

Reveal and Conveyance in Unauthorized Sale

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Abstract: Unauthorized sale is one of important issues on subject of sale and given that this sale integrity depends on permission, it is particularly important to describe permission status in unauthorized sale. In Fiqh (Religious Jurisprudence) terminology, sale is defined as transferring the object of property from one person to another, with Known return and parties' consent (Sharh-e Lame). Unauthorized sale is one lacking element of owner permission. Instances of such a sale include usurped sale or sale without owner permission, fool sale and poor sale, in all cases of which sale is accurate and operative only by the owner permission. Permission takes different forms such as explicit permission, implicit permission and present witness. Islamic jurists have viewed unauthorized sale differently. Some attribute absolute integrity to unauthorized sale; a group regards it void; and others enlarge upon between sale and buying. Many scholars believe that unauthorized sale is accurate but with suspending integrity; this suspension and unauthorized sale reach certainty and perfect integrity, respectively, only through subsequent permission by owner. Permission status in unauthorized sale is perceived differently by different Islamic jurists because some argue that permission is an indication (revealer) in unauthorized sale, that is, as soon as the sale contract is concluded ownership is created but its rule is not revealed without permission. On the contrary, others believe in conveyance, considering permission as conveying. They argue that ownership is created after giving permission, not upon contract conclusion because a contract consists of elements without all of which it is not effective and operative.

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1. Introduction

Primarily, it is necessary to provide some definition of unauthorized sale, permission and its effects on such a sale and, next, to deal with permission meanings, conditions and different comments on it.

In an attempt to define unauthorized sale, Fiqh-related and legal texts provided definitions that are identically interpreted but with a bit negligence, which reads "A person deals for another or with his property without being the latter's agent or being authorized by him."

An unauthorized sale may be either possessory or promissory; possessory unauthorized sale takes place when a person sells another's property to other person without the owner's permission, and promissory one takes place when a person promises to do something for the other party on account of a third party.

Now, it is arguable whether such a deal is accurate or not?

Article 247 of civil Law states, "To deal in the other's property is not operative although the owner is consent heartedly unless the dealer does it as an agent, executor or guardian".

From this Article and from words of Islamic jurists and lawyers, it is understood that contrary to the essence and conditions of sale/deal accuracy,

unauthorized sale is accurate, but not operative and it is operative or binding depending on original owner's permission or on the other's permission as interpreted by law since according to law, a person who makes a deal for another person without being his agent and without his permission is termed "meddler", other party of transaction is termed "authentic", and the third person for whom and/or in his property the deal is made is termed "the other", who are termed "unauthorized seller", "customer", and "original owner", respectively, as interpreted in Fiqh-related texts.

Now, the question is what effects this permission has. There are 2 views provided in Fiqhi texts: (1) reveal theory, and (2) conveyance theory.

Permission: Definitions, Conditions, Sayings

Literally, permission means to permit, to sign, to authorize, but in Fiqh terms, it means to affirm a transaction made by an unauthorized person (meddler) (Wiki Fiqh).

Permission Conditions

In order for the other's permission to be effective making unauthorized transaction complete and binding, it needs to meet following conditions:

1- The owner's permission makes the contract complete only if it was not rebutted previously, otherwise such a rebutted transaction has been annulled and subsequent permission cannot give

validity to the annulled legal nature.

2- Permission must be given at the time when the person giving permission is in legal capacity/is competent. Permission is ineffective in cases where the owner is a minor, insane or silly person while giving permission.

3- Permission needs to be expressed by words indicating heartedly consent explicitly. Civil Law Article 248 states, "The owner's permission toward an unauthorized transaction shall be obtained by words or acts indicating contract affirmation".

For instance, after an unauthorized transaction has taken place, the owner submits the object of property to the customer (authentic party). Under Article 249 of Civil Law, the owner's silence, although he is present when the contract is concluded, is not regarded as his permission (Shahid Sāni, Sharh-e Lam'e Sheikh Ansari, Makasseb).

Sayings about transaction situation and effects after obtaining permission

Whenever the owner makes unauthorized transition authorized, transaction is finalized and will have its own legal effects, but the point is that when the contract will be of legally binding effects.

Fiqhi texts have provided 2 major theories: (a) conveyance theory establishing that permission is effective upon being joined and, prior to this joining, a contract made under duress unlawfully has no legal effects. According to this theory, therefore, legal effects of such a contract will be created upon giving permission. Based on conveyance theory, whenever traded property gains profits and attachments during the time lapsing between that of contract conclusion and of obtaining owner's permission, such profits belong to the owner, not to customer (authentic party).

Those who say the owner's permission conveys the property upon being given (and the effect-property conveyance-results at the time of giving permission, not at the time of contract conclusion) argue that, undoubtedly, until the permission is given, contract is ineffective and when the permission is obtained, its effect comes, that is, effectiveness of contracts depends on permission, therefore, permission becomes an element causing conveyance as if cause conveying the property has 2 elements: contract and permission, the former took place prior to the latter occurrence, therefore, effect is achieved by completing cause through permission.

Review of Conveyance Theory

Conveyance theory contradicts necessary application of sale contracts because if sale contracts are binding, they will be effective at the time of conclusion and, if not, it will have no effects even after the permission is given by the owner. For intellects, conveyance theory is problematic.

Moreover, requirement of a contract of sale

conclusion is realization of contract content upon its conclusion and what being written is the essence of ownership/possession nature and contract influence makes sense through possession realization upon its conclusion, in other words, requirement of sale contract is the essence of exchange nature and its application requires that exchange takes place between parties upon contract conclusion, namely exchange nature essence is essential for a sale contract and its application requires that exchange occurs between contract parties upon conclusion and it does not make permission required, but rather the contract itself is of interest (Dr. Mousazadeh, "Reveal and conveyance in unauthorized sale; Imam Khomeini, "Sale Volume").

B) Reveal theory

Based on reveal theory, permission is considered as given from the time of contract conclusion, that is, when permission is joined to the contract, it is regarded effective at the time of conclusion and it has a retrospective effect. Therefore, this theory states that unauthorized or reluctant contracts are accurate from the onset, and permission has a retrospective effect.

On the basis of research and studies done, six theories have been developed on permission revelation, of which true reveal theory (permission as a delayed condition) is acceptable supported by narration (Sahiha) cited by Abu Obaidah, and other 5 theories of reveal face important problems.

To accept theory of permission revelation and to assert effect application prior to giving permission by the owner entail important problem of superiority of effect to cause and/or superiority of conditioned to condition.

It should be noted that sale necessity and possession realization are caused by sale contract conclusion, owner's permission and absence of canonical barrier and, obviously, the second one is integral to its cause and condition. Therefore, how is it possible that an unauthorized sale be created from the time of contract conclusion while possession condition (owner's permission and consent) be delayed and met after creation of unauthorized sale? (Imam Khomeini, Sale Text; Sheikh Ansari, Makasseb; Dr. Mousazadeh, Reveal and Conveyance in Unauthorized Sales).

Imperative reveal theory

Believing in permission revelation, some of Islamic jurists have selected imperative reveal theory and argued that, for unauthorized sales, conveyance of possession is realized after obtaining the owner's permission, but possible possession effects such as attachments and profits result upon conclusion of sale contract.

That is, sale contract concluded by meddler has not been effective in possession from the beginning. To obtain the owner's permission and join it to an unauthorized sale contract makes such sales effective.

Such effectiveness means a sort of conversion of ineffective into effective, which is an unreasonable thing because unauthorized contract is concluded with feature of ineffectiveness, so it is impossible for such a contract to become effective after the owner's permission is obtained (Dr. Mousazadeh, Reveal and Conveyance in Unauthorized Sales).

Two faults are expressed on imperative reveal theory as follows:

1- Distinguish made by legislator between possession acquisition and its effects is cancelled since if sale contracts are binding due to generalities, then to make distinguish between possession and its effects is meaningless and there is no reason for proving such distinguish (Imam Khomeini, Sale Text);

2- Advocators of imperative reveal theory, who believe that true reveal theory is problematic, suffer the same problems due to selecting imperative reveal theory because if the effects of sale contracts are regarded valid prior to obtaining permission, they require lack of involvement of permission in effects resulting, which is a corrupt meaning; and in presence of permission, if we are convinced that contract effects results prior to giving permission, this meaning requires problem with delayed condition; and after giving permission, if resulting of sale effects is merely obediently created from the onset of conclusion of an unauthorized contract, this means conversion, which is addressed in conjunction with next theory.

Therefore, imperative reveal theory suffers problems with delayed condition or required conversion. The result of examining imperative reveal theory is that reasons given to prove accuracy of imperative reveal are inaccurate and groundless.

True reveal theory

Another theory developed by some of Islamic jurists on real/true revelation of permission says, "To give permission signifies the owner's consent relating to the content of sale contract which means conveyance of 2 substitutes at the time of sale contract conclusion, that is, the possession itself for which the owner gives consent is realized due to unauthorized contract and called possession extending to the time of contract conclusion. Therefore, possession is created at the time of contract conclusion.

True reveal theory has been criticized on some grounds.

1- Required conversion

Based on mentioned theory, permission joins unauthorized contract after its conclusion and creates the effect from the time of its conclusion, that is, an unauthorized contract, which is initially ineffective, is considered as being effective from the beginning due to permission given by the owner. And this is an unreasonable meaning because, having been created, nothing can change losing its essence and its nature

conversion is not appropriate and accurate, so unauthorized contracts are ineffective prior to permission acquisition. Then how is it possible for such contracts to be converted after permission acquisition and be effective from the onset of conclusion? (Sheikh Ansari, Makasseb; Dr. Mousazadeh, Reveal and Conveyance in Unauthorized Sales).

2- Problems with separation of effectiveness from effects

True reveal theory, based on which permission applies to the content of contracts, requires that effectiveness and creation be separated from effect and existence, respectively, since effectiveness is created upon giving permission while the effect, acquisition of possession, is created upon sale contract conclusion which is impossible because creation and existence, effectiveness and effect are the same thing and cannot be separated (Dr. Mousazadeh, Reveal and Conveyance in Unauthorized Sales).

3- Lack of canonical reasons

One important problem with true reveal theory of application of permission to the contract content is the lack of canonical reasons for proving it. That is, if we accept that permission is not an integral element of cause and is merely the cause of effectiveness of sale contracts concluded in the past and that owner's permission is not an idiomatical condition superiority of which to the conditioned is not essential, then for which reason has legislator confirmed such permission and considered it effective?

True reveal theory

Based on true reveal theory, an unauthorized contract is effective in possession conditional on obtaining permission and consent of the owner and permission itself and its late-comer existence not to the point and happening are conditions and by obtaining the owner's permission, sale contract is grounded on property and the sale made by the meddler is considered as if it was made by the owner.

It should be noted that legislator is not prevented from considering current contract and delayed consent as subject to validity affirmation. There is no barrier morally and intellectually because conscience certifies its possibility and intellect rules that such meaning is a mere validity for something reliable.

And since position relates to validity, nothing precludes restraint to validity so that whatsoever done be an instance of the task (sale) on the condition that restriction is achieved in its position initially. This restriction is not a really incipient matter so that it can be argued attainment of restriction is abstaining without attainment of bound, but rather it is a matter of reliability with no barrier to its obtaining so that active restriction is brought to existence due to attainment of bound in its position.

As for narrations, Sahiha of Abi Obaida (Sheikh Ansari, Makasseb; Imam Khomeini, Sale Text) indicated real revelation of permission as the delayed condition and so does Sahiha of Mohammad Ibn Qeys (Sheikh Ansari, Makasseb; Imam Khomeini, Sale Text) which indicates mentioned real reveal if we do not go beyond the subject of marriage because of combined consensus of opinions or of cutting the branches and reaching to unity of criterion.

Mentioned theory has been criticized on some grounds being addressed below:

1- Unreason ability of delayed condition

The most important problem with true reveal theory is that separation of cause and effect or, in other words, precedence of effect to cause is impossible without realization of all its elements and delayed condition is unreasonable.

Answer

Impossibility of precedence of effect to cause is a matter of intellectual, not canonical, affairs since commands of religion are a matter of validity (reliability) and their truth is the same reliability/validity nature and it is permissible for those who validate things to validate a non-existent thing on the basis of validity possibility.

There are some canonical instances where effects are superior/precedent to causes such as Friday ceremonial washing fulfillment on Thursday instead of Friday which is considered a lawful precedence by legislator although the cause is Friday ceremonial washing and/or permission for paying Fetryeh Zakat (Charity given on the occasion of the end of holy month of Ramadhan) prior to sight of Shaval new moon, therefore, difficulty of conditioned precedence to the condition is not justified.

2- Owners' discontent

Another difficulty stated on true reveal theory is the absence of owners' content from unauthorized sales. While reasons for validity of owner consent validate it at the time of sale contract conclusion, and because of owner's consent absence during contract conclusion, on one hand, and of validity of sale contract in the view of intellects, on the other, the result of permission obtaining and joining to the sale contract is conveyance theory rather than true reveal one.

Answer

In response to difficulty of owner discontent, it can be argued that owner consent actuality is unnecessary and legislator may decide that sale contract attached by owner's consent is effective although owner's consent joins to the contract some time after its conclusion; and intellectually, there is no problem with it, and it is also confirmed by generalities.

Sahiha of Abi Obaidah

Quoted from Imam Baqer (G.H), Abu Obaidah says, "I asked about marriage of underage girl and boy girl and boy whose fathers concluded their marriage contract.

Imam(G.H) answered, "Their marriage is lawful, and both girl and boy, when mature to come of age, have the option to withdraw. If they die prior to maturity, they are excluded from inheritance, and the girl has no marriage portion unless they come to age and agree to marry.

I asked, "What if either girl or boy comes to age before the other does?"

Imam (G.H) answered, "If that one concerned agrees with marriage, this matter is permitted."

I asked, "If the boy comes to age prior to the girl maturity and if he agrees with marriage, but then, he dies, will the girl be bequeathed some property?"

Imam (G.H) said, "Yes. The wife's here detrement is reserved from the man's property until she comes to age. Then, she is asked to take an oath in order to determine whether she was really satisfied to marry, if so, the hereditament and half of the sum of marriage portion will be paid to her."

Narration's substance

Sahiha of Abi Obaidah manifests and signifies true reveal theory of permission as delayed condition because Imam (G.H) has ordered to reserve the girl's hereditament from property of matured and deceased man conditional on her agreement with former marriage contract.

With respect to revelation of the cause through the effect, the wife's permission is of true revelation of the fact that, in real world, that property belonged to her; particularly, that Imam (G.H) absolutely has ordered the hereditament to be reserved, specifying no heirs' consent condition. Moreover, it should be noted that whenever it is accepted that mentioned narration supports permission revelation, nothing is against heritance rule necessitating heirs inherit from the deceased and against the rule providing that people govern their property; but if permission is considered as conveying in mentioned narration, then the narration's substance contradicts both abovementioned rules.

True reveal theory conditioned on backward permission

In order to avoid difficulty of precedence of conditioned to condition to condition in unauthorized sale, some of Islamic jurists believe that in an unauthorized sale, effectiveness requirement is quality of backward permission rather than permission be effective with its external existence, and this requirements of backward permission exists at the same time of such a contract conclusion because it is abstracted as precedent of contract itself.

Therefore, a contract to which the owner's consent is joined is included among contracts on the basis of verse 1 of Surah Al-Máidah, like contracts concluded prior to and/or concurrent with the owners' consent.

Review of true reveal theory conditioned on quality of backward permission

As necessitated by verse Tarazi (Mutual consent or compromise), what is valid with respect to accuracy and necessity of sale contracts is consent nature, not three-folded qualities of (1) precedence of contracts to the consent, (2) concurrence of contracts with the consent, and (3) consent joining to the contracts. Obviously, if there are some reasons, to bind over 3-folded qualities is permitted.

Based on guidance of verse Tarazi, with regard to sale contracts, permission itself is valid and the owner's consent comes after conclusion of an unauthorized contract.

Mere reveal theory

According to mere reveal theory, sale contracts are perfect and full cause of possession acquisition, the reason for which is Noble Verse "Honor Your Contracts"; and in unauthorized sales, contracts are considered full only with knowledge of permission realization.

Therefore, whenever an owner permits an unauthorized sale, it is clear that sale contract is full, and possession results on sale contract; if it is not the case, it is necessary to honor not only the sale contract but also the contract accompanied by other thing for which no cause or reason exists.

Since nothing but the contract occurs in addressed belonging and since if other thing involves with its belonging, it is expressed in addressed belonging, it is known that sale contracts are all cause and effect in possession, which is performed by the meddler (Shahid Sani, Sharh-e Lamé).

Review of mere reveal theory

The result of brief review of mentioned theory is that if a sale contract is itself a full cause of possession and if permission plays no role in acquiring possession, then it requires that validity of the owner's consent in the sale contract be considered gratuitous while canonical and intellectual arguments for owner's consent signify its effects on the contract.

And if the sale contract itself is not a full cause of possession, but a contract with owner's consent results in possession, then integrity of cause of possession prior to permission is unclear in case of permission realization, but rather a contract possession. In addition to the lack of grounds to prove accuracy of such a contract, some narrated and reasoned grounds exist to prove its inaccuracy. Therefore, lack of effectiveness and involvement of owners' consent in sale contracts to take possession is

against appearance of narrated and reasoned grounds (Dr. Mousazadeh; Reveal and conveyance in unauthorized sales).

Results of two types of permission

1- Interests and attachments gained during the time lapsed from transaction to permission times belong to the buyer based on reveal theory and, on the other hand, they belong to the seller based on conveyance theory. For example, if a person other than the real owner sells the latter's sheep, who signs the contract 3 months later during which the sheep gives birth to a lamb, according to permission revelation theory, the lamb also belongs to the buyer (customer), but it belongs to the owner according to conveyance theory and only the sheep belongs to the customer;

2- Unlike reveal speaking, based on conveyance speaking, customer is allowed to cancel transaction done prior to obtaining permission;

3- If the customer sells object of the transaction, it is correct based on reveal speaking and incorrect based on conveyance speaking. This is true that conveyance of permission is required by primary rules such as "honor your contracts" since until the owner agrees, a contract is not complemented and its elements become full upon giving permission, therefore, it is effective of the same time (Wikifiqh).

Subject of permission conveyance and revelation is one of important issues in civil law. However, there exists no consensus of opinions among jurists on which view is followed by civil law. Of course, this disagreement is not over revelation and/or conveyance and almost all jurists accept reveal theory, but rather they disagree over this question: Has Iranian legislator selected true reveal theory in relation to unauthorized and reluctant sales, or imperative reveal theory?

Permission effectiveness in Iranian Civil Law

There are 2 Articles on permission effect in Civil Law:

Article 258 of Civil Law provides, "with regard to interests of the object traded under an unauthorized contract as well as to interests from its substitute, permission or rejection shall be effective on contract conclusion date."

This article implies imperative reveal, that is, permission has a retrospective effect on interests transfer, but it has an established effect on the thing transfer. In other words, other party of transaction receives interests from the time of contract conclusion while he receives the thing upon permission.

Jurists disagree over interpretation of Article 258. Some consider this Article as imperative reveal, but others regard it as true reveal.

Article 257 of Civil Law states, "If the object of property traded under an unauthorized transaction is traded again before the owner authorizes and/or refutes the unauthorized transaction, the owner can

authorize either transaction he wishes, in which case transactions done prior to that authorized one are void and those done after that authorized one are binding.

Based on this Article, the owner is allowed to affirm any one of several of such permission is that transactions done prior to giving permission are rejected and that transaction intended by the owner is affirmed, for instance, when 6 transactions are done and the owner affirms the fourth one, 3 previous transactions are ruined but other 3 ones are valid, that is, the fourth transaction is considered accurate on date of respective contract conclusion, as a result, permission has a retrospective effect on the object of property transfer, therefore, legislator has adopted true reveal theory.

Conclusions

Supporters of true reveal theory, based on which permission relates to the contract content, who, so far, have considered and developed all matters and discussions about it, including theory explanations and answers given to relevant questions, in an attempt to demonstrate the theory truth, have failed to prove its rightness because the most important difficulty of the theory is the lack of canonical (lawful) signature and grounds. In other words, permission applies to precedent possession and is given actually by the owner since canonical grounds are adopted by legislator in order to sign, which are the very generalities such as noble verses on honoring contracts and on sale leave.

For this reason, legislator signature is realized upon occurrence of unauthorized sales prior to obtaining permission, that is, legislator affirms contracts with consent although it is delayed, but legislator does not sign the permission. Thus, theory of true revelation of application of permission to contracts' content is inaccurate.

By considering narrations and traditions about unauthorized and other contracts, it seems that 2 narrations of Abi Obaidah's Sahiha and Mohammad Ibn Qeys's Sahiha have the most and the best evidence on reveal theory, especially true permission revelation as the delayed condition, other narration such as Orvah Bareqi's and those analyzing Khoms (one-fifth of property being paid to the Islamic treasury) also signify reveal theory. But due to poor documentation or weak guidance, some difficulties and uncertainties raise which are ignored.

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