

THE DETENTION OF THE DEBTORS, AND ITS ALTERNATIVES: COMPARATIVE STUDY IN RELIGIOUS LEGISLATION AND LAW

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ABSTRACT: *Islam has permitted debt for people who need it. It is known that needy people only require debts. If one has a debt, he must fulfill it, according to the saying of God: "then let him who is trusted fulfill his trust, and let him be conscious of God, his Sustainer" because the non-fulfillment leads to a loss of trust among the people. God has initiated reconciliation to maintain the affection and affinity between Muslims, to eliminate hatred between them and eradicating the causes leading to it, and to reconcile between litigants. In the case of fulfillment, hearts will be clean and hatred will be removed. Nevertheless, in the case of the non-fulfillment of financial rights, Islam put means to fulfill these rights, including imprisonment, which is one of the means of pressure on the debtor. The detaining of debtors is not punishment, but it was found only as a means of ensuring the implementation of the obligation through forced execution to subdue the debtor and to fulfill his debt.*

Keywords: Legislation, Debtors

1. INTRODUCTION

Praise be to Allah who taught by the pen, who taught the human what he does not know. May Allah bless our master Muhammad and his family and companions and who follow his approach until the doomsday. The relationship between the debtor and the lender is financial rather than personal. Islam views the lender as a benefactor and helper to the debtor. Therefore, the debtor must repay the charity with charity and repay the debt as fast as possible.

There are two kinds of punishment: the first is the estimated punishment by the religious law (such as theft and murder), the second is the non-estimated punishment. In the second case, the guardian or the judge can estimate penalties, but the imprisonment does not depart from this framework. The Islamic law permitted the imprisonment to the rich debtor and prevented the imprisonment of the insolvent debtor. However, it opened the way for the judge to strive in the way of returning the financial rights of the owners, and knowing that the person is insolvent or not.

All legitimate rules take into consideration the principle of the responsibility of the debtor in his own money and not in his person. These rules respect human dignity, which should not be wasted for money. The question that should the insolvent debtor be imprisoned or not if he could not fulfill his debts, has aroused great controversy among the legal community.

The study deals with an important subject in civil transactions, namely, the detention of the debtors, and its alternatives: a comparative study in religious legislation and law. Thus, it is divided into an introduction, three main sections, and a conclusion. The first section deals with definitions of imprisonment, the debtor, the insolvent, section two deals with conditions and rules of the detaining. The third section deals with 'the detaining of insolvent and its effect

Third: Definition of the 'insolvent' in language and in terminology:

A - Definition of the word 'insolvent' in language: it is against the richness, and it is said to a man an 'insolvent' if face a financial problem.

B - Definition of the word 'insolvent' in terminology: (He

according to religious legislation and law.

Section One

Definition of Detention, Debtor, Insolvent.

First: definition of (detention) in language and terminology:

A - Definition of 'detention' in language: it means to detain a prisoner in custody, and 'detaining' is against the free leaving [2].

B - Definition of 'detention' in terminology:

In the Islamic jurisprudence: It is the obstruction of the person, and prevent him from acting by himself, whether in a house or a mosque or a dedicated place, or whether it was by a person or his agent.

In the law, it is a means of coercion and influence upon the debtor's will to carry out his obligation. Therefore, the convicted person is released if he fulfills the obligation. But, this execution of the sentence does not absolve the debtor from the debt. The detaining of the debtor is defined according to Law as: "restricting the freedom of the debtor by detaining him in places prepared by the public authority of the State by the legal principles and procedures." [4]

Executive detention is defined as "a means to force the debtor to fulfill its obligations by depriving him of his liberty temporarily". [4]

Second: The definition of the 'debtor' in language and terminology:

A - Definition of the 'debtor' in language: 'debtor' comes from 'debt'. It is said: debtor if he takes something from a lender.

B - Definition of 'the debtor' in terminology: (he who has taken a debt), it is he who is unable to pay the debt, or it is he who faced a financial problem and cannot afford, such as debt is fell due or the burning of money.

who was unable to pay his debt immediately). [4]

Fourth: The difference between 'detention' and 'imprisonment':

A - According to religious scholars:

'Detention' is used in the sense of imprisonment for a short period for questioning or verification of the matter. Nevertheless, 'imprisonment' is used in the sense of putting

a person in the prison for a long period, and large crimes and so on), for the following reasons:

1- The word "detention" is mentioned in the Holy Quran in only two verse: the first in the verse: "Take hold of the two after having prayed; and if you have any doubt in your mind, let each of them swear by God", [6]in the sense of detention for a short time for hearing the testimony of the witness. And in the second verse: And thus it is: if We defer their suffering until a time-limit set [by Us] they are sure to say, "What is preventing it [from coming now]?" comes in the sense prevention.

2- The word of imprisonment has been mentioned in seven places in the Holy Quran and all come in the sense of feast and threat, as the God says: "Said she: "What ought to be the punishment of one who had evil designs on [the virtue of] thy wife - [what] but imprisonment or a [yet more] grievous chastisement?",[6] and that when Joseph was put in prison for seven years, they used the word 'imprisonment', not the word detention.

B- In terms of situational law:

It is found that 'detention' and 'imprisonment' are in the sense of the penalty of imprisonment, which varies in length more than its kinds. It involves one meaning, which is the depriving of a person's liberty. 'Imprisonment' is the basic punishment for most crimes. It is used for any criminal who commits his first crime, commits a serious crime, and even commits a simple crime. In all these cases, imprisonment means the detaining of the person's liberty.[6]

Section Two

Insolvency and Detention: Conditions and Rules

According to the Islamic jurisprudence and secular law, when a lender wants to judge the debtor to compel him to pay the debt, these must be some conditions.

The Conditions of the insolvent debtor:

It is required the following conditions in the debtor to be an 'insolvent debtor.[6]

1. When his money is insufficient to meet his outstanding debts.
- 2 - When the time of debt repayment comes.
- 3 - The debt must be respected.

What proves the 'insolvency':

The insolvency shall be proved in several ways:[6]

- 1 – It is proved by confessing: It is one of the ways to prove a debt in Islamic law by the confess of the debtor. If a person committed himself to debt, there is no need for other evidence.
- 2- It is proved by a witness: It is also one of the ways of proving the debt, and it is considered as a proof before the judiciary in all incidents and facts
- 3 - It is proved by an oath: It is also a way of proving the debt, so the debt can be confirmed or denied by swearing in the name of God before the judge.
- 4 – It is proved through collecting information from experienced people, neighbors, friends, and those involved in treatment and traders with the debtor because they know his situation.

The rule of 'insolvent debtor ':

1. Whoever owes a property that is equal or more to the debt, he must pay his debt. If he refused, he will be imprisoned by a request from the lender until he brings the amount of the

debt. If he persists again and does not sell his money, the ruler can sell it and bring it back to the lender.

2 - If the debtor is imprisoned, he does not have the right to sell his property, but the judge who sells the property and divides its price as much as the debts. If the property is finished, he must be released.

3- If the ruler divided the property of the debtor among his litigants, it is not permissible to imprison him. The debtor is released and has to pay the rest of the debts.[6]

What should the judge leave to the 'insolvent debtor':

If the judge sold the property of the debtor for the sake of the litigants, he must leave with him what is enough to live with, such as the house he lives in, the means of traveling, and money to feed him. If the debtor was a merchant, the judge should leave for him enough money for trade.

Conditions of detaining the debtor according to the Islamic Law:

The detention of the debtor in the Islamic jurisprudence requires the following:

1. The debt should be proved by debtor's confession or evidence.
2. The lender or his guardian must ask the judge to imprison the debtor.
3. The debtor should be adult and sane (it is not permissible to imprison the young or the insane).[7]
4. The time of the debt should be run out.
5. The debtor can pay his debts.
6. The debtor was a procrastinator.
7. The debtor shall be a non-parent.[7]

Conditions of detaining the debtor according to the positive Law

1. Refrain from the debt repayment.
2. The debt has proved on the debtor's side.
3. The confirmation of the debtor's ability to paying.
4. The detention order shall be final.
5. The debtor was a procrastinator.
6. There is no impediment to imprisonment.

When could the debtor be released from custody:

The debtor shall be released from imprisonment by one of the following: insolvency, the litigant forgives the debtor, the fulfillment of the debt, the consent of the litigant after the debtor's leave from the prison. If the lender persists on the imprisonment to the debtor, and the debt is not fulfilled yet, the ruler can sell the debtor's property for the payments and released him from prison.

The legality and wisdom of detention:

The saying of God "Take hold of the two after having prayed; and if you have any doubt in your mind, let each of them swear by God". It means the detention for a short time for hearing the testimony of the witness. This sense gives legitimacy.

Some scholars take the proof from the prophet's act (peace be upon him) when he detained a man in charge and then he released him. This is the precautionary detention. It is proven that the second caliph Omar Ibn Al-Khattab had a prison, the same for Osman, and Ali (may Allah be pleased with them).

The wisdom from the detention is to be used as a means for the forced implementation (in the case of the replacement of the fine with imprisonment), as a means of coercion (to

induce the debtor to perform its obligations), as a precautionary means (from the fear of the debtor's escape or the smuggling of his money).[11]

Section Three

The Detention of the Insolvent Debtor and Its Effect, According to Religious Legislation and Law

Islam has emphasized the principle of "fulfilling the debts", and shows the importance of this act in establishing trust and facilitate cooperation among Muslims. It considers it as a legitimate duty fixed in the debtor's side unless he fulfills it or forgiven by the lender. Some of the religious scholars have permitted the detention for the debtor, but others did not. However, the idea of detention remains a means of obtaining the right of the lender through coercion and enforcement. Even those who supported the idea of detention have put a set of specific conditions. They differentiated between the insolvent debtor and the rich debtor, and between the ability and the disability of the debtor. Detention is a restriction on the freedom of the person, so the legislation tends to narrow its scope in a way to facilitate for the debtor to work and to earn enough income and pay its financial obligations.

The rule of detaining the poor debtor:

A - The rule of detaining the poor debtor according to the Islamic jurisprudence:

Those who are unable to fulfill their debts are not required to do so, and it is prohibited to detain them, and they must be given enough time to fulfill their debts. It was narrated that there was a man during the reign of the Messenger of Allah (peace and blessings of Allah be upon him) lost his money and had many unfulfilled debts. The Messenger of Allah (peace be upon him) said to the debtor's litigants: (Take what you found only, you will not get anything more than that).[12]

Therefore, the right of the lender is only to claim his right by reconciliation or by bringing the case to court for a judgment compelling the debtor to fulfill his debt in the case of his ability to fulfill the obligation.[12]

It was narrated by Abu Hurayrah (may Allah be pleased with him) that the Messenger of Allah (peace and blessings of Allah be upon him) said: "Delay in payment by a rich man is injustice, but when one of you is referred for payment to a wealthy man, let him be referred".[12] Al-Shaafa'i (may Allah be pleased with him) said: "If the debt is proven on the debtor, he must sell what he has, so that he is not imprisoned, but if he does have anything for selling, he has to prove his statue as an insolvent debtor. It is stated in al-Mabsoot (The man is detained for every debt except the son's debt to the parents or some grandparents. But, for the debts of others he is detained because he has become unjust).[13]

B - The rule of detaining the insolvent debtor in law:

The judge can enforce the debtor to pay his debt by one of the following means: imprisonment, detention, forced sale. According to Abu Hanifa, the debt remains until the debtor fulfills his debts. But, if it is proved that it is insolvent, he should be released. This opinion indicates that imprisonment is merely a means of compulsion to fulfill the debt and not execution on the debtor.

The Arab Charter on Human Rights [22] states: "it is not allowed to imprison a person who has been proved as insolvent debtor from a contractual obligation". It also stated

in the International Covenant on Civil and Political Rights [11]: "A person shall not be imprisoned for his inability to fulfil a contractual obligation".

Article (41) of the Implementing Law of Iraq states that the insolvent debtor should not be imprisoned in the following cases:

First: If he does not complete 18 years of age or over 60 years of age.

Thirdly: If he was from the assets of the lender, brothers or wives unless the debt is an expense.

Fourthly: If he has a salary or a wage from the state or the socialist sector.

Fifth: If the debt is required or fell in any way.

The Iraqi law allowed the detention under [42] of the Iraqi Execution Law:

First: If the judge was convinced that the debtor can fulfill the debt or part of it but he did not show an appropriate settlement and rejects the settlement offered by the judge, he may be imprisoned.

Second: If the debtor stops fulfilling the settlement agreed upon, he may be imprisoned.

The period of the imprisonment for the debtor

There is no explicit provision in Islamic law that limits the period of imprisonment of the debtor, which opened the way for the multiplicity of jurisprudential opinions. Some jurists believe that the period of the detention in debt is not limited and the judge who defines it according to his discretion and according to the difference of persons, time and place, and what is the debt. This assures the fact that the penalty of detention in debt is only to enforce the debtor. (they see that the judge is detaining him as far as he sees).[21]

On the authority of Imam Abu Haneefah, the period of imprisonment is two or three months, and it is narrated that it is four months to six months. The predominant opinion is that there is no limit to the period of imprisonment, but rather that he should be imprisoned until he gives people their rights, or if the judge finds that he has no money but after a while, they found that he denied money to hide the rights of the people.[18]

In the Iraqi Execution Law, [15] specifies the maximum period of imprisonment of the debtor for (4) months, the text states: (The period of detention may not exceed four months).

The effect of imprisonment on the debt in jurisprudence and law

It is agreed in all Islamic doctrines that the imprisonment of the debtor does not abate the debtor from the debt, no matter how long the imprisonment last. Rather, his debt remains except by fulfilling or aborting or for any of the legal reasons.[15] In law, the imprisonment of the debtor is not a penal sanction but it is merely a means of guaranteeing the implementation of the obligation through forced execution to enforce the debtor to fulfill his debt.[21]

It is stated in the [45] of the Iraqi Execution Law[23]: "The imprisonment of the debtor does not invalidate the debt and does not affect the right of the lender to request the confinement on the debtor's money whenever he gets the money." We find that the law is compatible with Islamic jurisprudence in that imprisonment does not affect the debt

nor lead to cancel the debt from the debtor.

Section Four

Alternatives to the Detention of the Debtors

The following suggested alternatives have economic and social importance. These alternatives will help the lender to obtain his rights, which will help to continue his work as he receives part of his debts. Besides, these alternatives will help the debtor in paying off his debts. All the alternatives that we will mention have come from Islamic jurisprudence. They and can be divided into two parts, the first is alternatives in the judiciary, and the second is alternatives related to the lender:

First: alternatives in the judiciary

The contemporaries used the term "debt settlement" and meant (reducing part of the debtor's debt or dropping it all)[23].

A - Zakat: the judge, as a part of the system of the state, can get out some funds from the collected money to pay off the insolvent debtor's debts.

The Islamic legislation imposes rights to the debtors from the money of Zakat if they were suffering from a financial problem, even if he is a business owner. One of the zakat banks, as stated in the verse: "The offerings given for the sake of God are [meant] only for the poor and the needy, and those who are in charge thereof".[23]

'Those who are in charge thereof' are in three types, the first type: who has a debt for the interest of himself, the second type: who is in charge from reconciliation between Muslims, and the third: who is in charge from because guaranteed debt.

B - Credit: Credit is to loan, and this is permissible according to the Holy Qur'an, the prophet way, and the agreement of scholars, for the Almighty said: "O YOU who have attained to faith! Whenever you give or take credit for a stated term, set it down in writing".[23]

The loan is lawful to the lender and allowed to the debtor according to the speech of the Prophet: "If anyone relieves a Muslim believer from one of the hardships of this worldly life, Allah will relieve him of one of the hardships of the Day of Resurrection. If anyone makes it easy for the one who is indebted to him (while finding it difficult to repay)".[23]

C. Repayment: The judiciary can repay the debt of the insolvent debtor from the social security institutions, to remove the damage from the lender and the debtor. It is also possible to provide work for the insolvent debtor suitable to his or her capacity since this debtor is in need to work. One of the issues that traders and creditors generally deal with is to accelerate the deferred debt of the debtor, in return for dropping part of it. This issue is called by the scholars as (drop off to hurry).[19]

Al-Jassas said: "It is permissible for the lender to hasten the payment, in turn, to put away part of it, but without any condition".

Second: Alternatives that related to the lender (lender procedures):

Islamic jurisprudence has regulated the insolvency of the debtor by an economic and social organization that protects the rights of lenders and ensure the facilities to the debtor, through the following:

A - Postponement, or extension of time, waiting: The Almighty said: "If, however, [the debtor] is in straitened

circumstances, [grant him] a delay until a time of ease". This means (if) the one, from whom you want to receive money, was insolvent debtor, you have to wait till he becomes able to pay. The Prophet (peace and blessings of Allah be upon him) said: "He who gives respite to someone who is in straitened circumstances, or grants him remission, Allah will shelter him in the shade of His Throne, on the Day of Resurrection".[18]

B- Partial waiver: it means that the lender and the debtor are reconciled to waiving some of the debt. Evidence of that is the action of the Prophet (Peace and blessings of Allah be upon him) when he refers Kaab Bin Malik by his hand to waive from half of his debt to a poor man. This is called the waiver agreement because the right holder has waived part of his right to the defendant.

C – Total leaving or complete waiver: it means that the lender waives the total debt to the debtor. Islam has called the rich people to what is better than waiting for the insolvent debtor, as God said: and it would be for your own good - if you but knew it - to remit [the debt entirely] by way of charity".[23]

It comes in the encyclopedia of jurisprudence that a complete waiver is needed because it is often a kind of charity. It often involves the removal of the debt from the insolvent debtor. Even when the debtor was not very poor and can pay, the waiver process increases the respect between the lender and the debtor.

CONCLUSION

From the above discussion, we conclude the following results:

- The Muslim jurists and the laws agreed that the debtor could be detained if he delays the paying with his ability to fulfill. But, the insolvent debtor has the right to have waited, and the amnesty is better than detention.

- Fulfillment of the debts is not obligatory in the case of the insolvent debtor. Even the detention is not a punishment but it is a means of pressure and coercion to force the debtor to fulfill the debts, or as a precautionary means. Many pieces of evidence assured that many debtors fulfilled their obligations out of fear of detention.

- Detention is considered as a restriction for the freedom of the person, so the legislation tends to narrow its scope, to preserve the dignity of the person, and even to facilitate the debtor to work and to earn enough income and meet its financial obligations.

- The debtor may be detained only at the request of the lender. This detention shall be for a short period for questioning or verification of the matter, and it should be in small cases only. The prison shall be for long periods and in large crimes.

- The law is agreed with Islamic jurisprudence that detention is a penalty and the judge who determines the duration of the sentence if it is necessary. the detention does not affect the debt and does not lead revoke it from the debtor.

- As for the period of detention, the Islamic law did not specify a fixed period for it, but it was left to the jurisdiction of the judge. Some jurists mentioned that it was 40 days to six months. The law sets the limit of detention for four

months.

- If the judge decides to detain the debtor for logical reasons, he must take into account the humanitarian causes of justice for both parties (the lender and the debtor together), so that detention does not lead to the social injustice that may not be remedied.

- The Islamic law has created alternatives to the imprisonment of the insolvent debtor that undoubtedly benefits the two sides (the debtor and the lender), such as credit, repayment, delay, partial waiver, and removal or complete waiver.

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