

Alienation of a Property in Shiite Jurisprudence and Positive Law of the Islamic Republic of Iran

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Received: July 11, 2016 Accepted: July 27, 2016 Online Published: October 30, 2016

doi:10.5539/jpl.v9n9p8

URL: <http://dx.doi.org/10.5539/jpl.v9n9p8>

Abstract

The concept of alienation is a condition for consideration that has many interpretations and in jurisprudence, especially Shiite jurisprudence. Civil law has no reference to alienation of property a condition for consideration or or dealers. By commenting on legal provisions, some few jurists have noted “non-belonging to a third party” as a general condition for the accuracy of transactions. The impact of alienation in the correctness of contracts and other financial possessions belongs to certain object or an indirect possession as well as the absence of clear legal carrier to verify this requirement has signified the importance of explaining the provisions, the position, and the procedure of the subject’s involvement in the correctness of financial seizure. From the perspective of jurisprudence, lack of reasons preventing possession by others for the correctness of a transaction results in the fact that the necessary alienation in each instances of this discussion requires a particular reason; in the absence of such reason, the owner’s seizure becomes effective. This article tries to explain ownership, the process of transfer, and its extinction at first; then, it reviews alienation (literally and legally), its history, the conditions for alienation in Shiite jurisprudence in Iranian positive laws.

Keywords: ownership, transfer, extinction, alienation, condition of alienation, object, Shiite jurisprudence, Iranian positive laws

1. Introduction

Considerations should be possessible. Some scholars believe that considerations should be a property of parties and others do not regard this condition as a prerequisite an as a condition for correctness of the contract. Therefore, parties of a sale contract should be the owner of the object or the the representative of the owner without any restriction. The restrictions may be classified in two groups:

- 1) Restrictions related to the parties.
- 2) Restrictions related to the consideration.

In the first case that relates to the parties of a contract, the basic rule states that every person can occupy his own property in any way he likes and nobody can prevent his occupation except in accordance with law. Thus, parties of a contract must be either the owner or allowed to occupy under titles such as executorship, wardship, delegation, and so on. In the restrictions related to the parties, it is discussed about the conditions for parties, the person who performs the act must be sane in mind, of legal age, and capable of forming, a decision. Article 345 of the Civil Code stipulates:

“Besides being legally competent, the seller and the buyer must be entitled to take possession of the property or its value.”

The remarkable issue is that parties’ non-ownership does not terminate the contract because the seller or buyer is either permitted to do the transaction (that the contract is correct) or concluded the contract regardless of the owner’s satisfaction (that contract is not terminated but some provisions become ineffective) unless the owner confirm it. For instance, the contracts concluded by an insolvent are ineffective. Article 212 of the Civil Code points out that a transaction between people who are not of age, nor in their proper senses nor mature is invalid because of their incompetence. Article 247 of the Civil Code notes that contracts regarding the property of others, except those entered into by natural guardians, executors or legal representatives, are not binding even thought the owner of the property agrees; therefore, ownership is the basic terms of a contract and it terminates the

contract only if seller rejects the unauthorized transaction and the owner does not delegate. In the transactions related to the object of consideration, all jurists have presented the example of an endowed property; this restriction relates to the object that has not the capability to be transferred unless according to the terms stated in Article 349 of the Civil Code or the sale of a property that has another beneficiary such as a mortgaged property. This case, restriction with respect to the property, is discussed in alienation when the property can be possessed. It can be concluded that ownership is an addition and relationship established between the person and the property. With respect to the relationship, they are studied as ownership and possession.

2. The Concept of Ownership

Ownership is an arbitrary relationship property on the one side and the person (legal or natural) on the other side on which basis the owner can occupy the property in any rational way. Ownership is just a rational arbitrary relationship. Scholars set the ownership as the relation between properties belong to a person and the property; the relationship is the source of his domination over the object. The assigned relationship is the very domination and ownership is the relationship between the person (owner) and the property (possession) that enables the person to employ the property in any way he likes. However, the relationship prevents other to occupy the property. In fact, the relationship is a social rule; ownership is one of the first rules accepted by society and promoted in in the community. Thus, ownership is the relationship between the owners of a right to the possessors. Ownership is the most complete right one has in relation to his properties. According to the hadith of the Prophet, "الناس مسطون على أموالهم", every possessor can have the fullest domination on his property. The ownership right has been mentioned by jurists as the condition for parties; for the fulfillment and transfer of an object, the parties should be possessor and capable of forming a decision; otherwise, the contract is ineffective according to the ideas of most famous jurists (Najafi Al-Khansari, 2003, pp. 320). In terms of possession or the relationship between the person and the properties, it is stated that the object of consideration should be possessed de facto by a certain person. It should have a possessor because according to the definition of a transaction, sold object should be excluded from the property and the price is owned by the other party. In the case of non-possession, the subject is rejected and the contracted has not been concluded. This term has not been noted as an independent condition by Sheikh Ansari as he does not say "يعتبر فيها الملك" to convey the proprietary worth as a condition. He only refers to avoidance conditioning to possession; consequently, he has regarded the the condition of possession as grading comment. One may argue that there is no need for this term by stipulating the state of property. It shall be answered that property state is not synonym for possession or property state is not an inclusive general to cover the meaning of possession. The relationship between these two is intersection of sets. Hence, famous jurists have not regarded possession as an independent term in the consideration; they just have not noted the possession for things without a known owner that may be possessed by any private citizen; the trade of such objects is invalid due to lack of possession (Muhaqqiq al-Hilli, 2004). This matter is discussed in Articles 23 to 27 of the Civil Code. Some jurists question regarding possession as a term in consideration. Jurists like Muhaqqiq Isfahani and Akhond Khorasan (in comments to Al-Makasib) not only reject possession in consideration but also reject the constraint 'avoidance of possession'. Imam Khomeini has also rejected conditioning of possession (Hasani, 2010). As a result, the relationship between owner and the property is arbitrary because some concepts have external implications in the real world like human domination on him. A man can talk, move his hands or feet, open his eyes, close his eyes, and control his organs when he likes. He is also dominated on his mind to some extent. Thus, human domination on mind and body is real and it is not stipulated by social relations. On the contrary, some concepts are created by mind and social relations and they have no external implication in the real real world. Laws and regulations do's and don'ts, and the concept of ownership are included in the later category. Therefore, the argument that ownership is a relationship between property and the owner on which basis the owner can occupy the property in any rational way he likes is a contract accepted by the society. It is clear that this fact has no external reality in the world; in this regard, any transaction requires a series of written and verbal formalities and a few sheets of paper and it is terminated through another formality.

3. Transferability

One condition having been introduced for considerations is its transferability. A transaction requiring the transfer of property should have a transferable object it is either a contractual transaction or a possessory transaction because the result of such transaction is the ownership of transferred object. The object of transaction has to be alienable and other party shall involve in its ownership. Thus, a property is alienable when it has owner but it has no claim. When the object is not transferable, the commitment is terminated and the action is irrational. The inalienable properties are public assets and endowments unless the permission has been issued by endower. Accordingly, the object of transaction is transferable only when it is alienable.

4. Literal Meaning of Alienation

In Persian and Arabic, alienation means 'free' (Farahidi, 1993). Alienation means released and freed; in this regard, the worlds alienated is also used for a released slave. It also uses for divorce. In dictionaries, there are some derivations like alienation of language, alienation of hands, alienation of horse, alienation of face, and alienation of property (Firoozabadi, 1992). Therefore, an property is called alienable because the owner can occupy it in any way he likes and he requires no other document. He can do any ownership occupation he intends.

5. Legal Meaning of Alienation

In the legal terms, alienation is used on the contrary to conditional while meaning the full domination. In other words, the owner is free to occupy his property independently without the need for issuance of permission by another party (Madani, 2004). Consequently, alienable property in law is a property that has no other beneficiary in participation to the owner (Jafari Langroodi, 1999).

6. The Background of Alienation

In Al-Makasib, Sheikh Ansari states, "و اعلم أنه ذكر الفاضلان و جمع، ممن تأخر عنهما في شروط العوضين بعد المكلية: كونه طلقاً" (Ansari, 1997). One should know that the inventor of this condition is Muhaqiq Awal and Allameh Hilli; then, some later jurists like Shahidain have followed him as they noted alienation after ownership. They concluded that the property has to be alienable in addition to being possessed by owner; it means that it should have the transfer capability; then, other conditions have been derived from this conditions.

7. Alienation from the Perspective of Jurists

As noted, alienation of an object of transaction refers to a state in which the owner has full ownership domination on his property and it is free. The meaning of full domination is the permission of independent occupation without the need of another party. In this case, all occupations and transfers by the owner are correct and effective; otherwise, trade and transfer are terminated and ineffective. Some jurists, has regarded alienation as an independent condition in addition to other provisions including Shahid Thani in "The Beautiful Garden in Interpreting the Damscene Glitter" syas, "يشترط في المبيع ان يكون طلقاً" (considerations shall be alienable in addition to being possessed) (Al-Jubai al-Amili, 1997). Alienation has not been regarded as an independent condition by most jurists; they merely issued possession as a condition of correctness. They have regarded as full ownership as concluded issue. They introduced the principal items preventing full ownership as conditions that have been regarded as alienation terms and they knew alienation as their result; the terms are endowment, mortgage, will, etc. (Hasani, 2010).

8. Sheikh Ansari's View about Alienation

Sheikh Ansari presented the condition of alienation in the chapter discussing the terms of considerations; he explains:

"و المراد بالطلق، تمام السلطنة على الملك بحيث يكون للمالك أن يفعل بملكه ماشاء ، و يكون مطلق العنان في ذلك. لكن هذا المعنى في الحقيقة راجع إلى كون الملك ممّا يستقل المالك بنقله و يكون نقله ماضياً فيه ؛ لعدم تعلق حق به مانع عن نقله بدون إذن ذي الحق، ... فمعنى «الطلق» أن يكون المالك مطلق العنان في نقله غير محبوس عليه لأحد الحقوق التي ثبت منعها للمالك عن التصرف في ملكه، فالتعبير بهذا المفهوم المنتزِع تمهيداً لذكر الحقوق المانعة عن التصرف ، لا تأسيساً لشروط ليكون ما بعده فروعاً، بل الأمر في الفرعية و الاصله بالعكس. (Ansari, 1997) "

The meaning of being alienable is that the owner has a full domination on his property so that he is unbridled to do what he likes; in other words, the owner has a full and unbridled domination on his property independently. In this case, his transaction is correct and effective because the transaction contains no other transferred right without the permission of its owner. Therefore, in the condition of a sale contract, the owner can independently sell the object of sale and need no permission by another person. In this way, the occupations and transfers are effective and correct without referring to anyone and satisfying him. The independency in occupation or authority implies that the owner can occupy his property or he has the permission, capability, or correctness. The alienation condition refers to the fact that the sale contract shall be correct on the behalf of owner; it is a result although it has no result since it is an axiom. That is to say, in the conditions for correctness of a sale contract, correctness of sale is impossible because cause and effect becomes one. Thus, this condition differs from other conditions. Other conditions like the being a property, the knowledge of considerations, the ability to submit are all independent conditions in themselves. They are mentioned in reasoning literature in the same titles; thus, they are basic doctrines. Each basic doctrine results some corollaries. Nevertheless, this condition (alienation) is not a condition in itself and independently that allow us rejecting the sale of an endowment. This condition is indeed the exploitation of each particular right (the right for mortgagee, the right for beneficiary of endowed property ...)

that prevents the occupation of owner. For example, the freedom of pledge and alienation are resulted from the disposal of the rights. In other words, the absence of restriction is a condition; alienation is not a condition. To be precise, the object of transaction has to be non-endowment, non-pledged, and so on; these conditions convey the concept of alienation. Accordingly, alienation signifies that the owner is free in the possession or enjoyment of the real property with the assurance that the possession will not be disturbed by superior title. Therefore, this abstract expression is a context for legal statement that prevents the possession of owner not foundation of a major condition. The principle is non-endowment, non-pledged, non-mortgage etc. they are restrictions preventing the correctness of a sale contract and their absence is condition; all these absences are gathered and form a condition called alienation. However some misunderstand it as a condition with the same effect as other conditions. Consequently, most jurists questioning this condition (alienation) have explained only the three known rights (endowment, mortgage, and motherhood of a child) and have no reference to other rights. Then, they articulate the rights for a criminal servant while they have no disagreement about selling him. With these lines, the condition of 'being alienable' has not been accepted by Sheikh Ansari and many contemporary jurists. They regard alienation as a requirement of possession not a condition for separation of possession.

9. Imam Khomeini's View about Alienation

After the requirements for possession, some jurists have argued alienation as a condition in the transactions and noted it as an independent condition like other conditions of the considerations (Muhaqqiq al-Hilli, 2004). They have used two meanings of full possession (Najafi Al-Khansari, 2003) and full domination for alienation. They believe that the object of trade should be owned fully and has no dependency. It seems the definition is not comprehensive because it does not contain contract of buying an object in credit and selling it to a lower price in cash while this type of contract is correct but does not include full possession. Imam Khomeini has excluded full domination from the conditions of consideration and he has regarded it as condition for parties to a contract (Imam Khomeini, 2000). Sheikh Ansari regarded alienation as the state of absence of restriction for sale and as a condition for absence of restriction. Imam Khomeini questions this idea and argues that 'condition for absence of restriction' is an independent term; if one regards it as a condition, it will become a non-existential affair while conditions are existential obligations. Non-existential affairs can never effect on existential affairs. Conditions can be effect in two terms: a condition in the causation of a cause or in the capability of a capable. If alienation is regarded as the absence of restriction, a non-existential affair cannot interfere and influence on an existential affair. If one looks upon the stipulation of lawgiver (meaning that the existence of conditions and properties are due to stipulation of lawgiver), the cause of nullification of affair rounds between stipulation of absence of restriction and stipulation of restriction, both will be in opposition. Inevitably, one should be preferred over the other one while such preference is not real (ibid: 119). If the rights and concepts implied from alienation (such as mortgage, endowment, etc.) are regarded as restrictions independently (not as a new condition or condition of absence), the sale is questioned with respect to the restrictions. The sale should be empty of these restrictions to be regarded as a correct sale. Consequently, Imam Khomeini has not regarded conditioning of alienation as an independent condition. He only explains the rights whose presence prevents the conclusion of the contract freely. Some of the rights are endowment, preemption, will, mortgage, etc. These particular rights are known as the restrictions to full possession. If the committed property is affected by one of these rights, their sale is terminated because it has been inalienable (Hasani, 2010).

10. Alienation in Positive Law

There is a general rule among jurists that buyer possesses the object and seller possesses the price due to a sale contract (Katouzian, 2015). Therefore, the object of sale and price (or the commitment subject) should be free; the meaning of free here is the state in which occupation for possession is permitted and there is no restriction. In legal system of Iran, alienation has also been used on the contrary to seizure; seizure signifies any property forbidden for transaction due to a cause (Katouzian, 1992, pp. 157). Since the object of sale should be salable, there are two important causes of prohibition for trade and transfer in the positive law: first, legislative ban and second, belonging to another. In addition to the cases whereby individuals can nullify a contract, according to Article 348 of the Civil Code, "The sale of something of which the sale or purchase is by law forbidden ... is null and void unless." In order to maintain the common properties, or public order, public sanitation, rules of some countries have nullified the buying and selling some properties.

- 1) A sale contract may be terminated because some assets belong to public and they cannot be possessed by individuals such as roads, streets, bridges, public squares, and national parks (Articles 23 to 27 of the Civil Code). In this regard, it is said that the object of sale should be free.
- 2) The owner's intention can make a property inalienable for a specific time or always by seizure of the property.

A telling example in this regard is Article 349 that stipulates, “The sale of property that is religious endowment is not valid unless there is a dispute among the beneficiaries in such a way that there is a fear of bloodshed or of the destruction of the endowed property, and except in the cases provided for in the Chapter relating to Endowed Property. Therefore, the legislator prohibits the mortgager from occupation of the rights related to the mortgagee and its effectiveness is suspended to the permission of the mortgagee. This right prevents the mortgager to transfer his property easily.

3) Preserving public interests may require that government prohibits buying and selling some objects permanently or temporarily such as the prohibition of selling antiques to individuals (Article 9 of Law for Maintenance of National Assets), the prohibition of selling drugs (Article 5 of Law for prohibiting poppy cultivation and the use of opiates) buying and selling warm weapons (Article 43 of The Law for Punishing Contraband (1933) (Katouzian, 2015).

The important and delicate point in this field is using law from the word ‘legitimate’ in Article 215 (“The object of a contract must be capable of being owned and must embody some reasonable and legitimate advantage”) while Article 348 of the Civil Code have used the word ‘law forbidden’. The decline is not questioning in expression because the two words are not equivalent in the popular culture and they are not used in scientific and legal texts. Some scholars of law believe that authors of the Civil Code have intended not to announce the prohibition of all trades having been prohibited in religion according to jurists’ books. Hence, they have not used the word ‘legitimate’ and have expressed their idea by mentioning ‘law forbidden’. In the adjustment of the chapter related to obligations, they have used the word ‘legitimate’ because jurists’ books have not a particular chapter titled as obligations. However, it is not easy to ignore this expression (Emami, 2012). The general conclusion of the ideas presented by legal experts is the fact that alienation has been used on the opposition to seizure; the properties that have been forbidden from being sold or bought due to prohibitions stipulated by legislator or by their belonging to others. As agreed by all jurists, the object of obligation should be so that it does not prevent the conclusion of sale contract freely because the transfer of sale object is a condition for correctness of sale contract (Imam Khomeini, 2000).

11. Credit Transfer or Actual Transfer

One of the characteristic of sale contract is the state of being possessory or commutative transfers. Possessory contract sale implies when the transfer is performed by credit or legally; in communicative transfer, the sold object is transferred to the buyer by the seller in exchange for the price. In other words, the transfer is fulfilled by offer and acceptance and it is not depended on another affair such as submission of the sold object to the buyer unless an element is regarded as transference part due to a reason. For example, submission of object is a condition in forward sale. Possessory state of sale contract in Islamic law and the Civil Code has been accepted as an axiom. It is a new concept in European laws and it has not been accepted by some countries (Katouzian, 1992). Since the sold object may be entitled to a right or not (According to Article 305 of the Civil Code), one may doubt that the obligation is set only for seller to submit the object to the buyer, but no certain object is delivered to the buyer at the time of concluding the contract. In order to fix this issue, jurists believe that it refers to a certain object that can be transferred at the time of concluding the contract (Tabatabaei Yazdi, 1999). In this case, some believe that capability and susceptibility are the subjects of possession; however, some has regarded possession as a statement or assumption. It is reasonable to argue that sale contract causes possession in all cases. Possession is fulfilled due to the contract and the conditions for determining the extension are emerged later; hence, fulfillment of the condition (determining the extension) does not need a supplementary cause. With this interpretation, possessory contract can be a type of contractual agreement that has been created by determining the general extension by possession obligee. In any case, sale contract is effective in possession and general sale can be called a possessory contract (Katouzian, 1992, pp. 35-36). Although this definition contains many instances of sale (especially when the object is created in future gradually), it seems it mixes possessory contract and contractual contract and eliminates the conventional classification of possessory contract and contractual contract. Financially, possessory attribute is limited to certain sale contracts. Some researchers state that the possession performed by parties in a sale contract is arbitrary the same as personalities and relinquishment that do not require the presence of an external reality in the external world. In this view, the transaction containing the concept of sale is performed between two financial concepts. Due to the multitude of instances, general property is excluded from the subject of credit and this financial transaction (that disturbs the relationship between seller and buyer in relation to object and price) should not be misunderstood with location movement of the object (that is real and requires a special and certain subject). Sale contract causes credit transfer not real transfer (Khoei, 1991). In this manner, general sale can be regarded as a multitude of instances. Despite all disagreements about the definition of sale contract, it is conveyed that from sale contract that it is

exchange of two assets. If the consideration is money, it is called trade; this description distinguishes sale from free contracts. Therefore, if possession is not the exchange for consideration, it cannot be called sale; if the condition is transfer of a property to another person free of charge, the condition is void and nullifies the contract unless other provisions of the contract imply that the parties have intended another type of contract. In this case, just application of the title 'sale' does not cause ineffectiveness of the contract with respect to the principle of 'contract follows intention' and the general terms for correctness of a contract and transaction. Thus, it should be noted that intention to conclude another contract requires reasons since it is contrary to the appearance of the statement (Tabatabaei Yazdi, 1999). Consequently, transfer of the property is a condition in sale contract, transfer of the object is arbitrary not real, and location based. Hence, if the object of sale or the equivalent price is a certain external reality, the possession is transferred immediately after the conclusion of the contract to the buyer by seller. In this regard, sale contract is called possessory contract. If each other sale objects is not a certain object and they are entitled to a certain right, the sale contract is contractual. In general transactions of certain objects, there is a disagreement among legal experts with respect to the time of ownership by the buyer. Some believe that the ownership is fulfilled for buyer at the time of concluding the contract (Emami, 2015). Others believe that ownership is an arbitrary relationship between a person and an object. Therefore, ownership cannot be imagined for a uncertain object but a real right is fulfilled for the buyer in relation to a certain collection (Shahidi, 2011, pp. 33).

12. Conclusion

Consideration or subject matter of a sale refers to the assets or objects having the capability to be price or object of a sale contract. Each asset can include liability, interest, action, or right. In order to have the qualification of being traded, considerations should have some features of assets including proprietary worth, ownership capability, alienation capability, submission capability, and being certain. Proprietary worth signifies the conventional or religious value of sold object. In positive law, tradability is noted as attribute of proprietary worth. Second, condition is ownership; in this regard, most jurists pay more attention to the nature of ownership conveying the occupation of the parties to a contract, rather than paying attention to the relationship between owner and the object that is the nature of possession. In addition to proprietary worth and being possessed by a certain person, the objects set as the subject of obligation have to be alienable. Alienation refers to the state in which owner have full domination on his own property and require no need by others to occupy it. Most jurists including Imam Khomeini have not regarded alienation as an independent condition like other conditions of consideration. In this regard, they have articulated just some rights (endowment, mortgage, and preemption) that their presence prevents correctness and conclusion of a sale contract. The fourth condition for consideration is the submission capability. The seller should be able to submit the subject of obligation at the appointed time. It is assumed for customer to have the capability to occupy the subject of sale contract in exchange for the received object. Finally, the fifth condition is determinacy of the considerations, seller and the buyer should have a correct idea about the subject of their obligations; however, general and brief knowledge of the nature and attributes of the obligation subject is enough for correctness of the transaction. Boundaries and limitations of the object, its amount, and its nature should be determined for the parties of the contract in every transaction. Here, customs and reason play important roles and cover the inclusion and boundaries of the considerations. Therefore, if one of the conditions is not met in the contract timely, the contract is terminated and ineffective due to the absence of the condition.

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