

Apparent Ownership

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Extended Abstract

The purpose of legal rules and procedures is to regulate social relationships and maintain order in a community to pave the way for economic and social improvements. Based on this, legal rules are to be adaptable to different contexts, and the legislator is to be well-aware of the realities of the society and observe them carefully. Rules and regulations concerning unauthorized transactions, which have been dealt with in the Iranian law since a long time ago, are established based on the assumption that supporting the owner would lead to the prevention of theft and fraud. Accordingly, the rules associated with unauthorized transactions set the principle that no one can grant nor sell anything that does not belong to them whatsoever. This principle has enjoyed great integrity and use in the past, now, however, the world of business calls for a change due to the transformed nature of trades and transactions which clings on the decision-making speed.

This paper aims to investigate the ineffectiveness of the rules and regulations concerning unauthorized contracts from philosophical and economic points of view. To do so, first we will deal with the issue of Domain of Knowledge, which posits that knowing the real owner is not logically possible for the potential buyers. Alternatively, we will illuminate the notion that the principle of Yad (the principle which considers the owner to be the one who currently possesses the possession) in the realm of contracts is closer to the theory of appearance comparing to the rules concerning unauthorized transactions. Finally, we will analyze the issues at hand from an economic point of view to see which one can maintain the transactional order in a society.

In this day and age, it goes without saying that human cannot grasp the naked truth, and can only resort to the appearance of things. Knowing this, it is obvious that no

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potential buyer would be ensured of the real owner, so the transaction is to be carried although there is no way to know whether the seller is the owner of the possession or not. The transactions are chiefly done based on a mere conjecture rooted in the compelling evidence showing that the possessor is the owner. In other words, people cannot be expected to thoroughly investigate the ownership of the seller before a purchase; however, they are to look for it to a standard minimum extent so as to know the owner and observe the principle of speed in the transactions. That is why people would always trust the appearance of things and regulate their behavior based on that. In view of that, the rules concerning unauthorized contracts impose responsibilities on people which are beyond their capabilities. Legal rules and procedures should be set in accordance with the common behavior of people. Otherwise, transactional order would disturb and people would always be in stress whether the possession they have purchased belonged to others or not.

The documents regarding the principle of Yad do not accord with the interoperations given for this principle. One instance of the documents, which is used a lot in fatwa-decreeing (religious decrees), is the one related to Hafs Bin Ghayas, in which the Imam has used certain terms [سوق للمسلمين يقيم لم هذا يجر لولم] to justify this principle indicating the transactional order. This would only make sense if we believe in the validity of an authorized transaction. The main evidence of this is the principle of common sense (manner of the wise). The common sense does not consider an unauthorized contract to be nullified and calls for more evidence in this term.

In an economic examination of the issue at hand, the acceptable rule concerning unauthorized contracts is to be the ones which reduce theft and crime in the society, and impose less cost on the parties. Executing the rules concerning unauthorized transactions and supporting the owner would increase the negligence on the part of the owner and thus impose unnecessary costs and problems on people who have not made any mistakes. On the other hand, in case of executing the theory of appearance and supporting those who trust the appearance, the owner would be more careful and avoid negligence in cases like not registering the transaction, and he/she would protect his/her possession; secondly, the buyer would be more meticulous in knowing the real owner to be later supported by the law. This happens because the commodity will be given to the purchaser in good faith. In this way, we will observe both transactional order and a reduction in the possibilities of theft and fraud, and thus an acceptable social security will be seen in the society. In addition to this, the acceptance of the rights of a purchaser in good faith will enable the parties to sign a given contract after conventional examination of the ownership. However, in case of mere supporting of the owner, buyers should do more than the conventional examinations, and investigate to see whether the seller is the real owner or not. This would reduce the contract costs and, as there is no way to know the real owner, would undermine trust in the market and thus it will lose its credit, which is of great importance economically speaking.

The purpose of owning a commodity is not just the mere possession of it, but the usages it can bring. Accordingly, insisting on the tangibility of the concept of ownership is kind of neglecting the truth. It is because by an appropriate compensation, the owner will get back what he/she has lost. Accepting the theory of appearance would dismiss many of the legal rules; however, we should bear in mind that the aim of legal rules is to meet the demands of the society, and currently the society calls for it. What is actually practiced in the society is based on supporting

the ones who trust the appearance, while the law has not provided an answer for this yet.

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