

# The legal nature of the debt gift contract In Jordanian civil law compared to Islamic jurisprudence: A comparative study between Jordanian and Iraqi law

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## **Abstract:**

*The gift is held with an affiliation with acceptance, and it is carried out in the transferee and does not require registration unless the talented person is a car, ship or plane, then its holding requires registration if the talented person is a real estate, the enforcement of the gift contract against the contracting parties and others will depend on his registration in the Land Department within which the talented property is located. The donator may, with the idea of the donation remain, stipulate that the gifted person must perform a certain obligation, and this commitment is considered a substitute, and the gifted person must implement the duties imposed on him under the gift and conditional contract in the interest of the donor or one of his relatives. So if he violates these conditional duties without justification and these violation Great efforts were made by the donor, breaking the contract. The acceptance of recourse in the Jordanian Civil Law requires that there is no objection to recourse. We believe that the Jordanian legislator should interfere with amending some articles of the civil law included in the subject of this research, unlike the Iraqi legislator who mentioned a text on the gift of religion in the Iraqi civil law. But its provisions were scattered, besides that the texts of the gift were derived from Islamic jurisprudence but it was not clarified in Formulating its independent characteristics that distinguish it from the gift in general, in contrast to Jordanian law, the gift of religion is a legal behavior that arises with the sole will of the creditor, as it forfeits its right in return for the emergence of its commitment to this forgiveness, which is not claiming the debt.*

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## **I. Introduction:**

The gift is one of the named contracts, which arranges an obligation "on the shoulders of one of the parties to the contract and not the other. It is a contract whereby the grantor disposes of money to him without compensation, and the gift does not take place unless accepted by the talented person or his deputy. However, it is permissible in the movable that the gift is made by arrest without the need for an official document

But if the gift is a car, ship or plane, then its registration needs to be registered. If the gift is a real estate, the enforcement of the gift contract against the contracting parties and others will depend on his registration in the land department within which the talented property is located. The donator may, with the idea of the donation remain, stipulate that the gifted person must perform a certain obligation, and this commitment is considered a compensation, and the gifted person must carry out the duties imposed on him under the gift and conditional contract in the interest of the donor or one of his relatives, so if he violates these conditional duties without justification and this violation Great efforts were made by the donor, breaking the contract.

The donor may return the gift before the arrest without the consent of the gifted person, and after the arrest the return is made by accepting the gifted to him whether there is an acceptable excuse for the return or the absence of his presence. If the gifted person refused to accept the return, then the donor who relies on an acceptable excuse justifies the return to ask the court to cancel the gift and it has the discretion to accept or not return.

**As for the research problem**, it is that despite the Jordanian legislator stipulating the gift of religion within the provisions of the civil law besides the provisions of the gift, drawing its rules from Islamic jurisprudence. But it did not clarify in its formulation its independent characteristics that distinguish it from the gift in general; the debt gift is a legal behavior that arises with the sole will of the creditor, where he forfeits his right in return for the emergence of his commitment to this omission, which is not to claim the debt.

**The importance of the debt donation issue** to the debtor or to other important topics comes from both theoretical and practical standpoint. It raises an important practical topic from the applications of legal behavior created by a separate and organized will separately within the folds of the civil law, without the topic of the gift of religion receiving the interest of the commentaries of the law by explaining and clarifying , although it was singled out by a separate text. Moreover, this issue is distinguished by the scarcity of its judicial applications, but it may be the subject of many legal questions, including those concerning the creditor, the debtor, or others to whom the debt was transferred in the event it donated it.

The research adopted the comparative approach by comparing the Islamic jurisprudence opinions which are Hanafi and Maliki. Also, compare the Iraqi civil law with the Jordanian civil law to determine the differences between them. The research also adopted the analytical method of analyzing the opinions of the people of language and the views of legal jurisprudence in some of the matters that require this.

Therefore, the current study consists of two topics. In the first part we discuss what is the debt gift, and the legal nature of the contract for the debt gift.

## **II. The first topic**

What is the debt gift?

We divide this topic into two requirements. In the first, we deal with the definition of the debt gift, and the pillars of the debt gift.

### **The first requirement**

The debt gift definition

We address this requirement in two branches; we speak in the first to define it linguistically and legally, and in the second pillars of the gift of religion.

#### **First branch**

The definition of the debt gift in language and law:

First: in the language:

Linguists said in the chapter (Heb), that distraction and epidemic indicate attention, vibration and movement, and perhaps denotes the tenderness of something, and classified these words (Heb) in two chapters:

A- wind blows, blows, the sleeper blows. And from where did you come, so and so, as if he said: Where did you come from, where did it end for us? He was told so and so flowed. They say Heb does such-and-such. I shook the sword so it was a gift. She gave him a shock and shook him in his tax, a sword with a gift. He gave the camel a walk.

B- Blowing the dress: Yes. It is said to cut the dress blown. The flame of the mirage: The lightning flowed and the flames of the mirage. Linguists said about religion as obedience. Dan is told to him that he owes a debt, if he saves and obeys.

Debt: It is said I debt someone: If you treat him as debt, either give or take. Debt is said and condemned if I take a debt. And condemned: loaned and given a debt (1).

#### **Second: In the law:**

Organized by the Jordanian Civil Law in Article (560) of it, stating:

1. The debt gift to the debtor is valid and considered a discharge.
2. It is valid for non-debtors and is executed if the debtor pays the debt to him.

Through this text, the following notes can be made:

1) The Jordanian Civil law permits the debt gift in its two types for the debtor and the non-debtor, in contrast to some legislation.

2) The donation of the debt to the debtor is also considered in Jordanian law to be a discharge for the creditor's assignment of his right and his ownership of the debtor without compensation. For the creditor, and the debtor is discharged, the debt will be waived, as Article 444 of the Jordanian Civil law stipulates that "if the creditor discharges a debtor of his choice. The right will be lost and the obligation will be expired." Article 445 of the same law also indicated that "the release does not depend on accepting the debtor except that he refuses to return the debt, and if he dies before acceptance, the debt shall not be taken from his estate." As for the gift of debt to a non-debtor, it is not permissible except after observing the conditions mentioned in the above law. The debt gift in this law is a legal act that arises with the sole will of the creditor without its development depending on the will of the debtor.

### **The second branch**

The pillars of the debt gift in law

Because the debt gift is a legal act arising from a sole will, it must have all the pillars of legal behavior, which are three pillars:

The first pillar: Satisfaction of debt gift donor

Although the Jordanian Civil law did not include an explicit text on the eligibility of the donor, it can be said that the debt gift is a donation, and donation is only issued by a person who is qualified. It is a voluntary legal act that is valid only by issuing a donor who has full legal capacity and that his will is free, true and is not flawed with the defects of the will, which is coercion, mistake and deceit with injustice and exploitation. So those who were under the age of majority are not entitled to of their debt gift.

The second pillar: the place of the debt gift

The Jordanian legislator indicated that the place is the fixed debt of the debtor, and it stipulates several conditions that it referred to as Articles (157-163) of the Jordanian Civil Law, which are in short:

- 1- The place must be present or possible.
- 2- The place is designated or subject to appointment.
- 3- To be able to handle any project.

The third pillar: the reason for the debt gift

The debt gift must have a cause and if it is legitimate for this Article (165) of the Jordanian Civil law by saying: "1- The reason is the direct purpose intended from the contract. 2- It must be present, valid and permissible, not contrary to public order or morals."

### **III. The second topic**

#### **The effects of the debt gift**

In order to know the legal nature of the contract for the debt gift, it is necessary to explain the implications of that in Islamic law and jurisprudence, and the effects of the gift of religion differ from the effects of the debt gift to the non-debtor gifted to him. This will be clear through the following two requirements:

The first requirement: the effect of the debt gift to the debtor

The second requirement: the effect of the debt gift to others

#### **The first requirement**

The effect of the debt gift to the debtor

The Iraqi and Jordanian civil law derives the effects of the debt gift from the views of Islamic jurisprudence. Because the effects of the debt gift differ from the effects of the debt gift to a non-debtor endowed with it, and this will be evident through the following two branches:

#### **First branch**

The impact of the debt gift in Islamic jurisprudence

Islamic jurisprudence differentiated the creation of the gift of the debt to the debtor from the effect of its effect on both parties, so they agreed to its creation by the sole will of the creditor (its affirmation) without this development being dependent on the will of the debtor (its acceptance and non-refusal). But they differed on how it would affect the debtor and the creditor. This will be detailed in detail through the following two paragraphs:

#### **Firstly: The impact of the debt gift on the debtor**

With the emergence of a debt gift to the debtor, it becomes valid to arrange its effect on the debtor, which is clearing him of his debt. So, he is not considered obligated to pay the donation, but he has the right to refuse to pay, as what his creditor required to do so. But when will he be discharged? In other words, is it required that he accept the gift in order to benefit from it or return it, if he refuses it, then it is returned to the creditor? When answering this question, it is noted that the Muslim jurists differ in the requirement for the debtor to accept or return the gift because they differ in giving priority to either side of the ownership or forfeiting the composition of the debt gift to the debtor, and this will be clarified in detail through the following two points.

#### **1. Acceptance of the debtor**

Muslim jurists differed on the requirement for the debtor to accept the arrangement of the debt gift to him or not due to their difference in giving priority to one side of the ownership or forfeiting over the other. They distributed among the following opinions:

Firstly: Audiences of the Hanafi (), Shafi'i (), Hanbali () and Jaafari ()

The debt gift to the debtor means forgiving the debt from him in order to give precedence to the projection of the debtor. Because the forfeiture the creditor has acted in a pure right for him and does not affect the right of the debtor or arrange a commission on it. This gift arises and its effects arise with the sole will of the donor, without its effect being dependent on the acceptance of the debtor but implemented despite his return to it.

Secondly: Malikiyah audience (5)

The debt gift to the debtor means his ownership of the debt through his exoneration from him, and in the discharge the aspect of the ownership overcomes the overthrow of this. So, it can only be implemented with the acceptance of the debtor.

## 2. The debtor's response

The Muslim jurists differed as to whether the debtor must accept whether or not the debt gift is enforceable against him. They also differed regarding the condition of the debtor's response to its enforcement of his right as well. They were distributed according to the following opinions:

Firstly: Hanafi audience

The full the debt gift to the debtor by the individual creditor's will does not mean its enforcement against the debtor, because if it includes the meaning of the forfeiture, it also includes the meaning of the ownership. So, the right has the right to return it if he refuses it, then it returns to the creditor.

Secondly: Audience of Shafiya (3) and Hanbali (4)

Because the debt gift to the debtor means that the debt be waived from him, so this is done by managing the individual creditor and does not revert to the debtor's righteousness to it. But it is implemented against him in spite of his return to it.

Third: Malikiyah audience (5)

The debt gift to the debtor his acquittal of the debt and the discharge they have is not executed except by not returning it. So, the gift is returned to the debtor by refunding it to the creditor.

## **Secondly: The debt gift on the creditor**

If the creditor donated his debt to his city, whether the gift included the meaning of ownership or cancellation, the creditor's right is removed and it is lost with his individual will. Because his assignment of his debt is regarded as an act that is his exclusive right, and his right to extinguish it is removed, and he is to the jurisprudence rule (that everything that was right of its owner employed it in itself and was Standing

while the projection is purely for the projected or most often. It has not resulted in a legal change in the status of the projected and is not related to the possession of an eye for sure, it falls with the projection and no money) (1).

By giving the creditor a debt to his city, the effects of it on him are:

1. The creditor is obligated with a donation, so he has no right to reconsider it and his claim is due by the debtor because his donation is a discharge and the discharge is not entitled to reconsider it (2).

2. By granting the debt to the debtor and exonerating him from it, the creditor ceases to have the right to it, and by dropping it the right ceases to exist and disappears for good.(3)

### **The second branch**

The effect of the debt gift to the debtor on the law

The Iraqi civil law and Jordanian civil law organized the effects of this gift. It was not enough to refer to the effects of the gift in general in this regard because the gift of religion has characteristics that distinguish it from the gift, making it independent of its effects, and perhaps the most important of these characteristics is its place. So, the place of the gift of debt is the fixed debt in the debt of the debtor. By his gift to him, he becomes the property of the debtor and one of the elements of his positive liability. The question is when will the debtor possess the debt granted to him? To answer it, it can be said that the influence of these two laws on the Hanafi and Maliki jurists in formulating the texts of the gift of religion led them to apply the effects mentioned in them as well, the effects of which were as follows:

#### **1. The impact of the debt gift on Iraqi civil law**

Through the text of Article (607) of the aforementioned law, it can be said that the gift of the debt to the debtor is his disavowal of the debt, and it is executed against him without its application being dependent on his acceptance of the meaning of the debt forgiveness. Because it includes the meaning of ownership for this and it bounces back by returning it to it. If he does not want it executed, he will be discharged from the debt in return for the creditor's commitment to this discharge. So, he will not be required to pay, otherwise it is the debtor's right to refuse to cancel the debt. But if the debtor returns the creditor's gift, it will be returned to him or his heirs in the event of his death, then this debtor will not benefit from it. And as Hanafi said that.

#### **2. The impact of the debt gift on Jordanian civil law**

Article 579 of the Jordanian Civil Code stipulates that "the debtor is granted the debt to the debtor." 8 If the creditor donated the debt to the debtor, as indicated in Article 560 of the same law, it said: "1 - The debt gift to the debtor is valid and considered discharge. 2 - It is valid for non-debtors and is executed if the debtor pays the debt to him.

Jordanian law made affected by Islamic jurisprudence the granting of a gift to the debtor when it accepts it, because the debtor is absolving the debtor of this debt. In exchange for the creditor's obligation to exonerate him, he has no right to demand the debtor to pay.

Preventing the return of the gift in this case justifies that the debt gift to the debtor is a discharge, which is tantamount to overthrowing and the lapse is not returned, and this is what Article 230 of the Jordanian Civil Law indicated.

Muslim jurists differentiate between the eye gifts from the debt gift. If someone sold his home to his mother for a known price, he donated the price to his mother, and he passed away. The other heirs do not claim the price or share in the ownership of the house as it is outside the money of the deceased. And Islamic jurisprudence requires that the creditor endow the debt to the debtor himself and not to another person, otherwise the donor may return in the face of the non-debtor, because the gift that falls on this face is property of the eye and not the forgiveness of a debt. (1)

The debtor's discharge of the debtor shall result in the right of the debtor having the right to extinguish the creditor's right, and thus the debtor's commitment will be terminated unless he repays it. "The substantive provisions that apply to each donation shall apply to each donation. " According to Article 447 of the Jordanian Civil law".

It is clear from these articles that it is permissible at first glance to refer to the discharge by the creditor if it is based on an acceptable excuse, and my innocent creditors are challenged in disclaiming the claim that the debtor's actions harmful to them are not effective when the debt surrounds his money and here the question appears, is it permissible to revoke the discharge in the law Jordanian civil?

It is clear through the general rules on release and articles (444-447) that it is permissible to refer whenever the donor relied on an acceptable excuse. Unless there is no objection to recourse, which is explicitly provided by the legislator in Article 579/8 of the Jordanian Civil law. As the private restricts the public, the creditor's gift to the debtor is prohibited from returning in the gift. However, it is permissible in our view for the innocent creditors to appeal the donor's acquittal, through a claim that the debtor's actions are not enforced against his creditors, and there is no provision in our view that there is a text in Article 579/8, because this prevents the donor from returning his donation, and there is no relationship to the donor's creditors with this inhibitor.

### **The second requirement**

#### **The effect of the debt gift to others**

The effect of this gift will be on three parties: the creditor, the debtor, and the third party (who is gifted to him). Its effect will be clarified in Islamic jurisprudence and then in the law through the following two branches:

#### **First branch**



### The effect of the debt gift to the non-debtor on Islamic jurisprudence

The Shafiaa, Hanbalis, and Ja`fari did not authorize the gift of the creditor to his debt to a non-debtor and their false void (1) because it is impossible for this third party to receive the debt from the debtor, while others sanctioned it by Islamic jurisprudence on conditions that guarantee to others the payment of the debt, and they have the following opinions:

The first opinion: the Hanafi audience

They authorized the gift of debt to the non-debtor on the following conditions:

1. The creditor orders the others (gifted to him) to receive the debt from the debtor, and to collect it as his representative (1)

2. If the creditor of others (the gifted to him) seized the debt.

3. The gift of debt to a non-debtor is valid in wills (2)

The second opinion: the Malikiyah audience

They authorized the gift of debt to the non-debtor on the following conditions:

1- A valid condition is: Certification of his gift to a non-debtor.

1. A condition of perfection, namely:

a. Paying the mention of the right or the document confirming the debt.

b. Combining the Gifted and Debtor (3)

Through the two advanced opinions, it can be said that the effect of the debt gift to the non-debtor has three parties:

The first side: Creditor (donor)

The creditor grants his inalienable right to the debt of a debtor to others without the full donation of this gift depending on the acceptance of the debtor. So, it is created and implemented against the debtor without this being dependent on his will.

The second side: The debtor

When the creditor gives his fixed debt to the debtor, this does not mean that it will be waived and removed, but rather remains committed to it towards others (the gifted to him) to whom he transferred the right to claim it. This debtor has no obligation to the creditor.

The third side: Others (gifted to him)

With the emergence of a true debt gift (the availability of its elements and conditions) it becomes valid to arrange its impact against others. But when will it be implemented against it? Answer: Based on the

advanced opinions that permitted the debt gift to the non-debtor, it is different from the conditions that must be met to enforce this gift to the gifted person.

1. An order issued by the creditor to the talented person ordering him to take out the debt as his representative.

2. Shedding the gifted creditor to him to receive the debt. This means enabling him and his assistance to collect it and shedding the debt that is made through his delivery of the debt bond so that he can claim it.

As for the Maalikai, stipulate the following for the validity the debt gift to the non-debtor:

1. Create a debt gift to the non-debtor, in the presence of the parties to the gift, who are the creditor, the debtor, and the third party (gifted to him), as well as the presence of witnesses to support this.

2. Handing over the debt or its bond to the third party (the gifted person) so that he can collect it.

The more correct of these two views, is the opinion of the Maalikis, because it was entrusted with the task of implementing the gift with its three parties. Because they are all responsible for it by imposing an obligation on each of them, so they must all attend and receive the others (the gifted to him) the debt bond.

#### **The second branch**

##### **The effect of the debt gift to non-debtors in the law**

As we mentioned earlier, the Iraqi and Jordanian laws have regulated the gift of religion to non-debtors in Article (607/2) and Article (560/2) of them, respectively. With reference to them, the following can be observed:

It is noted that they have organized the effect of the debt gift to the non-debtor in terms of this (the gifted to him) based on this view of the Hanafi jurisprudence and Maliki jurisprudence, where the Iraqi Civil Law stipulated that the arrest of others (the gifted to him) with the permission of the creditor The donor to be implemented against him and can benefit from it, but the civil Jordanian law had stipulated that the debtor pay the debt to others (the gifted to him) in order to implement it against him, without touching on the other conditions necessary to enforce this gift against others (the gifted to him), which can be said to be necessary as mentioned by Maliki jurisprudence, as it will collectively guarantee receipting the debt from the debtor, and not stipulating one of these conditions.

#### **IV. Conclusion:**

The following findings and recommendations include:

Firstly: Results:

1. Islamic jurisprudence recognized the importance of the debt gift, so it organized it into the gift section, and distributed it in two types: the debt gift to the debtor and the debt gift to the non-debtor. First,

the creditor will voluntarily drop his fixed debt with the debt of a debtor waiving it and the debtor possesses it and is not bound by it. As for the second, the creditor gives his fixed debt on the debt of a debtor to others, assigning it to him. So, this third party, which is called the gifted, has the right to either ask the debtor to pay or to cancel the debt from him. Similarly, the Iraqi civil law and Jordanian civil law did, as they organized the gift of the debt within the provisions of the gift contract, divided into two types. The two mentioned above.

2. Because the debt gift to the debtor is like acts of reward and drawing closer to God Almighty, as the creditor acquits the debtor of his possession by possessing it, and this is why Islamic jurisprudence agreed that it is permissible at all on restrictions and conditions. As for the debt gift to the debtor, they differed in its permissibility due to the inability of the gifted to receive the debt from the debtor, some of them prevent it. So, the reason is, and some of them authorized it on conditions and within conditions aimed at facilitating and mitigating this gifted him from collecting the fixed debt in the debtor's debt.

Similar to Islamic jurisprudence, the Iraqi and Jordanian laws have passed and permissible the debt gift to the debtor at all, while it authorized the gift of religion to the non-debtor within specific conditions, taking into account the different laws mentioned in terms of jurisprudence or the doctrine on which he relied on it, as the Iraqi civil law relied on Hanafi jurisprudence and adopted Jordanian civil law is based on the jurisprudence of Malikiyah, without their difference affecting their agreement to count the two types of debt. Both types of legal behavior arise with the sole will of the creditor without its emergence being dependent on the debtor accepting or not returning it.

3. Despite the agreement of Islamic jurisprudence on the emergence of the debt gift with the sole will of the creditor without that being dependent on the acceptance of the debtor or its non-repayment. But they differed on how its effects are arranged according to their difference in its types, whereas the Hanafi believed that the effect of the debt donation to the debtor arise if the debtor did not return it. Al-Malikiyah said that its effect is whether the debtor is accepted or not.

As for the debt gift to the non-debtor, its effect is arranged by the gifted receiving of the debt from the debtor by order of the creditor, and as the Hanafi said that, while the Malikis went on to say in the order of their effect when the debtor pays the debt to the gifted to him, and other jurisprudential conditions that must be met in order for the effects of the gift of debt to be of the two types mentioned.

Regarding the position of the aforementioned laws regarding the arrangement of the effects of the debt gift, they relied on the two jurisprudence mentioned above in regulating its effects, whether this gift is for the debtor or for others.

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