

Analysis of Theory of Contract As Being Subjective or Objective In Islamic Law

By

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ABSTRACT

Back ground of the article: The Islamic banking system is growing day by day in the market of the world. There are many Shariah tools applied by Islamic banking to solve the problems of their clients but some of these tools are disputed among the classical jurists. The article is going to solve this problem by analyzing the evidences of Muslim jurists and providing preferred opinion regarding these disputed tools of Islamic banking.

***Objective of the article:** The article is going to elaborate the theory of contract as being subjective and objective. Objectivists are supporting the objective theory of contract and hold that whatever contrary to consent of Almighty Allah is null and void while subjectivists are supporting the subjective theory of contract and wherever, the elements of contract are found the contract is considered valid and enforceable.*

***Requirement:** the article removes the ambiguity regarding the consent [رضا][Rida] of contracting party and it is first element of contract according to majority of Muslim jurist while it is only one element of contract according to Hanfi jurists and it is [rida] and it is hidden thing, so it is stipulated for contracting party to come with the [sigha] form and it means offer and acceptance and issuance of form is considered consent of contracting party whatever will be his intention behind it and the contract is considered concluded according to form of the contract.*

***Method of research:** It is analytical method of research and evidences of each opinion are given accordingly and these are analyzed and whatever evidence remained protected from objection is preferred on other opinions of Muslim jurists.*

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Result of this research: This study is resulted that subjective theory of contract is preferable on the objective theory of contract and this theory supports the Islamic banking system and advised it to facilitates their clients by these disputed tools of financing and expand their business in all over the world.

Conclusion: The doctrine of [SaddayDaray] blocking lawful means to unlawful ends is not common and absolute principle but its applications are restricted with text of Quran or Hadith otherwise it is not capable to change the permissible rule approved by text of Shariah and declare it prohibited.

Key words: Contract, theory, Subjective, Objective, analysis.

Introduction:

It is agreed upon among all Muslim jurists that wealth is fifth necessity of human being. If wealth is not available mankind cannot survive in this world.

The contract of sale and purchase is major source for earning wealth. Prophet [صلى الله عليه وسلم] declared that: there are ten sources of earning wealth but nine of these are in business transactions.¹ There are many types of business transactions but weight is given to the contract of sale and purchase due to being more important than others because it is concluded by everyone though he is male or female or he is poor or rich or he is under the age of puberty or over the age of puberty while other transactions do not have such an involvement in the society of mankind. The sale contract is divided into several types. Some of them are agreed upon and others are disputed, so the attention is given to disputed types of sale contract. Disputed types of sale are further divided in to two types: some of them are applied as tools of Islamic banking and others are not applied as the tools of Islamic banking, so the concentration is given to those types of sale which are applied as a tool of financing. The dispute of Muslim scholars in such types of a sale is based on the theory of contract that it is subjective theory or it is objective theory, so the theory of contract is basic requirement of this article to define contract and discuss the theory of contract.

1- **DEFINITION OF THEORY {نظريّة}**: There are two meanings of Nazriyyah:

1- literal 2- technical meanings.

a- **Literal meaning of Nazriyyah:** The word {Nazriyyah} is taken from the word nazar and there are two meanings of nazar:

i- Literal meaning and

ii- Technical meaning:

¹ It is narrated by al Hafiz al Iraqi Zainud Din: al Mughni an haml-al Asfar: hadith: 1576

- i- **Literal meaning of nazar:** The word {نظر} is used in two meanings as follows: If there is word {إلا} {إلى} after nazar then it is used in the meaning of watching and seeing something as {نظراليه}. If there is word {في} {في} after nazar then it is used in the meaning of thinking about as {نظرفيه}.
- 2- **Technical meaning of nazar.** The scholars of logic {منطق} define it and said: It is arrangement of known things in such a sequence which causes to find out unknown thing.
- { هو ترتيب أمور معلومة للوصول إلى أمر مجهول }

So, the word Nazriyyah is component of Nazar and word [ya] and If this [ya] is [msdariyah], then it is in the meaning of masdar which is Nazar and whatever is the meaning of nazar, the same is the meaning of zriyyah. If this [ya] is for nisbat, then it is in the meaning of knowledge and this knowledge is defined as follows:

- b- **Technical meaning of Nazriyyah {نظرية}**. My respected renowned teacher Dr Ahmad Fahmi Abu Sinnah {may Allah bless him} defined it and said. { النظرية مفهوم كلي يتألف من نظام متكامل متناسق يتحكم في جميع ما يتصل بموضوعه }² The theory is general principle comprising from complete system with proper sequence, ruling over whatever is related to its subject.

2- DEFINITION OF CONTRACT:

There are two meanings of contract: 1- literal meaning of it, 2- technical meaning of it as:

- a- **Literal meaning** of contract is fastening as Arab people said: fasten loop in the feet of camel.³
- b- **Technical meaning** of contract is legal connection of two expressions {offer and acceptance} affecting legally in the subject matter.⁴

Affecting in subject matter means the ownership of subject matter is transferred from seller to buyer and ownership of price is transferred from buyer to seller.

3- SUBJECTIVE THEORY:

The Subjective means the clear requisite of contract are its elements and basic conditions of each one of these. There are three elements of contract according to majority of Muslim jurists such a Malki, Shasfei and Hanbli jurists. These are as follows: 1- Form [صيغة], 2- contracting Parties [عاقدين] and 3- Subject matter [معقود عليه].

CONDITIONS OF ELEMENTS: the conditions for each one of these elements are as:

² Dr Ahmad Fahmi Abu Sinnah/ al Nazriyyat al Amah lilMuamlat al Maliyyah al Asariyyah al Islamiyyah /Cairo: Dar al Talif/ 1967/ 44

³ Refer Ibn al Manzur / lisan al Arab:3: 296

⁴ Refer Mustafa Ahmad al Zarqa/ al Madkhal al Fiqhi al Aam/ 1: 291

a- **CONDITIONS OF FORM:** there are four conditions for form {صيغة} and these are:

- 1- Conformity between offer and acceptance.
- 2- One session for the issuance of both offer and acceptance.
- 3- Survival of offer until the issuance of acceptance.
- 4- Form of contract should be in past tense or one of these two [offer or acceptance] must be in past tense.

CONCLUSION:

This article is concluded as:

- 1- Theory of contract is subjective but not objective.
- 2- Evidences of subjective theory of contract are stronger than the evidences of objective theory of contract.
- 3- Principle of blocking lawful means for unlawful ends [سد الذرائع] is not general principle.
- 4- Opinion of Hanfi and Shafei jurists in the principle of SaddayZray is preferred on the opinion of Malki and Hanbli jurists.
- 5- When elements of contract are found and its conditions are met the contract is found and validated.

b- **CONDITIONS OF CONTRACTING PARTIES:** there two conditions for them:

Contracting parties should be pubescent persons and it means they must be {عقل بالغ}.

c- **CONDITIONS OF SUBJECT MATTER:** there are six conditions for subject matter:

- 1- **Legality of subject matter.**
- 2- **Existence of subject matter.**
- 3- **Knowledge of subject matter. It means it is known for both parties.**
- 4- **Ownership of subject matter. It means it should be owned by the party going to sell it.**
- 5- **It is deliverable. If it is not deliverable such as selling a missing camel, it is not sold.**
- 6- **Right of third party is not relating to it.**

4- Meaning Of Subjective And Objective Theory:

a- **Subjective Theory Of Contract:**

It means: the contract should fulfil its all elements and conditions as mentioned above. When the elements of contract are found and the conditions of contract are met the

contract is found what will be the objective of contract and the occurrence of contract is based on the availability of its elements and conditions but it is not based on its objectives.

b- OBJECTIVE {النية والغرض}:

There are two words which are used in the meaning of objective but these are two different matters from each other.

1- Objective means: Intention causing for the conclusion of contract. {الإرادة والنية لإنشاء {العقد}. It is always found before the conclusion of contract. There are further four words which are covered with the word of intentions as:

- a- Iradah [إرادة] it is first stage of intention and it is also first situation of intention comes in the heart of mankind.
- b- Azm [عزم] it means: establishment of intention but it is still change-able due to change of comfortable situation or due to the advice of reliable person.⁵
- c- Samm [صم] it is third situation of intention where it is determined and now, it is not change-able and intending person is not in position to listen or accept advice of someone. D- Hamm [هم] it is forth situation of intention where a person start his action and movement to implement his intended objectives and it takes place through following procedure: the heart which is the centre of intention and planning, has commanded to mind and the brain also has commanded to body parts which are workers, to perform required act to achieve the objectives. Holy Qur'an supports this fourth type of intention while saying regarding Yusuf [عليه السلام]: [عليه السلام]: {ولقد هممت به وهمّ بها لولا أن رأى برهان ربه} ⁶ She intended for him, and he intended her if he did not watch the signs of Almighty Allah [but he saw the signs of Almighty Allah so he did not intend her].⁷

This intention is called in Arabic language cause [sabab] and motive [baith] for creation of a contract {السبب والباعث والمحرك لإنشاء العقد}. It is called in logic Illahfaeli {علة فاعلية}. This intention is always shown through form {الصيغة} of contract.

2- Objective means: The purpose behind the conclusion of contract remained hidden. It is found after conclusion of contract. It is named in logic with Illahghaiyyah {علة غائية}

OBJECTIVE THEORY: The objective theory of contract means: The purpose from the conclusion of contract should be legally valid. This purpose is intended through conclusion of contract. The legality of objective of contract is also basic condition for the

⁵ Doctor Abdul Aziz Muhammad Izam/ Legal Mxims/ Cairo: Dar al Hadith/1426-2005/ 81

⁶ Surah Yusuf/ 24

⁷ This evidence of Quran is Qiyas Istisnai [قياس استثنائي] Mowlana Fadal al Imam Khaiabadi, al Mirqat/ Din Muhammad and Sons: Lahore/ 43 .

validity of contract according to this theory though it is shown or it is not shown. If the purpose from conclusion of contract is not valid the contract is void.

SUBJECTIVE THEORY: Subjective theory of contract emphasises on the existence of elements and conditions of contracts. If contracting party does not show his intended meaning from the conclusion of contract the contract is considered valid though the intending purpose from the conclusion of contract is illegal.

THEORY OF CONTRACT IS SUBJECTIVE OR OBJECTIVE:

It is disputed theory among Hanfi, Shafei and Malki, Hanbli Jurists. There are three opinions of Muslim scholars as follows:

FIRST OPINION:

a- Hanfi and Shafei jurists incline to the subjective theory of contract. They hold the legality of object of contract is not condition for the validity of contract and they argued on their view point by following evidences:

EVIDENCES OF FIRST OPINION:

FIRST EVIDENCE: The contract is based on its elements and their conditions. When the elements of contract are found and conditions of these are met the contract must be found. It is agreed upon according to them.⁸

SECOND EVIDENCE: Almighty Allah said: Almighty Allah permitted sale and prohibited interest.⁹ It is evidence for the permissibility of all types of sale except those types of sale which are declared prohibited by Quran or Sunnah. The number of prohibited sale contract is very limited. All other types of sale are permitted, so these will remain permitted on the basis of permissibility given by Shariah.

THIRD EVIDENCE: There is an agreed upon principle that: [الأصل في الأشياء الإباحة] the origin of all things is permissibility. It is regarding to rule given to contract of sale in Islamic law. The principle emphasises each and every thing is permissible in its origin

⁸ The opinion of Hanfi and Shafei jurists is given preference on the opinion of Malki and Hanbli jurists because of that: there are four types of Illah in logic {Mantiq}:

- 1- IllahFaeli. It causing for the creation of anything. The Illahfaeli of contract is contracting party or their intention to create contract.
- 2- IllahSuri and it is shape of thing after being created and madden and illahSuri of contract is form of contract {offer and Acceptance} and different types of sale are different forms of contract also.
- 3- Illah {madi} material cause of anything and Illahmadi of contract is subject matter.
- 4- IllahGhai, the objective of creation of anything and the illahghaei of contract is purpose of contract and it is agreed upon among the logic scholars that: when illahfaeli, IllahSuri and Illahmadi of anything are found the thing is found and some time the purpose of thing is attained after existing of thing and some time it is not obtained but it does not mean the thing is not found, so the contract is found when its IllahFaeli, IllahSuri and IllahMadi are found though Illahghai of contract is not found till now.

⁹ Surah al baqarah | 275

when Almighty Allah revealed Islamic law. All those things which were harmful for mankind were declared prohibited and all those things which were necessary for mankind were declared obligatory and binding for mankind and all those things which were neither harmful nor necessary remained permissible according to the principle mentioned above and sale contract is neither harmful nor beneficial because it has possibility of being harmful or being beneficial, so it is remained valid and permissible according to its origin {الإباحة الأصلية}.¹⁰

FOURTH EVIDENCE: There is another legal maxim supporting subjective theory of contract [الأصل في الكلام الحقيقة]¹¹ The words always are given their original and figurative meaning not their secondary and metaphorical meaning unless the original meanings are not possible to be intended from these words. The words are used in their original meaning will be the intention of person. If a person said: I sold you my car for four hundred thousand and other party accepted during the same session the sale contract is concluded and these words are considered the purpose of the seller and it is due to principle that original meaning of the words are preferred over their metaphorical meanings.¹²

FIFTH EVIDENCE: The subjective theory of contract is supported by another legal maxim: [العبرة للدلالة في مقابلة التصريح] no acknowledgement is given to implicit meaning of words as against their explicit meaning.¹³ When contract is concluded by proper words and elements are fulfilling all conditions the contract is considered executed whatever be the purpose behind this contract.¹⁴

SIXTH EVIDENCE: The subjectivist jurists support the theory of contract by legal maxim: The acknowledgement in the contracts is given to words and spellings not to objectives and meanings [العبرة في العقود للألفاظ والمباني للمقاصد والمعاني]¹⁵ The last evidence is very clear about the theory of contract that it is subjective not objective.¹⁶

SECOND OPINION OF MUSLIM JURISTS: Malki and Hanbali jurists are inclined to the objective theory of contract. They made the legality of objective a condition for the validity of contract. They argued on their view point by the following evidences:

FIRST EVIDENCE: The tradition of Prophet [صلى الله عليه وسلم] All acts are based on their intention. Those who migrated for Almighty Allah and his messenger their migration is for Almighty Allah and his messenger {صلى الله عليه وسلم} and who migrated to

¹⁰ Abdu l Aziz/ Legal Maxims/ 109

¹¹ Majallah al Ahkam al Adaliyyah/ 12, al Kurdi al Hajji Ahmad/ al Madkhal al Fiqhi/

¹² Al Sarkhasi / Usool al Sarkhasi/ 1: 172, Abdul aziz al Bukhari/ Kashf al Asrar/1: 395. Abdu l Aziz/ Legal Maxims/ 3370.

¹³ Majallah al Ahkam al Adaliyyah / maxim no: 12

¹⁴ Al Kurdi Hamad hg Hajji/ al Madkhal h g trid/ Syria: Matba al Insha/ 1404- 1984/78, Majallah/ Legal Maxims/ No:13

¹⁵ Majallah, Maxim: 2

¹⁶ Abdul Aziz/ Legal Maxims

marry a woman or for world {الدنيا} to obtain it, his migration is for what he migrated.¹⁷ It means the purpose of act. If the purpose of act is legally valid the act is valid. If the purpose of act is illegal the act is illegal and the contract is also an act, so it too is based on the legality of objective of contract. If the objective of contract is legally valid the contract is valid otherwise it is null and void.

OBSERVATION ABOUT:

The rules of Islamic law always are relating to acts of pubescent persons {aqil - baligh} [عاقل - بالغ] and acts of such persons are divided in to three types in Islamic law: 1- Pure worship acts. 2- Pure crimes. 3- Permissible acts.

- a- The pure worship acts these are always based on their intention and purpose. If intention is legally valid the worship act is valid and if intention of the act of worship is mala-fide the act of worship is not valid.
- b- The pure acts of crimes: these are prohibited in Islamic law whatever will be the objectives of these acts, so good objectives of criminal acts do not validated the offences as someone committed theft to help needy person, such an objective does not validate the act of theft.¹⁸
- c- The permissible acts in Islamic law: all permissible acts such as all contracts and dispositions are considered legally valid and permissible depending upon the intentions and objectives behind performance of these provided all the elements of these acts are found valid and their conditions are met based on the evidence of Holy Quran while declaring that Almighty Allah permitted the sale contract and prohibited the {riba} interest.¹⁹

QUESTION:

Now question is that: what about the tradition mentioned above? Because it declared that the intention plays the vital role in the validity of all acts. The contract is also an act.

ANSWER:

Seven answers are given for this question:

- 1- All permissible acts are legally valid regardless of the intention by performing of them because these are made permissible by Islamic law and the intention of Lawgiver is known from the law formulated by law giver. He permitted sale contract as stated in verse of Holy Quran mentioned above. So, intention of man does not have any weigh while clashing with intention of Almighty Allah.

¹⁷ It is narrated by Imam al Bukhari, Sahih al Bukhari/ hadith: 2529, 3898.

¹⁸ Ifk-e-Nujaim/ zain al Din/ al Ashbahwa al Bazair/ Beirut: Dar al kub alImiyyah/ 19-25

¹⁹ Sura al Baqarah / 275

- 2- The tradition mentioned above is only related to worship and it means all acts of worship are not valid without good intention. Worship matters promoting the relationship between Almighty Allah and mankind and here too the intention is stipulated by law giver, so the worship acts are not valid without their good intention and objective.

The reason is that Almighty Allah Himself stipulated good intention for the validity of worship and He said: [وما أمرُوا إِلَّا ليعبدُوا الله مخلصين له الدين]. They are not commanded but to worship Almighty Allah keeping intention for Him.²⁰ It means: worship of Almighty Allah should be made with clean and neat intention which is careless from reward and fearless from punishment.

- 3- Intention is hidden thing and Almighty Allah knows the hidden things, so intention plays the role in the worship matters which are performed for Almighty Allah while intention does not play any role in all other acts such a crimes and dispositions and contract because these matters are related to mankind. Human being does not know the hidden things. It is intending meanings of hadith mentioned above.
- 4- The Muslim person is always required to intend the consent of Almighty Allah by performing any permissible act because when he comes with such intention with performing the permissible act, this act is converted from simple act to worship act by this intention and he gets reward on this act due to this intention and it is supported by legal maxim: [لا ثواب إلا بالنية]²¹ There is no reward without the intention to consent of Almighty Allah.
- 5- It is known from the hadith mentioned above because the migration for woman or for world is not made prohibited but this migration is not considered worship causing for reward from Almighty Allah because it is not made with the intention for the consent of Almighty Allah.
- 6- The rule of law is given in crimes and disposition to the acts not to the intention because the judge gives his judgement according to the matter supported by evidence and testimony. The testimony can prove the watchable matters because testimony means providing information about any event watched through the eyes. The intentions and objectives of any act are not watchable by eyes due to being hidden, so the intention and objectives cannot be proved by testimony and witness. Shariah court cannot give the verdict in the favour of matter which is not proved with any evidence.
- 7- If someone is taking riba for charity purposes. This intention does not validate the riba made prohibited by Lawgiver. The same is the rule for whatever is made permissible by Lawgiver.²²

²⁰ Surah al Bayyinah/5

²¹ Ibn-e-Nujaim Zain al A'bidin/ al Ashbahwa al Nazair/ 19.

²² Al Kurdi/ hg Madkhalhgrid/ 23, Abdul Aziz/ 370

SECOND EVIDENCE: Malki and Hanbli jurist supported their objective theory of contract by legal maxim and [العبرة في العقود للمقاصد والمعاني لا للألفاظ والمباني]²³ it is: The acknowledgement in contracts is given to objectives and meanings not to words and spellings. This legal maxim is very clear that the objectives of contract play very important role for the validity of contracts.

OBSERVATION: It is observed that this legal maxim is acceptable and applicable when it fulfils three conditions as follows:

- a- The words of contract are to be used in intended meaning of contract. If these words cannot be used in the intended meaning of contract, then objective of contract does not play any role in the validity of contract, for example as seller said to buyer: I did not sell you this book for two hundred rupees and he intended: I sold him this book for two hundred rupees. The contract is not concluded because the words are not having as per intended meaning of contracting party.²⁴
- b- The words can possibly be used in clear meaning and intending meaning, for example one party said to other: I donated you this book for two hundred rupees and he intended sale contract by these words. It is considered sale contract.
- c- The rule of intended meaning is not less in status than the rule of clear meaning of words. For example: party said to other: I donated you this book for two hundred rupees. It is considered sale contract though he intended by these words donation. The reason is that: the ownership obtained by donation and sale but ownership obtained by donation is lesser than the ownership attained by sale contract because donation [hibbah] disposition is revocable²⁵ while sale contract is not revocable.

If one party said to other: I sold you this book without price and he intended by these words donation. It is void sale contract and it is not considered donation because the ownership obtained by donation is less in standard than the ownership obtained by sale contract because of that the donation is revocable while sale contract is not revocable.²⁶

RESULT OF THE CONFLICT:

This conflict of opinions in the theory of contract as being subjective and objective has resulted in other disputes between them in the principle of [SaddayZray] [سد الزرائع] [blocking lawful means for unlawful end] and several types of sale contract. This principle is as follows:

²³ Majallah al Ahkam al Adaliyyah/ legal Maxim: 3, AL Madkhal al Fiqhi/ Legal Maxim:2

²⁴ Al Kurdi/ al Madkhal al Fiqhi/ 23

²⁵ Provided consideration against donation is not paid.

²⁶ Ahmad al Hijji al Kurdi/ al madkhal al Fiqhi/ Demishq:Matbah al Insha/1984/ 23

a- PRINCIPLE OF SADD-ZRAY:

The principle of {Sadd-e-Draye} means: blocking lawful means for unlawful end.²⁷ It is intended by this phrase that: the lawful acts are prevented to be performed when these are causing commission of any unlawful act.

DIFFERENCE OF OPINION IN THIS PRINCIPLE:

This principle Saday Zaray [سد الذرائع] is general or it is not general. There are two opinions of Muslim classical jurists as follows:

- a- **FIRST OPINION:** Those scholars who hold that theory that contract is objective such as Malki and Hanbli jurists say it is general principle.
- b- **SECOND OPINION:** Those scholars who hold that theory of contract is subjective such as Hanfi and Shafei jurists say it is not a general principle but it is valid principle where is supported by text of Quran or Hadith otherwise it is not valid and applicable.

EVIDENCES OF FIRST OPINION:

Malki and Hanbli jurists argued with the verse of Holy Quran: { يا أيها الذين آمنوا } لا تقولوا راعنا وقولوا انظرونا [صلى الله عليه وسلم] Raina but say: glance to us.²⁸

ANSWER: It is answered that the argument by this verse is not valid because Hanfi and Shafei admit also that the principle of Sadd-e-Zray is applicable wherever the text of Quran or Hadith is supporting it and the lawful means to unlawful end are blocked by text but wherever text of Quran or Sunnah made means lawful, then these means cannot be blocked by any other evidence against the text of Quran and Hadith such as principle of Sadd-e- ray.

EVIDENCES OF SECOND OPINION:

Hanfi and Shafei classical jurists argued their view point by following evidences as:

- a- Principle of Sadd-e-Zray is only applicable in those cases wherever text of Quran or Sunnah is found. Wherever text of Quran or Sunnah is not found, then implementation of this principle is null and void because it is contrary to basic

²⁷ Refer al Baji Abu al Walidsuliman bin Khalaf / Ahkam al Fusul / Editing : Abdul Majeed al Turki/ Dar al Maghrib al Islami / 1995/ 689-690, al Qurtabi Shams al Din / al Jamy le Ahkam al Quran/ Editing: Dr Samir / Dar al kutbIlmiyyah/ 2003/ 2: 58, al QrafiShihabud Din Ahmad/ al Faruq / editing: Khalil al Mansur/ Bierut : Dar al Kutub al Ilmiyyah /1998/ 2 : 61, al FatuhiTaqiud Din Ahmad bin Ibrahim / Sharh al Kokab al Munir/4 : 434, IbnTaimiyyah Ahmad bin AbdulHaleem al hurrani/ al Fatawa al Kubra/ Editing : Mohammad Abdul Qadir Ata and Mustafa Abdul Qadir Ata/ Bairut : Dar al Kutub al Ilmiyyah / 1987/ 6 : 172.

²⁸ Surah al Baqarah/ 104

sources of Islamic law and these are Quran and Sunnah because these both declared these means lawful and permissible while principle of Sadday-e- Zray is prohibiting them and it is causing for the abrogation of the rule ascertained by Quran and Sunnah and abrogation of rule given by Quran and Sunnah after closing the revelation is not allowed by the consensus of Muslim jurists.²⁹

- b- Principle of Malki and Hanbili jurists is conflicting with the objective of Lawgiver because He made these means lawful while this principle made them unlawful and this principle was formulated to protect the objective of Lawgiver while it is going to destroy the objective of Lawgiver, so it is rejected as a general principle.
- c- Malki and Hanbli jurists are champions of objective theory, particularly Shaikh Ibn-e-Taimiyyah and Abu Is'haq al Shatbi and they hold that whatever is contrary to objective of Lawgiver, is rejected according to them, so principle of [SadayZray] should be rejected according to them.

PREFERENCE: Hanifi and Shafei view point is preferred to the view point of Malki and Hanbli jurists because the evidences are stronger than the evidence of first view point.

b- DISPUTED SALES CONTRACT:

The conflict of opinions in the theory of contract is resulting in following sales contract

- 1- Selling weapons in the hand of terrorist is prohibited according to Malki and Hanbli jurists while it is valid according to Hanfi and Shafei jurists provided the terrorist did not show his intention by any way at the time of purchasing weapons.
- 2- Selling a gun in the hand of person intending to kill any innocent person is invalid according to Maliki and Hanbli jurists while it is valid according to Hanfi and Shafei Jurists provided the offender did not show his false intention at the time of contract.
- 3- Selling grapes in the hand of winery is not valid according to Malki and Hanbli jurists while it is valid according to Hanfi and Shafei jurists.
- 4- Hiring house in the hand of person who runs brothel in this house is not valid according to Malki and Hanbli jurists while it is valid contract according to Hanfi and Shafei jurists provided the mala-fide intention is not shown at the time of contract.
- 5- Marriage contract with woman to facilitate her remarriage with her ex-husband is invalid according to Malki and Hanbli jurists while it is valid according to Hanfi and Shafei jurists provided this intention is not disclosed at the time of contract.

²⁹ Note: All permissible acts can be restricted by legislation of government to fulfil the requirements of society.

- 6- Paper marriage with woman though she is Muslim or Christian or Jewish in Muslim country is not valid according to Malki and Hanbli jurists while it is lawful according to Hanfi and Shafei jurists provided mala-fide intention is not shown at the time of contract.³⁰

CONCLUSION:

This article is concluded as:

- a- Theory of contract is subjective but not objective.
- b- Evidences of subjective theory of contract are stronger than the evidences of objective theory of contract.
- 3- Principle of blocking lawful means for unlawful ends [سد الذرائع] is not general principle.
- 4- Opinion of Hanfi and Shafei jurists in the principle of SaddayZray is preferred over the opinion of Malki and Hanbli jurists.

³⁰ This is rule of paper marriage for those countries where Islamic personal law is enforceable and those countries where Islamic personal law is not enforceable the paper marriage will be treated as their local law.

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