

Study of Buy and Sell Debt to Debt in Islamic Jurisprudence

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Abstract

One of the most common sales in business communications, especially the international ones is debt to debt sale. Despite prevalence of debt to debt in internal and international business communication and lack of certain legal text about its validity or invalidity, there is a question that whether this type of sale should be allowed or based on principles in constitutional, in the case of law silence we should refer to valid legal resources. Although according to jurists, debt to debt sale is completely invalid, there is no valid reason to invalidity of a sale in which the price and values are both in the form of debt, but according to documents of contract permission and origin of transactions validity, such trades could be considered correct and according to some hadith "لا يبيع الدين بالدين", of course in order to compensate the weakness of its document to evident act, dedicated invalidity just to its certain case which should be both sale and cost before contracting a debt.

Keywords: sale, debt – debt, future contraction, commodity to commodity

1. Statement of problem

One of the sales which current business community especially international trade is engaged in it is debt-debt sale and if debt-debt sale is known invalid, thus there would be a big problem in human life. Fortunately, investigating judicial texts and documents suggest that mentioned frame does not correspond to jurisprudence completely and the topic is analyzable and could be assessed. Debt-debt sale often has been proposed in two fields in jurisprudence.

1: during discussion about condition in the committee of future sale

2. During sale argument also there is a reference to debt sale.

It should be noted that in futures sale, this jurisprudence consequence is proposed that when in this sale, transaction price is a credit which is for seller, has debt – debt sale been realized?

Replying the above questions, jurists stated various ideas which include:

1. Most of the jurists know such a sale invalid.

2. Some people also believe that when there is a current debt, the sale is allowed.

3. Another group know the sale allowed because the sale in this trade has been converted to debt after contract and while contracting being debt to debt is not significant and won't be a reason to ignore the Hadith, however, since it is similar to debt to debt sale, it is execrable.

4. Some jurists also believe their distinction, so that whenever a client mention that previous debt as a condition in the trade and as a cost against certain cost, the transaction will be invalid because of realizing debt to debt sale. And eventually the discussion about division has been mentioned by Seyed Muhammad Kazem Tabatabaie and various aspects of debt – debt sale which is in 46 forms have been stated from that great scientist view and also there is a conclusion so that some forms of debt – debt sale have no religious problem and in those cases, the sale is true and is not considered invalid. Totally, debt–debt sale is not invalid absolutely and is correct in some conditions.

2. Lexical meanings of credit

Credit is something that has a duration or it is giving a property to the others for a certain time and also everything which is not present is called credit (Ibn-e-Manzour, 1984, 13th edition, p 166 – Firouzabadi – Bitā, 4th edition, 225 – Zobeldi, 1993 – 18th edition, p 214).

In juridical term, the credit has been defined as: "the credit is a total property that is owned by someone for the benefit of the others for some reasons. Someone who is involved in that due is called debtor or debit and the other person that the debt is in favor of him is called creditor and payer. The reason for credit is loaning or other arbitrary activities such as placing something in sale, in futures sale and price in credit sale or pay in the rent, dowry in marriage

and change in disposition, etc. The reasons for credit may be compulsive cases like guarantee and alimony of permanent wife and like that. (Imam Khomeini, 2011, first edition, p 647).

3. Jurisprudential study of debt to debt sale

In order to study public and Shia scientists about "debt-debt" principle, before starting main discussion, the issue should be clarified partially. Thus it is essential to assess everything in the field of credit – credit principle about which there is a scientific and diligence argument, conflict and dispute. In our jurisprudential study, we will attempt to present pros and cons of judicial scientists and interpreting their reasons while answering the proposed questions.

4. First topic: the view of cons about credit-credit sale

The jurists are all agree about debt-debt sale invalidity although there are some disagreements in its applications. In the other word, there is an argument that in verity of debt- debt sale, sale and price, both should be before contracting the credit or if sale or price has not been a debt but because of contraction are considered debt, is also considered the credit-credit sale?

In his book, Meftaholkerameh, Hoseini Ameli referred that some people like Saheb Hadayeq, attributed the quote of debt by debt sale invalidity absolutely to famous Imami jurists (Hoseini Ameli, 1998 – 4th edition, p 425).

Sheikh Yusef Bohrani (D. 1186 AH) proposed the relationship between futures principles and debt-debt sale in some aspects. In futures sale principles, he says: "there is an agreement on necessity of catching the price in futures sale, however there is no certain reason or text about this matter and probably because of this, Ibn e Tavous has stopped and it's an appropriate act. Thus Sheikh analyzes three narratives and eventually says no one is the reason to necessity of catching price; so it can not be a document for preventing debt-debt sale. In debt book he says: "debt-debt sale is forbidden and narratives of Talhe ben Zeid and public speech also prove its invalidity and prohibition, however in some situations in which there is a debt sale by contract, this prohibition does not make sense, about which second martyr also talked. (Bohrani, Bita, 20th edition, p 18). Sheikh Muhammadhasan Najafi also considers this sale invalid and believes that there is an agreement about this matter (Najafi, Bita, 22th edition, p 346). In three books, Ibn Edris says: "if the credit is deferred, its sale without any conflict to other than debtor (first martyr – 1993 – 3rd edition – page 313) and in Lame, he says: "debt sale (whether currently or deferred) is not allowed against a debt which is deferred and long term." (First martyr, 1990, 3rd edition, p410). Elsewhere, we read that: "debt by debt sale is not allowed more and also credit sale is not accurate (Tabatabaie Hakim, 1979, 2nd edition, p 187).

5. The reasons of debt by debt sale advocators

The reason for respecting debt by debt sale has been mentioned: As debt by debt sale results in "betray" and "conflict", this sale is not allowed and it is agreed upon by all people (Katouzian, 1995, p 312), however in order to better understanding the issue, it should be said that for invalidity of this sale, it is resorted to "news", "agreement" and "the originality of non-quotation" the principle of rooming of ownership survive".

In Imami narrative texts, there is just one narrative clarified by Shia named "debt by debt sale" "Muhammad ben Yahya, An Ahmad ben Muhammad, An ibn Mahboub – An Ibrahim ben Mohazzam, An Tal'e ben Zeid An Abi Abdellah cited that prophet Muhammad said: "لا يباع الدين بالدين", a debt is not sold against another debt. (Kulayni, 1988, 5th edition, p 100). However the document of this narrative has become in "Talhe ben Zeid Batari" who has been illiterate and has not been documented, thus the hadith proof is weak (Muqaddas Ardabili, 1991, 9th edition, p 97).

There is also a narrative from prophet Muhammad in the foundation of Islam cited by public which says "انه نهى عن الكالى بالكالى" and "هو بيع الدين بالدين" (Qazi Ne'man, 1993, 2nd edition, p 33). Prophet Muhammad has prohibited debt by debt sale and decedent Qazi Ne'man in Islam Foundation after citing the hadith says, "debt by debt sale is like that a person pre-buys some wheat to be delivered in a certain time, but the seller could not access to wheat in certain time to deliver it, so buys the wheat from another one who is debtor by credit and in this way a debt has been converted to another one and goods by goods sale is from items in which a person pre-buys some wheat but doesn't pay the cost and it remains a debt which should be paid by him" (Qazi Ne'man, 1993, 2nd edition, p 33). According to "Muqaddas Ardabili" this narrative has been quoted just by public and its proof is not evident even in public books (Muqaddas Ardabili, 1991, 9th edition, p 97).

6. Consensus

The most important reason to invalidity of debt by debt sale is consensus, so that some of jurists such as first martyr have consented in order to forbid debt by debt sale following Ibn Edris. However referring to jurists' votes clarifies that: first – the first person who has consented in this issue is " Ibn Edris " while before him Sheikh Tousi doesn't know debt by debt sale forbidden but it was only invalid when existing previous debt and in addition it is realized from his way that his basis is the narrative of " لا يباع الدين بالدين " not consensus, even in the book of Alhalaf which solve the problems by consensus (Tousi – Bitá , first edition , p 310) . Second, the validity and value of consensus is for discovering innocent vote and it is considered criterion when there is no other device. While about mentioned issue, most jurists have relied on narratives or applied comparison in order to bill price in futures sale. So the consensus could not be valid as an independent reason. Third, if we discover some kind of consensus from jurists' votes, there is agreement on just some part of this claim and it is prohibition of debt by debt sale which has been existed before contract and not after contraction, so there is no absolute consensus and could not be the proof of this claim. Fourth, the mentioned consensus is evidential or like-evidential and almost certainly has been evidenced by approvers of hadith " لا يباع الدين بالدين " . It has been proved in principles that evidential consensus or like – evidential is not proof and reliable i.e. while proof of jurists' verdicts and their consensus is narrative, it is not certain for other jurists even if many people propose verdicts based on it and they should perform according to their own knowledge. Since generally jurists agree about invalidity of debt by debt sale, some case or cases which are uncertain to include in debt by debt sale are considered true according to accuracy principle and the cases in which sale and cost are present before contract should be considered invalid.

7. The originality of non-transfer

In the case of doubt in accuracy of each proof in debt by debt sale, it can be referred to the principle of non-transfer of seller ownership to client and comment to non-ownership of client and invalidity of everything which is proof of debt by debt sale, since if there is a doubt towards deal transfer, the principle is non-transfer (Najafi, Bitá, 24th edition, p 289).

A base necessary to fulfill the sub-contract is that there has been a true contract in order to fulfill it. While there is a doubt in discussed case that whether this contract is true or not, so this contract is not valid. However, this reasoning does not include cases in which sale and price become debt after contract and this subject is discussed in the situation of accuracy principle performance. On the other hand this principle is performed where in which there is no evidence (الأصل دليل حديث لا دليل له) , and there is no doubt in the case of non-transfer principle according to some words like " اوفو بالعقد " and " احل الله البيع " that all prove contract accuracy .

8. The view of debt by debt advocates

Seyed Abolqasem Khoyi proposes that while one of debts is debt before contract and one is debt after contract, thus it is correct (Khoyi, 1989, first edition, p 418). Some people knows debt to debt true while it does not include the concept of credit to credit. According to them there is no consensus on the invalidity of debt to debt, but credit to credit sale is invalid in public sources (Kamal Hamad, 1985, p 249).

9. The comparison of debt to debt and credit to credit

The interference of debt to debt sale interference and credit to credit sale is considered one of argued problems among jurists which its main reason is interference of Imami and public jurists schools which caused confusion of authors , so that according to some jurists there is no difference between credit to credit and debt to debt sales (Hosseini Ameli , fifth edition , p 29 , Araki , Bitá , first edition , p333) . So it is appropriate to compare these two subjects and realize the relationship between them. Whatever mentioned from people and there is in public jurisprudence is credit to credit sale. Therefore prohibiting credit to credit sale has been accepted and executed by Imami jurists totally while it has not been quoted by Shia and is just in public jurisprudence (Najafi, Bitá, 24th edition, p 295) and future scholars also consider this practical reputation as cause of narrative validity and also consider Fatwa reputation to its concept as cause of compensating the weakness of narrative proof. On the other hand some people know debt to debt true when it does not consist credit by credit concept. According to this group of scholars, there is no consensus based on invalidity of debt to debt sale, but what has been introduced invalid is credit to credit sale. It should be noted that the criterion in credit to

credit trades is delay of sale and price so that none of them is not present or cash , while debt by debt sale has various phases which certain value of invalidity agreed upon by Imami is when price and value in it are " debts " before contract . It should be mentioned that debt by debt sale has 46 phases according to some claims, although some of these phases are called debt considering customary neglect. By exact investigating these phases it is realized that there is absolute public and private relationship between debt by debt and credit to credit sales. Among public scholars like Alish in Monhaloljabal , Qazi Ayaz in Mashareqolanvar , Razqani in Sahrhe Mota' and Sabki in Talkehe Almajmou' (Kamal , Hamad , 1985 , p 13) believe that credit to credit sale is more extended concept of debt to debt sale . So that when price and valued or one of them is by debt that their time and end has been determined their trade won't be cause of realizing credit to credit sale since credit to credit is delay of price which is against present and being cash .

10. The comparison between debt to debt and trade option

One of sale concepts which is in the sale field is "the contract options " . Of course this is just a claim and it will be proved when some disagreed subjects are solved. Trade option is sale of "the right of trade subject "against debt to debt sale in which a property is transacted. Jurists identify property as: "in legal terms, property is something that could be transacted and valuable for exchanging." (Emami, 1999, p 26). However from the enacted laws point of view, a right could not be transacted to another one by selling contract and the proof of this is 338 article, where it is said that "sale is acquiring an object instead of apparent." Thus according to this definitions some people insist on that a property should be in the form material and eternal , so hesitate about existence of properties and rights such as goodwill , copyright , invention right and trademarks and don't know their demand , influence and transfer allowed . However what is logical and make our rights closer to universal family is that sale contract is said to acquiring property or transfer of ownership for exchange, whether it is the same property or right, there is immediate ownership or is based on conditions or it delays for some period. Legal procedure is also same and considers "object "for separating it from acquiring profit. Also in business custom, "legal transfer "is called sale (Ja'fari Langaroudi, 2003, p 462). It should be noticed that contract option is from financial derivatives and is dealt both inside and outside of bourse.

11. The comparison between debt to debt sale and future contracts

In debt to debt sale , there is no convention meanwhile contraction and there is no need the quality , definition , quantity and deliver time of good to be identified and because of lacking features and characteristics of this sale it can be considered as " unknown sale (Bey ol Gharar) . however , future trade contracts include , the commitment of exchanging certain goods in defined time and the level of deposit should be defined in order to ensure exchanging in duration of contract to due date of contract and during time along with changing certain goods' prices . Of course according to some people mentioned difference does not separate debt to debt trade and future contract, since while delayed price and property is specified exactly in credit and future contract and the delivery time and other features are mentioned, the same is true in debt to debt sale. Thus, if future contract is not an exchange and there is a commitment to exchange in a certain time, so both of them are responsible to exchange a good in a certain date and with a fixed price and the sale occurs at the moment of exchanging the price and property and before that there is only a commitment to do the exchange. In this case if following secondary market conditions cause realizing debt to debt sale, this exchange is invalid. Generally it can be said that there are ways to do true future contract trade in initial market and for correcting it in secondary market either debt to debt exchange must be corrected or there should not be a future contract and just be commitment to do contract in future.

12. Various phases of debt to debt sale

As mentioned above, according to some narratives and idea of some jurists, debt to debt sale is not true, so in order to study debt to debt sale, various phases of debt to debt sale should be explained. Seyed Muhammad Kazem Tabatabaie Yazdi has signed various phases of debt to debt sale carefully for answering a question. Although invalid cases in his view are more than ones in other jurists' view, his accuracy in counting various forms of debt to debt sale is noticeable which are as followed:

1. Each of prices or properties or former debt (in which debt has been specified before and there is a date and time for that and this time has not ended yet and is stile delayed) are delayed currently
2. Delayed debt that should be paid now (in which a debt has been made before now and was delayed to a certain time but now it is the time of payment or has been necessary for another reason like death).

3. Current debt (in which a debt has been provided before now but has not been delayed).
4. Non-right delayed (in which there has been no debt before now but currently a debt has been provided e.g. because of an exchange or a contract and also a time has been specified for it.)
5. Current non-right debt (in which a debt has been produced currently but since there is no specified time for that is as present.

Each of these phases could be realized in price or property and thus become 25 phases and since debt is sold to debtor or other one, eliminating 4 phases, 46 phases are imaginable (Tabatabaie Yazdi, 1997, 180-181).

According to Tabatabaie Yazdi, 4 phases are invalid certainly:

1. Property: former debt, current delayed – price: former debt, current delayed.
2. Property: former debt, current delay, price: non-right delayed debt
3. Property: debt, delayed non-right, price: former debt, current delayed
4. Property: delayed non-right debt, price: delayed non-right debt

According to proposed subjects and criteria, it could be said that:

a) First phase from four above phases (whether debt is sold to debtor or another one) is persuaded value of debt to debt sale. Since there is debt description before contract and also is a delayed which its refund time has not approached yet. Thus all jurist know this phase invalid in agreement (Hoseini Ameli, 1998, 4th edition – p 425 – Tabatabaie Yazdi, 1997, p 180).

About second, third and fourth phases (of course there is no problem in fourth phase of selling debt to debtor himself) it should be observed that the mean of debt in Talhe ben Zeid is a debt which has been existed before contract or in addition to recent case, it also includes a debt which is created by non-right contract and as it be said there are two common notions among jurists in this field. If his view is accepted, thus three b, c, and d phases will be valid, otherwise according to second quote, these three phases also will be invalid.

B) Rules of phases in which the price and property are former delayed debt that should be refund now : accepting or rejecting the forms in this group is based on a criterion which has been introduced in the discussion of devoting debt to current delayed in the argument of duration and debt . If we believe that about delaying of debt, there is no need refund and time to exist yet but whenever refund time exists initially but now it has been expired, again it is called debt and all these phases are invalid. However if we know the reasons who are not certain about devoting debt to present and function according to principle , all phases of this group will be correct .

c) The rules of phases in which properties are former debts which are not delayed for a certain time: in all phases of this group one of exchanges is former debt which has been existed before but has not been delayed to a certain time, thus it is current. Therefore, at least in one part, debt is not based on a certain time. So, according to the view of jurists who know delayed debt forbidden in order to ensure the concept of delay including debt, these cases should not be considered invalid.

D) the rules of phases in which one of prices is non-right current debt : all of these phases are correct (Shahid Sani , 1989 , 4th edition , Fazel Meqdad – Bitā , 146 – Tabatabaie Yazdi – 1997 , 180) , Since all these phases are involved in debt sale .

13. Conclusion

Regarding that there is no valid and certain reason to invalidity of debt to debt sale absolutely , and since most of today exchanges are done in the frame of debt to debt sale and by progressing this kind of trades and since debt to debt sale is not against public regulation and nice manner , but is needed in trade relationship and its invalidity makes our international trade relationships problematic and because there is no certain text in modern principles and specially civil law in this field , so it is necessary to believe that according to reasons and verdicts of jurists in second group by debt to debt sale we mean that both price and property are debt before sale contract and the contract does not cause the price and property to be debt . Considering this many sales which are done currently and both of price and property are delayed debt exclude from invalidity circle because of being debt to debt. And there is no serious problem which causes distress and constriction and since it is rare that both of price and property to be debt before contract, so there is no distress and constriction in business relationship.

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