sarakhsī, 1986: 83-86; Ibn ʿĀbidīn, 1992: 687; al-Najafi, 1949: 161–164).

Now, assuming that the originality of the donation of debt has been proved, we need to see how the problem of receiving can be solved: receiving should not be considered only in its literal meaning of "catch". For example, in a contract of sale, the object of sale is given through material possession of it by the customer, but the situation is such that the customer cannot do any kind of possession; in the case of donation of debt, it would be natural that the receiving has not been realized. As stated in Article 367 of the Civil Code "delivery consists of the object sold being placed at the disposal of the buyer so that he has absolute control of it and can benefit from it in any way he likes and the receiving is the customer’s subscription to the object of sale." It is clear that a seizure is not important, but the customer's access to a variety of possessions is, so that the object of sale is dominant (Khomeini, 2001: 550; Sabiq al-Sheikh Seyyed, 1972: 68). So, "the possibility of possession and subscription" is more important than a material seizure (Al-Maydānī, n. d.: 171; Jafar Kashf al-Ghatha, 1813: 377; Ansari, 1865: 247; Baḥr al-ʿUlūm, 1983: 126; Khansarī, 1937: 352; Al-Kasānī, 1989: 120; Hosseini Marāghī, 1999: 262).

This approach can be confirmed in accordance with Article 369 of the Civil Code. According to this article, "the delivery takes place when the object sold is placed at the disposal of the buyer even if the latter has not actually taken physical possession of it." In this way, practical possession is not necessary, but the disposal of the object sold is the important criterion. On this basis, it can be concluded that the concept of delivery "has more of a spiritual and customary aspect, and the intention is that the object sold is so well placed at the disposal of the customer that the society perceives him in control of the property" (Katouzian, 1999: 166; for confirmation of the conventional meaning of receiving in jurisprudence: Sabiq al-Sheikh Seyyed, 1972: 68; al- Kasānī, 1989: 148; Hosseini Marāghī, 1999: 261). The tool of this control is sometimes a material receiving and sometimes a spiritual receiving. Naturally, there is no constant criterion of how to operate delivery, but the nature of the property can be an important criterion in this regard. As stated in Article 369 of the Civil Code, "delivery is operative in various ways according to the varying nature of the object sold. It must be done in a way that is accepted as valid according to common usage (Khomeini, 2001: 551).

In the case of donation of debt, the same rule applies. Due to the credibility of debt and the impossibility of receiving it materially, naturally, our criterion in receiving should be the moral control of the debt receiver, so that he can be considered in control conventionally. For instance, Hanafi jurists have considered giving the house key as an example of receiving the house. The same opinion could be seen in Imami jurisprudence (Khomeini, 2001: 551). This meaning of receiving is also true in the donation of debt; if the donee, after the donation of debt, gets control of the donation subject. This does not extinguish the debt and the creditor’s ability to reclaim it. It seems that according to this meaning, “receiving” credit assets can also be realized, when half the action of receiving occurs through the leaving of the subject to be received by the one who gave it (Sabiq Al-Sheikh Seyyed, 1972: 68) in a way that he abandons the property of the donation subject and gives it to the donee. This meaning applies to the donation of debt due to the impossibility of demand for debt by the creditor.

Additionally, one can take a step further than this and say that there is no need to receive in a donation of debt to debtor, as the donation subject, namely the debt, becomes the debtor’s responsibility. This view is also evident in the works of Hanafi jurists (Group of authors, (n. d.): 163; al-Zaylaʿī, 1896: 91) and Imami jurists (Yazdi, 2003: 242-243; al-Najafi, 1949: 161-164). Therefore, there is no need for a reception.

3.2 Legal Review of the Subject

According to Article 795 of the Civil Code, "a gift (donation) is a contract by virtue of which a person gives another person free proprietary rights in a thing. The person who gives is called “*wahib”* (the donor); the other party is called “*muttahab*” (the donee), and the thing which is the subject of the gift is called *“`ayn mawhubah”*. Regarding the use of the term "property", it has been said that any property, whether it’s the debt or corporeal property, may be the subject of the contract of the donation (Dr. Katouzian, 2001, 66). In jurisprudence, however, it is well-known that donation is specifically the giving of the possession of debts. But some jurists do not see a problem with the view that all rights can be donatable (Mohammad Amīn Zayn al-Dīn, 1993: 226-222; al-Imam Ahmad al-Martaza, n. d.: 34-35).[6]

On the other hand, according to Article 806 of the Civil Code, "if a creditor agrees to surrender his claim to the debtor, he has no right of revocation". The inclusion of this article in the chapter of donation and use of the term "surrender" can be considered to be the confirmation of the opinion that, according to the Civil Code, debt can also be the contract subject of a donation. It is difficult to interpret the word donation (gift) as release because in Civil Code there is a chapter called "release". Due to this chapter, the re-layout of release in the chapter of donation is meaningless and incompatible with the principles of interpretation. Particularly, we have seen that there is a difference between release and donation of debt that justifies the maintenance of both in the legal system. As for the problem of receiving, it should be recalled that if we consider receiving as the meaning of credit, the donation will also be receivable. In particular, it can even be said that the debt is in debtor’s possession in any case. Due to this, we can use the criterion of Article 800. According to this article, "if the thing given is in the hands of the donee there is no need for him to take it over”.

4. Donation of Debt to a Third Party

In the previous discussion, the possibility of donation of debt to the debtor himself was mentioned. There is a difference of opinion on the validity of this contract. Some believe it is void, and others believe it to be correct. According to the latter group, the effect of donation of debt to a third-party is that the third party is a donee and is the owner of the debt, and from now on, he can refer to the debtor as the creditor's deputy. In this context, two points of view will be presented.

4.1 The Jurisprudential Review of the Subject:

4.1.1 Inaccuracy of Donation of Debt to a Third Party

This opinion is seen among the Shafi'i jurists (al-Shirwānī and al-Ibādī, 1707: 305-306; al-Shirbīnī, 1997: 400; Muḥyi al-Dīn al-Nawawī, n. d.: 436-437); Hanafi (Ibn ʿĀbidīn, 1995: 177); Hanbali (al-Bahūtī, 1998: 367-370); Ibn Qudāmah, n. d.: 257); Zaydi (al-Mahdi, n. d.: 434-435); and Shia Jurisprudents (Yazdi, 2003: 242-243; Ibn Tey al-Faghani, 1998: 176; Helli, 2008: 410-411; Shahid I, 1994: 286; Golpaygani, 1994: 132–134). Some Shia jurists also see a drawback in it (Safi, 2000: 173–174). They exceptionally consider a donation of debt to debtor to be correct (Khazem, 1994: 70).

Their main reason is that receiving the subject is necessary for the realization of the donation. This is because debt is a creditable matter and receiving it by a third party is literally impossible (except for the donee) (Helli, 1۹۹8: 406; Shaheed Sani, 1994, 318-319; Yazdi, 2003: 242-243; Korki, 1990: 146; al-Shirbīnī, 1997: 400; al-Sheikh al-Tasi, 1991: 572-573; Helli, 1995: 276-277; Helli, 2008: 412).

4.1.2 Accuracy of Donation of Debt to a Third Party

Against the point of view mentioned in the preceding paragraphs, another group of jurists consider donating the debt to a person other than the debtor to be correct. This opinion is seen especially among the majority of Hanafi jurists (Ibn-al-Ṣiḥna, 1974: 119; al-Kasānī, 1989:119; al-Ḥaṣkafī, 2002: 567; Ibn Nujaym, 1726: 284; Ibn ʿĀbidīn, 1992: 687); Hanbali jurists (Abu al-Barakat al-Nasafī, 1885: 98-102); some of the Shafi'i jurists (al-Anṣārī, 1998: 446-447; al-Dimyāṭī Bakrī, 1998: 174); as well as some Shia jurists (Ibn Idris, 1990: 176, Yazdi, 2003: 242-243; Khomeini, 1989: 56-57).

To justify this opinion, Imami jurists cited a consensus as well as general reports (*akhbar*) and narrations (Tusi, 1991: 572-573). Additionally, since selling and debt exchange are correct, donating it should also be considered correct (Sheikh Tusi, 1991: 572–573; Helli, 2008: 410-411). But others object that in selling, receiving does not play a role in transferring ownership; while in donation, receiving is involved in the transfer of ownership (Ibn Qudāmah, 1990: 137-139).

Apart from this reason, others, in justifying the credibility of the donation of debt to a third-party, say that receiving debt in the donation of it can be realized by someone other than the debtor. However, due to the impossibility of a material receiving of debt until it is the debtor’s responsibility, they have changed the subject of the receiving from the debt itself to the reference of the debt (Rouhani, 1998: 229). In their opinion, the debt itself does not need to be received, but it is enough for the donee to receive it when the debt is collected, and the reference is identified in the outside world. This way of argumentation is especially apparent in writings of Shia jurists (Khoi, 1990: 204; Mohammad Amīn Zayn al-Dīn, 1993: 226-222; Khomeini, 1989: 56-57). In justifying this opinion, it is said that the collected debt is the same debt which has been the debtor’s obligation (Rouhani, 1994: 273-279). But others have objected to this reason because if the debt is collected and after that it is received, the debt itself is not received, rather its reference is received. Debt reference is also something other than the debt itself, while in donation it is necessary to give the donation subject itself to the receiver (Helli, 2008: 410-411; Rouhani, 1994: 273-279).

In Hanafi jurisprudence, it has also been said that the donation of debt to someone other than the debtor is allowed on the condition that the creditor gives a proxy for receiving the debt. In this way, the donee has become the lawyer of the creditor by the creditor’s permission and will receive the debt (Ibn Nujaym, 1726: 284; al-Soghdi, 1998: 518.), and also, from this moment, will be the owner of the debt (al-Hanafi al-Qadirī, 1998: 483). Among the Shia jurisprudents, the same argument can be seen (Yazdi, 2003: 242-243), but the truth is that ownership is created for the donee at the stage of debt collection; that is when the debt has become corporeal property. Thus, this assumption is regarding the donation of corporeal property rather than the donation of debt.

It seems that all efforts of the Shia jurists (regarding the adequacy of the receiving of debt being the reference rather than the debt itself) and the Hanafi jurists (the need to obtain permission through referring to the debtor to receive the debt) indicate that they also try to consider a donation of debt to a third party as correct, but they face difficulties in choosing the route. It would have been better for them to consider the action of "receiving" instead of the subject of receiving and trying to interpret it, to infer the correctness of the donation of debt.

4.2 Legal Review of the Subject

In the Iranian legal system, there is no indication of a prohibition of the donation of debt to a third party. Even from Article 38 on the law of insolvency, adopted in 1934, it is possible to infer the validity of third-party transferring in general. The use of the term "property" in Article 795 of the Civil Code, and the criterion of Article 806 of the Civil Code, which is based on the possibility of donation of debt to the debtor, can verify this kind of donation, particularly if that donation contract is based on negligence. Moreover, the realization of the donation of debt to someone other than the debtor should not make anything precarious for the donee and donor (Ibn Qudāmah, n. d.: 257). Apart from this, as noted earlier, receiving means the possibility of control and domination (Imam Khomeini, 2001: 551). The possibility of referring to the debtor as the donee, after the donation of debt, and being the owner of debt (Shahid I, 1994: 286), mean to control, and in other words, to receive. (Rouhani, 1994: 273-279). Indeed, as the creditor has control over the debtor’s obligation, and he replaces a third-party with himself: doesn’t this suffice for the receiving to be realized? (Hosseini Marāghī, 1999: 265-266). Surely it does. Therefore, it seems more reasonable to accept the accuracy of the donation of debt to a third-party.

5. Conclusion

The findings of this study demonstrate that:

1. Debt is the financial right of a creditor; each right-holder can perform any act of possession he wishes to his right (Article 30 of the Civil Code). The question is whether the creditor can use the contract form of a donation to forgive his or her right? To answer this question, one should distinguish between two modes: sometimes a creditor will donate his debt to the debtor himself and sometimes to a third-party (except for debtor).
2. In the case of donation of debt to the debtor himself, it is worth saying that release is the most natural way that the creditor can forgive his right to the debtor. However, the question is whether the willingness of creditors to do so in this way, means that you cannot use other legal instruments to forgive your debt? For example, can’t the creditor use the donation contract and forgive his debts in this way? In response to this

question, there is no single approach, neither in the Imami school nor in the Hanafi school. Considering that the donation contract involves corporeal property and there is a necessity to receive the property which is the subject of donation, some believe that we cannot use the donation format for this purpose because the creditability of receiving debt is impossible. But the truth is that the purpose of the receiving process is the possibility of possession and domination. In this sense, debt will also be receivable because after the donation of debt to the debtor the passing of ownership happened, and after that, the debt is extinguished. Also, as the creditor loses the possibility of claiming the debt, and the fate of the debt is in the hands of the debtor, control of the subject of donation has passed to the debtor and the act of receiving has been fulfilled.

3. In the case of the donation of debt to a third-party, well-known jurists of the Islamic schools of thought, except for the Hanafi school, believe that such a donation is not right. In justifying this opinion, the problem of receiving is also represented: in donation, receiving the subject is required, while receiving something that is under another person’s obligation, i.e. debt, is logically impossible for a third party (donee) because of its creditability. Contrary to this view, the well-known Hanafi jurists and a group of Imami Jurists believe the donation of debt to a third-party to be allowed. But in justifying the manner of receiving the debt, Hanafi jurists believe that delegation of the power of receiving to a third-party is the only possible way. On the contrary, Imami jurists believe that, given the impossibility of a material receiving, the subject of receiving is not the debt itself, it is the reference of debt. But the truth is that the reference of debt is something other than the debt itself, while a donation must give the subject of the donation itself for receiving to occur. So, it seems that it is better to consider the meaning of the receiving instead of its subject: receive means the possibility of possession and control. The effect of giving debt to a third-party is that the third-party is a donee and debt owner, and from now on, he can refer to the debtor as the creditor's deputy. The possibility of referring to the debtor means control of the donee over the property (the subject of donation) and, in other words, the fulfillment of the action of receiving. According to this interpretation, it seems that the donation of debt to a third party is also correct.

References

al-Anṣārī, Zakariyā. 1998. Fatḥ al-Wahhāb. Dār al-Kutub al-ʿIlmiyyah.

al-ʿAynī, Badr al-Dīn. (n.d.) ʿUmdah al-Qārī. Dār Iḥyāʾ al-Turāth al-ʿArabī.

al-Bahūtī. 1998. Kasshāf al-Qināʿ. Dār al-Kitāb al-ʿIlmī.

al-Dimyāṭī Bakrī. 1998. Ḥāshiyah Iʿānaḥ al-Ṭālibīn. Dār al-Fikr.

al- Faqaʿani, Ibn Tay. (n.d.). al-Durr al-Manozud. Imam al-Asr School.

al-Ḥaṭṭāb. 1996. Mawāhib al-Jalīl fī Sharḥ Mukhtaṣar Khalīl. Dār al-Kitāb al-ʿIlmī.

al-Ḥanafī al- Qādirī. 1998. Takmilah al-Baḥr al-Rāʾiq. al-Maktabah al-ʿIlmiyyah.

al-Ḥaṣkafī. 2002. al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār. Maktab al-Dirāsāt Wa al-Buḥūth, Lebanon.

al-Kasānī. 1989. Badāiʿ al-Ṣanāiʿ Fī Tartīb al-Sharāiʿ Granule Library.

al- Khansārī. 1987. Munyah al-Ṭālib Fī Sharḥ al-Makāsib. Islamic Society of Publishing.

al-Mahdī, Aḥmad bin Yaḥyā al- Murtaza. (n.d.). Sharḥ al-Azhār. Library of Ghamzan.

al-Maydānī. (n.d.). al-Bāb fī Sharḥ al-Kitāb. al-Maktabah al-ʿIlmiyyah.

al-Najafi. 1949. Jawāhir al-Kalimāt Fī Sharḥ Taʿālim al-Islām. Dār Iḥyāʾ al-Turāth al-ʿArabī.

al-Quddūrī. 1998. Mukhtasar al-Quddūrī. al-Maktabah al-ʿIlmiyyah.

al-Samarqandī, 1994. Toḥfah al-Fuqahāʾ. Dār al-Kutub al-ʿIlmiyyah.

al-Sarakhsī. 1986. al-Mabsūṭ. Dār al-Maʿrifah Li al-Tibāʿah Wa al-Nashr Wa al-Tawzīʿ.

al-Sharwānī. 1707. Hawashi al-Sharwānī. Dār Iḥyāʾ al-Turāth al-ʿArabī.

al-Shirbīnī. 1997. Mughnī al-Muḥtāj Llā Maʿrifah Maʿānī Alfāẓ al-Minhāj. Dār Iḥyāʾ al-Turāth al-ʿArabī.

al-Soghdi, Hossain. 1998. al-Notaf-o-fi- al-Fatava. Dar al-Forghan.

al-Suyūṭī. 1997. Jawāhir al-ʿUqūd Wa Muʿīn al-Qudāh Wa-al-Muwaqqiʿīn Wa al-Shuhūd. Dār al-Kutub al-ʿIlmiyyah.

Ameli, Zayn al-Din bin Ali ibn Ahmad (Shahid Sani). (n.d.). Describing al-Lama'a. Najaf Community.

Ansari, Morteza. 1865. Book of Al-Mekasb, v. 6, Bagheri.

Baḥr al-ʿUlūm. 1983. Bulghah al-Faqīh. Sadiq Library Publications.

Sabiq Sheikh Sayed. 1972. Fiqh al-Sunnah. Dār al-Kitāb al-ʿArabī.

Golpaygani. 1994. Hidāyah al-ʿIbād. House of the Holy Quran.

Helli, Fakhr Al-Mohagheghin. (2008). ʿIzah al-Fawāʾid Fī Sharḥ Mushkilāt al-Qawāʿid. Qom: Ismaili Institute.

Helli, Fakhr Al-Mohagheghin. 1998. Rules of Judgments, v2, Islamic Publishing Institution.

Helli, Fakhr Al-Mohagheghin, M. Ibn H. (n.d.). Tazerat Al-Foghaha, v.2, publications of the apostate library for the revival of the Jaafari monuments.

Helli, Fakhr Al-Mohagheghin, M. Ibn H. 1995. Various Shiites, v 6, Islamic publishing institution.

Hosseini Maraghi. 1999. Jurisprudence Headings, C2, Islamic Publishing Institution

Ibn Edris, M. 1990. Al-Sara'er al-Hawi li Tahrir al-Fatawi v.3, Islamic Publishing Institution.

Ibn-aš-Šiḥna, Muhammad ibn Muhammad. 1974. Lesan al-ahkam. Cario, Al-babi Al-halabi.

Ibn Âbidîn, M. A. 1995. Reddü'l-muhtâr ale'd-Dürri'l-muhtâr, v. 3, Dâru'l-fikr, Beirut.

Ibn Âbidîn, M. A. 1992. Reddü'l-muhtâr ale'd-Dürri'l-muhtâr, v. 5, Dâru'l-fikr, Beyrut.

Ibn Âbidîn, M. A. 1992. Reddü'l-muhtâr ale'd-Dürri'l-muhtâr., v. 6, Dar Al-Fikr for printing, publishing and distribution.

Ibn Najim, Zain o din ibn Ibrahim.1726. Al- Bahr-o-Al-Raegh. Islamic library.

Ibn Qudameh, Abdullah. (n.d.). Vocalist, J6, Arabic Book.

Jafari Langroudi, Dr Mohammad Jafar. 2006. Terminology of Law, Ganj Danesh, v 16.

Jafari Langroudi, Dr. Mohammad Jafar. 2009. Encyclopedia of Civil and Commercial Law, Ganj Danesh, p 1.

Jafari Langroudi, Dr. Mohammad Jafar. 2007. guarantee of contract, Ganj Danesh.

Kashf al-Ghatha, Jafar. 1813. Cover detector. Cover detection, v2, the spread of Mahdavi.

Katouzian, Dr. Naser. 1991. Unilateral obligation, Yalda.

Katouzian, Dr. Naser. 1999. Specific contracts, I., Behneshr, v 7.

Katouzian, Dr. Naser. 2001. Specific contracts, C 3, Ganj Danesh.

Katouzian, Dr. Naser. 2002. General Theory of Obligations, Volume, v 6.

Katouzian, Dr. Nasser. 2003. Specific contracts, Volume 4, Issue, p. 4.

Katouzian, Dr. Nasser. 2006. General rules of contracts, Bahman, 7 th.

Khansari. 1937. of the Student (Research Report of the Nayani), v3, Islamic Publishing Institute.

Khazem, Ali. 1994. Introduction to the Jurisprudence of the Shi'a Muslims, Dar al-Hadi for Printing, Publishing and Distribution, 1.

Khoei. 1990. Approach of Righteous, v2, City of Science.

Khomeini, Ruhollah. 1989. Edited by Al-Wasilah, J2, Scientific Book House.

Khomeini, Ruhollah. 2001. Al- Baea Book, v 5, The Institute for the Setting up of Imam Khomeini Works,

Khomeini, Ruhollah. 1999. Edited by Al-Wasilah, p 1, Qom, Al-Nasr al-Islami Institute.

Korki, Ali ibn Hassin (second investigator). 1990. Comprehensive Goals in explaining the rules of Hassan ibn Yusuf Allame Halli, v.9, Al-Bayt Institution for Heritage Revival, 1.

Ma'lami, Zine al-Din Ibn Ali ibn Ahmad (Shahid Sani). 1994. Al-Afha routes, v5, Islamic Knowledge Foundation.

Mohaghegh Damad, M. 1987. Jurisprudential rules, v.4. Tehran: Publication center of Islamic sciences.

Musavi Bojnourdi, Seyyed Mohammad Hassan, Rules of Jurisprudence, v.1 and 7, Hadi, p. 1, 1999.

Nauzi, Mohebi ibn Din. (n.d.). Kindergarten students, v.4, scientific book house,

Qomi, Abolqasem.1819. Jame al-shattat Tehran: Keyhan.

Rouhani, Mohamed Sadiq. 1994. Jurisprudenceof the Sadiq (p), v.20, Book House Institute.

Rouhani, Muhammad. 1998. Obvious of the Righteous, v.2, The Library of the Millennium.

Safi, Lutfullah. 2000. Hidayat Al-Abbad, v2, Al - Masoumah Institute.

Shahid I, Shamseddin Mohammad ibn Maki. 1994.Lessons, V2, Islamic Society of Publishing, P.1.

Shahidi, Dr. Mehdi. 1967. Collapse of obligations, p 8.

Tosi, Abu Jaafar Mohammed bin Hassan, (Shaikh Taifah). 1933. Mbsout in the jurisprudence of the Imam, v. 6, Haidari.

Tusi, Abu Jaafar Muhammad bin Hassan, (Shaikh Taifah). 1991. Al-Khalaf, v.3, Islamic Book of Propagation, 1.

Yazdi. 2003. Tight Assignment, v.6, Islamic Publishing Institution, 1.

Zine El-Din, Mohamed Amin. 1993. The Word of Taqwa, v.4, Mehr.

Endnotes

[1] *"Debt is a commitment that is in the obligation of someone to someone benefit in terms of its assignment to a creditor is called debt, and as a relation with the debtor, it is called debt." Jafari Langroudi, 2006: 316.*

[2] *In addition to these two reasons, there are also some Qur'anic verses that refer to amnesty. It is also believed that for the realization of amnesty only the forgiver will be sufficient and there is no need to accept the opposite.*

[3] *In addition, it is said that the debt of the two sides is related. By giving possession of debt from the creditor to debtor, these two sides are summarized in one, while logically this is not accepted.*

[4] *One of the most important reasons of Imami jurists for justifying their beliefs is to prevent probability of gratify. They believe that accepting the nature of the release for donation of debt will cause that for acquittance of debtor. Hence, there will be no need for him to accept. However, this lack of need for debtor's satisfaction, will cause burden of gratify for debtor (Ibn al-Alaham, 1969: 410; Korki, 1990: 137-139). Due to this reason, this group of jurists prefer to keep the donation of debt in the form of a donation; thereby, acceptance of the donee is necessary for its fulfillment (Ibn Adras Heli, 1990: 176; Yazdi, 2003: 242-243; Khomeini, 1989: 56-57; Helli, 1998: 416-417; Mohammad Amin Zainuddin, 1993: 226 - 227). However, it seems that prevention of gratify is not a good reason for considering the donation as donation because the same concern also exists in release. It is true that the creditor seizes his own right, but this seizure is necessary, considering that it has involvement with a legal relationship that one of them is debtor (for opposition, Shahidi, 2007: 139). So why don't we need his satisfaction in release in order to prevent gratify? It is due to this reason that some jurists consider acceptance of the debtor necessary in release (Shahid I, 1994: 286); while some other jurists give him the right to reject (al-Sarakhsi, 1986: 83-86). Of course, some other jurists, do not consider this burden of gratify so*

heavy to be conventionally unbearable (Rouhani, 1994: 273-279)

[5] *The fact is that the difference between giving possession and waiving might be logical in law, but in the perspective of ordinary people, it is not clear. If one can obligate to others by giving new right possession, why this cannot be done by removing other's debt?*

[6] *In addition, it has been said that "in donation of debt to debtor, according to the general rule of contract, contracted debt should be clear and definite, which is not necessary about release and whenever the quality or quantifier of debt is unknown or doubtful, obligation of release of debtor will be correct (Shahidi, 1967: 133); others also believe the same (Dr. Langroudi, 2009: 11). But the truth is that the donation contract is based on negligence, leniency, and beneficence. In this type of contract, as our masters have said, (Katouzian, 2006: 185), a glimpse of science is enough (Article 216 of the Civil Code). Therefore, from science and ignorance point of view, there is not much difference between release and donation.*

[7] *However, a word which is mentioned cannot suffice because exactly at the end of the same article, the donated property is referred to as the gifted.*