

Comparative Study of the Nature of Debt in Roman-German Law and Imamiyeh Jurisprudence

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ABSTRACT – Determining the nature of the obligation is one of the bases of obligation law in any legal system that shows its approach about the possibility of transferring pecuniary obligations. In German law and Roman law, there are two different theories in this context. The subjective theory that is a souvenir of Roman law that concerns the obligation as a matter that is inseparable from the debtor. Contrary, the Objective theory concerns the obligation as an independent existence. The second theory is preferred because of its capability in making treats on obligations more convenience and, its efficiency in a modern economy. In Islamic law- in this matter- no comprehensive study is done. But, a precise study of juridical acts that could be done about debt in Islamic law can show us that its point of view about debt is like the point of view of German law.

KEYWORDS: *Obligation, debt, objective theory, subjective theory, Imamiyeh jurisprudence*

Introduction

When we speak about General Theory of Obligations, we do not mean everything that is called Obligation in the language of law. Only those Obligations that are transferable and have determinable material value could be investigated. In other words, an obligation should be admissible for any person other than obligator too. In General Theory of Obligations, there is no place for obligations that are defined only for two single specific persons. Therefore every obligation concerning family right and obligations and also those obligations which does not have monetary value are not discussed in General Theory of Obligations, although in many cases these obligations have same rules with monetary obligations (Katoozian, 1385, 12) when we use the word Obligation, we mean actions or paying some money in a way that it has a general financial utility. The most obvious effect of and obligation or commitment is an obligation to pay cash that from obligator is called debt and from obligee is called demand.

One of the problems that are proposed as a base in Obligations law is the nature of debt and obligation. In any legal system, the orientation of obligation law towards the nature of an obligation, affects many of current problems in obligations and trading law. There are two different orientations In Roman and German law about the base of an obligation. First one is subjective theory (Roman) which considers debt and obligation to be a personal matter and relates it to debtor's character; the other orientation is objective theory that considers obligation to be independent of debtor's character and considers it as a financial matter. Choosing each one of these schools has its minor and major results; for example, if the base of the obligation is considered to be financial, having debts alone, could not result in imprisonment of debtor or as it was common In the past, result in his slavery, but after accepting such matter to be personal, it is not unexpected happen. Accepting objective view could provide an appropriate basis for justification of accepting making unilateral obligations – like rewards and promises of prize payment -. On the other hand, objective theory, by separating the obligation from obligator and obligee's character, transferring the debts and demanding a property from another property – as it happens in business documents - results in a quicker and easier way to make the transactions. If we consider the obligation to be personal, it would be difficult to unilaterally make an obligation and then transfer it, because if the obligation is connected to the obligator and obligee's character, it needs both sides to be present when they create the obligation, and when the obligation is needed to be transferred, both sides must be present for substitution of a different obligation, which has different form and effects from a simple demand transfer or a transfer according to business documents.

Due to the lack of an integrated theory in Islamic jurisprudence about admission or rejection one of these bases, we will try to extract Imamiyeh jurisprudence by using induction in the verses, traditions and jurists' theories.

First subject: Proposed theories about the nature of obligation in Roman-German law:

Since the last century, there were theoretical discussions about the nature of debt between European lawmen, and these discussions were the result of revealing two different views about the issue of obligation. These two views were objective view and subjective view. Subjective view, which is a souvenir from Roman law, and France law is its most important heir, is called French Theory, and the other view that is made from German law is called German Theory. First we describe these two views in European law, and then we match them with proposed problems in Islamic jurisprudence.

First discourse: subjective view

This theory sees obligation as a personal relation between obligator and obligee. In Roman law, an obligation was not separable from the character of its two sides, and it could not be transferred to someone else. Romans believed that obligations are personal; to the extent that they did not accept to have attorneys in trades (Katoozian, 1383 / 2, 53). The personal right was connected to the debtor and made domination on his physical integrity and freedom for the creditor. This domination was a separator between personal and real right, the first was interpreted as a domination of the character, and the second was interpreted as domination on his property (El Sanhuri, 1952 / 1, 106). As a result, creditor achieved a right over body and soul of debtor and in case of failure to pay the debts, the creditor could kill the debtor or sell him as a slave (Al Khafif , 1964 , 20 , Mazo , Told by Katoozian , 1385 , 58). Although the severity of domination of creditor over the debtor reduced and was restricted to imprison the debtor. However, centuries passed until the creditor's right – instead of domination over the debtor's character - converted to domination over his property (Al Khafif , Same, 20). The belief to subjective view continued in France law, and its stylized effects have made a shadow over the obligation law of France until now. In French law, obligation is a legal relation between two persons and by this relation, one of them gets the right to have demands for certain actions from another one .In another definition, the word domination was added: An obligation is a domination which is given to the lender against the debtor and gives the lender a right to force the debtor in doing an action which is beneficial for him (Planiol & Ripert, 1937/ 1,725). By these definitions, in French view, obligation is not considered to be a merely financial matter and this connectivity of the debt to debtor's character prevents the admission of some affairs and provides some difficulties in transferring the obligations. For an example, since obligation is a personal matter, to transfer it, novation should take place and in this process, the main debt is eliminated, and another debt replaces it. In this case, every single guarantee of main debt is eliminated, and perhaps it is not possible to restore every one of them. While by accepting objective theory such problem does not exist. This view has made some fans in German lawyers. Savini has insisted on the subjectivity of debt relation that he believes debts and slavery are from one kind. According to him sometimes a domination that is made from a person on another is total and thorough, and this domination leads to ownership; that is nothing but slavery. And sometimes this domination is minor and contains only performing of a certain deed or action; we call this relation obligation. Ownership and obligation are the same in nature and only differ in their degree. In both of them, domination and necessity of complying exists (Told by El Sanhuri, 1952 / 1, 107).

Second discourse: objective Theory (Thematic). Another theory in European laws about the nature of debt is a thematic theory of debt. Gierke says an understanding of the Germanic law on the obligation, is not based on a personal relation between the sides of an obligation and in this matter it is different from Roman law. In German understanding, the main focus is on the (subject) obligation, and it is this obligation subject that forms the essential element. In this idea, the obligation is separated from creditor and debtor's character and becomes an independent existence, so that the obligation forms a material object and its monetary value has the most importance. For creditor, it is not important who is paying the debt or where his expected benefit was gained from (Huebner, 1918, 463-489). The main purpose of obligee is to gain his rights and use his profits and services (Katoozian, 1385, 59). As you can see, in the second theory, obligation is the amount of money which should be paid or the deed or actions that should be done, therefore obligation from the sides has an independent existence and could be existed separated from them and be transferred.

Although in German law there are two other theories that support objective view of obligation.

Analysis Of debt's elements:

There is a theory in German law which divides obligation to debt and responsibility elements. Debt means the engagement of obligation to the debt and responsibility means its enforced demand. Debt is related to the person himself, but responsibility is about his properties; in other words, getting the demand should take place from his positive property and not from the person himself. The person is not responsible, and the lender has no domination on him (Abdul Monem Faraj Sadeh, 1974, 14 Katoozian , Same , 65). The debtor is responsible to pay the debt and if he did not, the demand could only be taken from his properties, and he could not be punished.

Property theory

The French theory about the property which also has largely influenced Iranian legal system too (Safaei , 1388 , 17) sees the property from a subjective view; meaning that it connects the property to the person himself. In this view, there is a property for every person and every property belongs to a specific person, and no one has more than one property (Aubry & Rau, 1953/9, 308). From this view, property is a container that is born along with the person himself and every single financial right and obligations of a person, despite their creating time, are placed in this container; in other words property is the person's qualification for taking obligations and or possessing rights, regardless of the fact that the person does have any right and obligations in the present time or not; but in German law, there is an objective view to property, and it is considered to be as one of the components of the character. They recognize the property to be a financial set consisting of positive and negative elements which are separated by being allocated to a definitive goal and not by being connected to a certain person (Al Khafif , Same , 22). So it is possible that some properties to be found without being referred to any person and it is also possible that some persons be found who have more than one property. When property, in general, is considered to be a material thing, it is normal that debt, which is a part of the property, must have a material nature. In this way, these two theories strengthened the German view of the debt and became a reason for its growth.

Effects of choosing one of these views:

These are not just theoretical views and choosing each one of them as a base for obligation law has its own practical results that are mentioned down below:

Surrendering debt and demand

As we said before, in Roman law not debts, nor demands were not transferable, since obligation was a personal matter and changing its sides was not possible without changing the obligation itself. Actually, transferring debts and demands were possible by novation. In the law of the heirs of Roman, like France, a draft is based on a novation (Katoozian , Same , 262). Article 1271 of France civil law, defines substitution of a different obligation as it follows “When in the result of a new obligation, a new creditor replaced the previous creditor who the debtor is separated from him.” If in a legal system, the subject of debt and not its sides is important, and also the debt is considered to be an independent property, there is no need for novation in order to transfer the debt. As in German and Swiss law which has accepted the objective theory, the draft of a debt or demand is accepted too. In Roman law, since the demand draft and the debt draft had the same nature if one of them was not accepted, the other one was not accepted too. If we recognize obligation as an independent financial element, it is transferable either negative or positive, and if obligation is not recognized as such, it is not transferable in any of these ways (El Sanhuri , 1952 / 1 , 109).

Making obligations without determining the lender

The second difference is that when the relation between persons is not essential in the obligation, it is possible to imagine a debt without having a creditor when the obligation is being created, and the obligation would be made dependent on itself (El Sanhuri , Same , 110) and since the only time that lender is needed is when the obligation is being fulfilled, the existence of lender or finding a way to determine him, is enough to make the obligation correct. In this case, the debt remains as an obligation and a financial burden on debtor’s property until the time of fulfillment of the obligation comes and the lender demands its execution (El Sanhuri , 1391 / 1 , 18) .This overall result could be of use in analyzing some minor obligation law issues, like the ones who will be mentioned here; for example when someone considers a prize for doing a certain action and declares it to the public. This obligation is correct, but its creditor is unknown. Accepting such obligation is only compatible with objective view and by having a subjective view of obligation; its correctness could not be proved (Mohaqq Damad, 1388, 69). The next case is when a supply contract concludes for a not-defined third party or a third person who has not born yet, like life insurance or supply contract for future children of; in this case, again an obligation is made without any creditor, and there is no doubt in its correctness, and subjective theory could not analyze and interpret it. The third case is about document bearer. A document bearer is a document that its signer promises that he will pay it to anyone who holds it (El Sanhuri, 1952 /1, 111). As you can see, there is another demand without determining who its creditor is, and we again need a objective view to explain the correctness of its obligation. In other words, since, in objective view, the relation between persons is not essential, obligator could from the obligation as a debt and make it an obligation on himself. The commitment level, how to perform it and how to determine the lender is determined in the obligation itself. The obligation is complete in every way, and the only missing element is the lender who would be determined by the conditions existing in the obligation. Actually, in this view, there is no need to recognize the lender before its implementation.

Accepting the correctness of unauthorized transaction

Based on the subjective theory, it could never be accepted that a person make an obligation, but someone else undertakes its performing. The reason of this is obvious. If the obligation is a personal matter, the person who accepts it should handle its performing and it is not possible due to satisfaction of someone who was not present in the contract, obligation be transferred to him. In this case, a substitution of a different obligation is needed which is a new contract. But if we consider obligation as a merely financial matter, there will be no problem in transferring it to someone who the obligation is made by him.

Advantages of each one of these theories

There is no doubt that objective view has some practical and useful analytical results which subjective view does not have. By conversion of debt to an independent financial element, which is separated from the character of sides of the obligation, objective view provides a quick and easy way to transfer an obligation which matches the contemporary economic order which needs quickness and easy way for transferring properties. It could also be said, without this view many legal actions would lack a basic and accurate justification. But it is not possible to leave the subjective view of debt. The debtor’s character will always have a role in the implementation of obligations. Also, in most of the obligations, the lender should be present when an obligation is made, and in every obligation the lender should be present when the obligation is being performed. The essential difference between real rights and personal rights is based on the debtor’s presence also. Domination of the lender in personal right is an indirect domination that should be performed by the debtor, and there is no way to perform it without preliminary referral to the debtor.

Nature of debt in Islamic resources

Imamiyeh’s jurisprudence view must be found from deduction of rules’ references and in the words of jurisconsults. In here we study the Book, tradition and then jurisconsults’ theories so that we could extract jurisconsults’ view of Islamic jurisprudence from them.

Debt in Quran

In The Holy Quran, there are some verses about debt. From these verses, our answer could be found in Baqarah Sura, verse 280 which means “if (debtor) is suffering from poverty, he shall get time to become rich”. In this verse that is well known as Enzar Verse, God has clarified Muslims’ duty in dealing with debtors who are unable to pay their debt. No violation to his physical integrity or freedom in sot is allowed. He could not be imprisoned or be taken as a slave or be killed, rather he shall have enough time to gain some properties and be able to pay his debts. As we see in here, the debtor is not responsible, and the debt shall be taken from his properties. While at the time revelation of this verse, slavery existed in Islamic and Roman law, and it was not and unknown and uncommon. However, the founder of Islam has not allowed this matter.

Debt in the tradition

Now we take a look at the prophetic tradition about dealing with the debtor, and we review two narratives in this matter.

It is told in some Hadith books that when debts of Moaz increased, and he became unable to pay them, he went to the Prophet... The holiness divided his properties between his creditors and each one of the, was paid five sevenths of his demand (and the rest of the demand remained) creditors asked the Prophet to sell Moaz (as a slave) in return of his debt. The Prophet said "Leave him alone, you have no authority on him" (Beyhaqi, 1414 / 6, 83). It is said in another Hadith that a man went under many debts in times of the Prophet. The Holiness asked people to give him some charity. And people did so, but these charities were not also enough. The Prophet told the man's creditors: "Take what you found from his property and you have no right other than this" (Moslem ibn e Hajaj e Qashiri Neyshaboori, 1340 / 5, 29). So from Quran and tradition it could be understood that the support is for the debtor person, and the responsibility is for his property and not from the debtor himself. The first narrative rejects slavery and is considered to be an obvious and valuable document. The second narrative shows that only property could be taken from the debtor, and physical or another punishment is not allowed.

Debt in Jurisconsults' view

There are some contracts in Islam which their main subject is debt and demand, and their transfer between people. Studying these contracts could show us whether transferring of debts and demands is happens readily or not – like German law, or they necessarily need a novation in its Roman terms (cancelling a debt and replacing it with a new one).

Draft contract

It could be understood from the definition of Draft contract that jurisconsults do not see any need of novation for transferring debts from one obligation to another obligation "... and that (draft) is a canonical contract for transferring property from one obligation to another obligation, and this contract holds for the same property (the same kind, same describe and the same amount)" (Mohaheq e Heli, 1418 / 1, 142). "In Ul-Vassileh book it has been clarified that draft is transferring from one obligation to another obligation that is engaged to the same debt and in Tazkera it is said that draft is transferring of property from an obligation to another obligation" (Mojahed e Tabatabaee, 1415, 144). Statements like these could be found in many other books of written by jurists (Sheikh e Toosi, 1407 / 3, 303 و Ibn e Zohreh, 1407, 257 - Alame Heli, 1411, 119 - Shaid e sani, 1413 / 4, 212 - Tabatabaee Haeri, 1418 / 9, 278 - Saheb Javaher, 1404 / 26, 160 و Sheikh e Ansari, 1421, 97).

From this definition it could be said that jurist sees debt as a property, because in this definition he mentions delivery of property from an obligation to another obligation, and secondly he sees debt as a property that is independent of the debtor and using a simple agreement between transferor and creditor could be extracted from transferor's obligation and place it on assignee. If the debt were depending on debtor's character, without novation it could not be transferred it is obvious in here that debt is independent of debtor's character.

Guarantee contract

Another contract which could be mentioned here is Guarantee contract and jurists have defined it as this: "When guarantee contract were performed rightly, obligation is transferred from principal to guarantor's obligation and obligee is allowed to demand the debt from guarantor only..." (Too, Same / 3, 311). Same words could be found in most writings by jurists about guarantee (Toosi, 1387 / 2, 323 - Ibn e Edris e Heli, 1410 / 2, 69 - Mohaheq e Heli, 1408 / 2, 88 - Sivari, 1425 / 2, 65 - Ardabili, 1403 / 9, 282). The only essential difference between guarantee contract and draft contract is resulted from this fact that in draft, drawee have a debt to drawer, but in guarantee contract, guarantor have no debt to principal, as civil law states properly in article 727, rules of guarantee would be executed for separated drawee. The mentioned definitions of guarantee confirm on our former understanding that transferring the debt from principal to guarantor's obligation takes place as an agreement, and there is not any need for a more explanation of this contract.

Donating the debt

Another contract that be concluded about debt, is donation (Article 806). The creditor can donate the debt to the debtor or by some views; he could donate this debt to anyone that he desires. "But debt, its donation is allowed for the one who is indebted... And if he donates it to another person, it is strongly right, and its bill is about the bill of its case (Moosavi Khomeini, 1422, 302) "The donation of debt to the debtor, is ownership of the debt to the debtor and... It is necessarily accepted (Mohaheq Damad, 1406 / 2, 269). But some do not consider the donation of debt to non-debtor to be right "And debt is right if it is donated to the debtor himself... But the donation of the debt to non-debtors is not right" (Moosavi Golpaygani, 1409 / 2, 137). Another jurist also says: "donation of the debt to the debtor is right, and it has no problem, and the bill is also achieved" (Bahjat e Foomani, 1422 / 3, 406). From the words of jurists, it could comprehend that they see donation of a debt without any problem and the reason of disallowing donation of the debt to non-debtors is not because the debt could not be transferred, rather it is because of their concerns about the bill, which is essential for donation and for debt, and it is doubted whether it could happen or not. This concern could be understood from Imam Khomeini's Quote from above. He clarified that the bill of the debt is possible by the bill of its case; meaning with billing the demand document like business documents, donation of a debt is allowed. So the reason that donation of a debt's to the debtor is correct, is that in this case, the bill was done before, and there is no need for a new bill.

Selling the debt

It is cited from Ibn al-Qayyim, one of the Sunni jurists, that debt in an obligation is the same as objective property. So it is allowed to exchange it, just like it is allowed to exchange other objects (Al Khafif, Same, 25). Selling the debt could be versus an object or could be versus another debt. Selling the debt is void only when it is versus another debt, and there is no doubt in its capability in being sold or exchanged "Selling the debt after its becoming to debtor or any other person is allowed (Mohaheq e Heli, Same / 2, 60 – Shahid e sani, 1422, 387) Another jurist says: "1- Selling the caused debt... and the present debt to an existing price, is absolutely correct" (Asadi Heli, 1407 / 2, 476). The important point is that jurists define selling as ownership of object to property or ownership of object to exchange (Sheikh e Toosi, Same / 2, 76 - Alame Heli, 1419 / 2, 443 - Fakhro Mohaheqin, 1387 / 1, 400 - Tostari, 1410 : 107 - Naeni 1373 / 1, 2). So how it is possible to allow a conclusion on the selling

contract of the debt? From this matter, we could find out that in jurists' view, a debt in obligation is like an object, and if this was not true, they never allowed the sell the debt.

No need for consent of debtor in paying his debt

One of the problems which are proposed in objective view was that it is not important who is paying the debt; rather it is important that obligee gets his demand. This issue have been discussed between jurists very clearly that paying the debts of others is allowed and there is no canonical reason for paying the debt from the debtor himself (Esfahani , 1422 , 466 - Tabatabaee Qomi , 1426 / 6 , 346 - Khoee , 1418 / 31 , 456 - Montazeri , 1409 / 4 , 256 - Tabrizi , 1427 , 104) Some have asserted not just there is no need for awareness and debtor to pay the debt, even when he has no awareness or satisfaction paying the debt is allowed (Golpaygani , 1413 / 2 , 66 - Mar'ashi e Najafi , 1406 / 2 , 142 - Tabatabaee Qomi , 1423 , 131).As we see, the reason for correctness was introduced from Qlanyh Sira¹; therefore in jurists' opinion there is no reason, not canonical nor common that debt should be pay by debtor himself, and his satisfaction, not a condition, so his disagreement has no impression.

No need for consent of principal in signing the guarantee

While comparing guarantee with paying the debts of others, jurists emphasized that permission or not having the permission of main debtor has no impression, except for referring the guarantor to him (Asadi Heli Same / 2 , 521 - Alame Heli , 1420 / 2 , 549 - Fakhr of Mohaqeqin , Same / 2 , 8 - Shahid e avval , 1410 , 135 م Mphaqeq e Karaki , 1414 / 5 , 317 - Yazdi , 1409 / 2 , 759 - Tabatabaee e Hakim , 1416 / 13 , 251). As we see, in addition to paying debts of others, there is no need for awareness and satisfaction of debtor for guaranteeing from him. Between Shia jurists, the guarantee could transfer the debt also, meaning that it is considered as a paying the debt for the debtor. This is another reason for the independence of debt from debtor's character and its transfer without novation.

Resolving some doubt:

There are two signs in jurisprudence that could be considered as accepting the objective theory of debt. Now, we put forward these two problems and answer them to give an answer to the doubts that may come.

Extinction of the guarantees

One of the cases that makes doubt between jurists about materiality of debts is the extinction of the guarantees of debt, because most of the jurists believe when guaranty-security is concluded correct, and the debt is transferred to guarantor, its guarantee dissipates also; meaning if there were any pledge, it separates and if there were any guarantee partnership, it dissolves. Only one of jurists had disagreed and had seen eliminating the mortgage to be difficult (Told by Katoozian , 1385 / 4 , 331).

Now the question is whether extinction of the guarantees comes from subjective view about the debt of jurists or not?

It seems that the reason of saying such opinion should be found in this fact that jurists consider the guarantee as paying the debt, although not any actual paying takes place for the creditor. This does not mean a debt is eliminated, and another debt has replaced it (Toosi , 1387 / 2 , 250 - Ibn e Saeed e Heli , 1405 , 391 - Mohaqeq e Heli , Same / 2 , 83 - Alame Heli , 1414 / 14 , 66 - Shahid e sani , 1413 / 4 , 84) rather It means that a debtor has replaced another debtor and when the debtor changed, former debtor should be become free of the restraints of aforementioned debt, i.e. if he has given some property for mortgage, that mortgage should be detached. The other fact is that, jurists probably have seen guaranty-security or documenting as a support for debtor and also a way for him to gain the creditor's trust, and they did not saw this as we see it today when we recognize it a mutual goal, one supporting the debtor and the another guaranteeing certain payment and not fiat payment of debt. In general, it could be said that, since jurists consider guaranty-security as a fiat payment, they give it every single effect of a fiat payment on it and since they know that the main purpose of guarantee and mortgages to be supporting of the debtor, they have accepted the extinction of the guarantees, and not that they consider the debt to be converted, or even consider it as a personal matter.

Incarceration of the debtor and the insolvent

Another problem which should be dealt with and engages the mind as a question is that if the debt is not related to debtor's character or his physical integrity and freedom, what is the subject of debtor and insolvent's imprisonment which is noted in many juridical writings and why in Islamic law, insolvent is imprisoned? In juridical books, there are two types of imprisonment for debtor, one for a debtor who does not pay his debt while he is not insolvent and the other for a debtor who claims to be insolvent.

Non-insolvent debtor

If the debtor has some property, it is necessary that he sells them and pay his debts. If he refused to do so, the governor is allowed to imprison him until the debtor sells them, or even the governor is allowed to sell those properties himself; because the Prophet said: "Delay in paying the debts from a debtor who can pay is oppression". He has also said: "Delay in paying the debts from someone who can pay causes the ruining of reputation to be allowed and permits his punishment (Toosi , 1387 / 2 , 250 - Ibn e Saeed e Heli , 1405 , 391 - Mohaqeq e Heli , Same / 2 , 83 - Alame Heli , 1414 / 14 , 66 - Shahid e sani , 1413 / 4 , 84). It is right if a debtor having no property should be compassionated with, but a debtor who can pay the debts and does not so, should be prosecuted so that he stops violating the rights of the people. Therefore, the first type of incarceration is the punishment for a debtor who can pay his debts and does not so, not the punishment of being unable to pay the debts.

Insolvent debtor

The second type of imprisonment is for someone who does not have many properties clearly and claims for insolvency, but his creditors do not accept his claim, or the lawsuit is essentially financial, and debtor had received some property from his creditors

¹ Rational practices and methods or omissions, which continuously operated by wise people of the world over.

and the *istiḥāb*² confirms that the properties are in his hands. In this case, the debtor is imprisoned, so that he could not hide or destroy the property that was given to him, and after the investigations were done, the debtor is freed. “When debtor’s insolvency is proved for governor – by filing the evidence or by creditors’ confirmation – his incarceration is not allowed and based on Enzar Verse it is necessary to give him a respite... It has been reported from Imam Baqir that he said: Imam Ali ordered to imprison someone for his debts, and when debtor’s bankruptcy was proved, he freed him to gain some property” (Alame Heli , Same / 14 , 67). So the second type of incarceration was only an action to make investigations easier and is not considered as a punishment for the failure to pay the debt. Accordingly after debtor’s insolvency has proved, his incarceration is useless and forbidden. In the end, after studying these two types of imprisonment that were present in jurisprudence, it is clear that these imprisonments were not because of being unable to pay the debts, rather the first case was in order to force the debtor to pay his debts and the second case is a precautionary and temporary action in order to maintain the right of creditors and investigate the debtor’s condition; therefore these imprisonments have no relation to any punishment of unable debtor.

Results

Studying the jurists’ words gives us the following results

The first fact that was obvious from the studies above was that jurists consider debt as property and this is the first and most important premise, and by this premise debts are related to other laws about properties. If this premise is not accepted, no other result could be made, and there will not be any way to trade the debts. The other premise is that jurists consider debt as a property from the debtor and the lender, therefore when they define draft and guarantee, they clarify the transfer of debts from one obligation to another obligation. Merging first and the second premise gives us that when debt is considered as property independent from the debtor; it is normal and natural to transfer it. The other fact is that for jurists, debt (or at least present debt) is as an objective property, because it is being dealt with same as an objective, and the only difference between them which separates the debt is the doubts in billing it. Because of this matter, non-debtor is not allowed to mortgage the demand and by some views is not allowed to donate it to non-debtors (while same jurists have no doubt in donating the debt to the debtor himself which in that the bill is already achieved). It is in this point that a leading jurist, like Imam Khomeini, gives the permission of donating the debt to non-debtor and verifies its bill with the bill of the case. This judgment could make a way for legislator to Another result from the mentioned premises is that in Islamic law, like German Law, the only important matter is that creditor gets his demand. And it is not important whether this from debtor’s property or someone else’s. To creditor is comes from debtor’s property or someone else’s property. On the other hand, the responsibility of paying debts is on debtor’s properties and not on debtor himself. Therefore, no one is punished merely for not paying his debts or being unable to do so. And this means Islamic view of debt is not a subjective view; rather it is more like an objective view. Hence it moves From Roman law and resembles German law.

References

1. Imami, Seyed Hasan (1390), *Civil Rights*, Third Volume, Thirty-first edition, Tehran, Eslamiyeh Publication
2. Khomeini, Seyed Ruhollah Moosavi (1422 AH), *Najat Al Abbad*, First edition, Tehran, Institute for Compilation and Publication of Imam Khomeini’s Works
3. Safaee, Hosein and Ghasemzadeh (1388), *The civil rights of individuals and wards*, Fifteenth edition, Tehran, SAMT Publication
4. Katoozian, Naser (1383), *General Rules for Contracts*, Second Volume, Sixth edition, Tehran, Joint Publishing Company
5. Katoozian, Naser (1385), *Specified contracts*, Fourth Volume, Tehran, Joint Publishing Company
6. Katoozian, Naser (1385), *General Theory of Obligations*, Third edition, Tehran, Mizan Publication
7. Golpaygani, Seyed Mohammad Reza Moosavi (1409 AH), *Collection of Masa’il*, Second Volume, Second edition, Qom, Darul Quran Karim
8. Gilani, Foomani, Mohammad Taqi Bahjat (1426 AH), *Complete Collection of Masa’il*, Third Volume, Second edition, Qom, Office of Supreme Leader
9. Yazdi, Seyed Mostafa Mohaqeq Damad (1406 AH), *The rules of Jurisprudence*, Second Volume, Twelfth edition, Tehran, Islamic Sciences Publication Center
10. Yazdi, Seyed Mostafa Mohaqeq Damad (1388), *General Theory of Conditions and Obligations in Imamiyeh jurisprudence*, First edition, Tehran, Islamic Sciences Publication Center
11. Sadr, Mohammad Bagher (1379), *Draft*, Journal of Ahlul Beyt jurisprudence, No. 21, Qom, Institute of Encyclopedia of Islamic Ahlul Beyt Jurisprudence
12. A group of authors (Without a release date), *Ahlul Beyt Jurisprudence Journal (Persian)*, Qom, First edition, Institute of Encyclopedia of Islamic Ahlul Beyt Jurisprudence
13. Ardabili, Ahmad ibn Muhammad (1403 AH), *Majma al faedah va al borahan fi sharh e ershad al azhan*, In fourteen volumes, Ninth Volume, First edition, Qom, Office of Islamic Publications of Teachers Association of Qom’s Theological Seminary
14. Esfahani, Seyed Abolhassan (1422 AH), *Vasilah al nanjat*, First edition, Qom, Institute for Compilation and Publication of Imam Khomeini’s Works
15. Al Khafif, Ali (1964 AD), *Al tasarrof al enferdi va al eradah al mnfaredah*, Cairo, Gabalawy Publication
16. Beyhaqi, Abobakr Ahmad Bin Hosein (1414 AH), *Sonan al kobra*, First edition, Mecca, Dar al baz publication
17. Tabrizi, Javad Ibn Ali (1427 AH), *Tangiho mabani al orvah- ketab al soam*, First edition, Qom, Dar al seddiqah al shahidah publication
18. Tostari, Asadollah Kazemi (1410AH), *Maqabees al anvar*, First edition, Qom, Aal al beit publication
19. Haeri, Seyed Ali Ibn Mohammad Tabatabaee (1418 AH), *Riaz al masayel*, Ninth Volume, First edition, Qom, Aal al beit publication
20. Haeri, Seyed Ali Ibn Mohammad Tabatabaee (1415 AH), *Ketab al manahel*, First edition, Qom, Aal al beit publication

² Presumption of continued existence of something that is known to have existed at a past date whether or not of a legal nature, eg an established right or debt, or merely the life of a person who has been missing and unheard of but who is not yet declared so by the court

22. Hakim, Seyed Mohsen Tabatabaee (1416 AH), Mostamsek al orvah al vosqa, Thirteenth Volume, First edition, Qom, Dar al tafsir publication
23. Halbi, Ibn Zahreh, Hamze Ibn Ali Hoseini (1417 AH), Qonyah al nozao fi al osoule va al forou, First edition, Qom, Imam Sadiq Institute
25. Heli, Ibn Edris, Mohammad Ibn Mansoor Ibn Ahman (1410 AH), *Al saraer al havle le tahrir al fataavi*, Second Volume, Second edition, Qom, Office of Islamic Publications of Teachers Association of Qom's Theological Seminary
26. Heli, Jamalodin, Ahmad Ibn Mohammad Asadi (1407 AH), *Al mohazzab al bare fi sharh e mokhtasar al nafe*, Second Volume, First edition, Qom, Office of Islamic Publications of Teachers Association of Qom's Theological Seminary
27. Heli, Alame, Hasan Ibn Yousof Ibn Motahar Asadi (1420 AH), *Tahriri al ahkaam al shariyah alaa mazhab al imamiyah*, Second Volume, First edition, Qom, Imam Sadiq Institute
28. Heli, Alame, Hasan Ibn Yousof Ibn Motahar Asadi (1414 AH), *Tazkerah al foqahaa*, Fourteenth Volume, First edition, Qom, Aal al beyt publication
27. Heli, Alame, Hasan Ibn Yousof Ibn Motahar Asadi (1419 AH), Nahayato al ahkaam fi marefato al ahkaam, Second Volume, First edition, Qom, Aal al beyt publication
30. Heli, Fakhrol Mohaqeqin, Mohammad Ibn Hasan Ibn Yousof (1387 AH), *Izah al favayed fi shah e moshkelaat al qavaed*, First Volume, First edition, Qom, Institute of Ismaili
31. Heli, Mohaqeq, Najmoldin, Jafar Ibn Hasan (1418 AH), *Al mokhtasar al naafe fi feqh al immamiyeh*, First Volume, Sixth edition, Qom, al matboot al dinniye publication
32. Heli, Mohaqeq, Najmoldin, Jafar Ibn Hasan (1418 AH), *Sharaaye al islam fi marefa al halaal va al haraam*, Second Volume, Second edition, Qom, Institute of Ismaili
33. Heli, Meqdad Ibn Abdollah Sivari (1425 AH), *kanz al erfane fi feqh al goran*, Second Volume, First edition, Qom, Mortazavi Publication
34. Heli, Yahya Ibn Saeed (1405 AH), Al jaame lel sharaaye, In one volume, First edition, Qom, Sayyed al sohadaa al elmayyah publication
35. Khoei, Seyed Abolqasem Moosavi (1418 AH), Al mosouah al imam khoyi, Thirty-First Volume, First edition, Institute of Restoring Imam Khoei's Works' Publication
36. Dezfouli, Morteza Ibn Mohammad Amin Ansari (1421 AH), Siyaq al oqoud va al iqaa, First edition, Qom, Association of Islamic Thought
37. Sanhuri, Abdolrazaq Ahmad (1952), *Al vasit fi shah al qanoun al madani al jadid*, First edition, Beirut, Dar al ihya al toraas al arabi publication
37. Sanhuri, Abdolrazaq Ahmad (1391), *Nazariyyah al aqd*, First edition, First edition, Tehran, Khorsandi publication
38. Toosi, Abu Jafar, Mohammad Ibn Hasan (1407 AH), Al khelaaf, Third Volume, First edition, Qom, Office of Islamic Publications of Teachers Association of Qom's Theological Seminary
39. Toosi, Abu Jafar, Mohammad Ibn Hasan (1387 AH), *Al mabsout fi feqh al imamiyah*, Second Volume, Third edition, Tehran, Al maktabah ah mortzaviyah le ihya al aasar al jafariyah publication
40. Ameli, shahid e aval, Mohammad Ibn Maki, (1410 AH), *Al lomah al dameqiyah fi fiqh al imamiyah*, First edition, Beirut, Dar al toraas and dar al islammiyah publications
41. Ameli, shahid e sani, Zeynoldin Ibn Ali (1422 AH), Hashiyah al sharaye al islam, First edition, Qom, Islamic Propagation Office of Qom's Theological Seminary Publication
41. Ameli, Second Martyr, Zeynoldin Ibn Ali (1422 AH), Masaalek al afhaam, Fourth Volume, First edition, Qom, al ma'aaref al islamiyah publication
43. Ameli, Karaki, Mohaqeq Sani, Ali Ibn Hosein (1414 AH), *Jame al maqased fi sharh al qavaed*, Volume 5, Second edition, Qom, Aal al beyt publication
44. Faraj Seda, Abdolmoaenem (1974), Nazariyah al aqd fi qavaanin al bilad al arabiyah, Beirut, Dar al nehzhah al arabiyah
45. Qomi, Seyed Taqi Tabatabaee (1423 AH), Al qaayat al qosvaa fi al taliq ala al orvah al vosqaa, ketab al ejarah, first edition, Qom, Mahalati Publication
46. Qomi, Seyed Taqi Tabatabaee (1426 AH), *Mabani menhaj al salehin*, Volume 6, first edition, Qom, Qalam al shargh publication
47. Moslem Ibn Hajaj, Abolhosein (1350 AH), Sahih al moslem, Part 5, Beirut- Lebanon, Dar al jalil publication
48. Mar'Ashi Najafi, Seyed Shahaboldin (1406 AH), *Menhaaj al momenin*, Second Volume, First edition, Qom, Ayatollah Mar'Ashi Najafi Library Publication
49. Naeni, Mirza Mohammad Hosein Qaravi (1373), *Monyato al taaleb fi hashyah al makaaseb*, First Volume, First edition, Tehran, Al maktabah al mohammadiyah
50. Najaf Abadi, Montazeri, Hosein Ali (1409 AH), *ketab al zakaat*, Fourth Volume, Second edition, Qom, World Center for Islamic Studies
51. Najafi, Sahebal Javaher, Mohammad Hasan (1404 AH), Javaaher al kalaam fi sharh al sharaye al islam, Volume 25 and 26, Seventh edition, Beirut, Dar al ihya al toras al arabi
52. Yazdi, Seyed Mohammad Kazem Tabatabaee (1409 AH), *Al orvah al vosqa*, Second Volume, Second edition, Beirut, aalami institute publication
53. Mazaud (henri, leon et jean): Leçon de Droit Civil, T. I. volume premier, par Francois chabac, Paris, 1983; T. II, volume premier, obligations, 4^e éd, par Michel de juglart, 1969, 6^e éd. Par F. Chabac, Paris 1978
54. Aubry & Rau, Droit Civil Francias, Sixième Édition, Par Paul Esmein, Tome Neuvieme, Librairies Techniques, Paris, 1953
55. Marcel Planiol, Georges Ripert, Deuxieme Édition, Tome Premier, Librairie Droit Et De Jurisprudence, Paris, 1937
56. A History Of German Private Law, Rudolf Heubner, Translated By Francis S. Philbrick, Little, Brown And Company, Boston, 1918