

Framing an Islamic Vision of Intellectual Property: Maqasid - Based Approach

Kawthar Abdalla Bayoumi,^{a*} Arieff Salleh Rosman,^b

^aFaculty of Islamic Civilization, Universiti Teknologi Malaysia, 81310 Johor Bahru, Malaysia

^bCenter of Research for Fiqh Science and Technology (CFIRST) & Faculty of Islamic Civilization, Universiti Teknologi Malaysia, 81310 Johor Bahru, Malaysia

*Corresponding author: kawtharbayoumi@gmail.com

Article history

Received: 2017-08-05 Received in revised form: 2017-09-17 Accepted: 2017-10-02 Published online: 2018-10-31

Abstract

The Islamic scholarship on Intellectual Property (IP) has extensively investigated its affinity to *Shari'a* upon a rule-based approach whereby a profound analogy and reasoning eventually generated a *Fiqh* rule that embraced the concept. However, a lingering discrepancy vis-à-vis the philosophical underpinning is hardly addressed. This paper undertakes an approach based on *Maqasid al-Shari'a* (objectives of *Shari'a*) to explore that underpinning as it pertains to the three key elements in the making of IP, namely, creativity, property, and policy. The major premise of the paper is that the current IP framework failed to fulfil the needs and aspirations of the Islamic countries. While its underlying objective emphasizes a strong utilitarian approach that contradicts in many ways the Islamic *Shari'a*. Consequently, better outcomes can be reached by adopting a holistic approach that takes into consideration the practical implication of IP system according to the benefits and interest of Muslim's societies. Whereby, IP should be comprehensively addressed according to the sources, objectives, and principles of Islamic *Shari'a*. These can be employed to evaluate the current application of IP and to identify the elements required in an IP system that is congruent with Islamic *Shari'a*. The comparative analysis of the fundamentals of the present international intellectual property system and the Islamic perspective indicated that the core aspects of IP concerning the concept of creativity and the scope of protection are delineated differently under the Islamic framework. Moreover, the policy and regulations as can be derived from the principles and *Maqasid al-Shari'a* have a great potential in promoting a robust Islamic IP system that is in line with *Shari'a*, the needs, and orientation of the society.

Keywords: : Intellectual Property, *Shari'a*, *Maqasid*, *maslaha mursalah*, ownership

1.0 INTRODUCTION

Ownership, in humans, is an inborn tendency. Hence, by all means, man is keen and predisposed to organize and protect it. Intellectual property is perhaps a relatively newer form of ownership known to humanity, probably much more sacred due to its close attachment to the owners revealing their modes of thinking and intellectual production. It is accepted that with the rise of scientific revival and the emergence of printing and publishing intellectual property rights (IPR) came into being and took shape as a legal concept. Moreover, given the close connection between intellectual property and the enormous technological advancement in the present time, intellectual property has imposed itself in multilateral trade relations and economic circles (Rogers, Tomalin & Corrigan, 2009). It is no longer operating as a separate self-contained entity but has a general role in supporting diverse aspects of social, cultural and economic progress amongst different communities.

Developed countries pushed strongly toward including IPR in the multilateral trade negotiations under the world trade organization (WTO). The central argument for the proposed robust protection is that: strong IP laws promote the progress of society and secure the good for all (Goldsmith & Lessig, 2010). Therefore, countries acceding to WTO including developing ones were forced to adopt the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Cammaerts, 2011). Responses to these concerns were controversial. Some research took the assumption that without IP protection individuals will lack the incentive to create, and that established exceptions and limitations will serve the public interest well, emphasizing that without strong intellectual property protection the economy will collapse. However, many other researchers on IP and development have argued that the integration of the current international IP system into the laws of developing countries will not serve the public interest in those countries (Price, 2009)

Moreover, Acemoglu et al. (2013) found that the impact of IP on economic growth is state-dependent. Whereas states with high technological capacity might experience an increase in 'the growth rate of the economy from 1.86% to 2.04%'. These findings reaffirm previous results, which implies that the introduction of the TRIPs had no beneficial impact on the status of global welfare. On the contrary, and given its 'one size fits all' approach, it is expected to be associated with adverse effects on the economic growth of developing countries. That, in turn, largely contradicts assumptions advocated by some of the major stakeholders in the current IP system who insist that the introduction of a robust IP system, compliant with the TRIPs, will enhance the economic growth for both developed and developing countries alike (Acemoglu et al., 2013).

In Islamic countries, as in other developing countries, the Western concept of IP is perceived as culturally based, prioritising the interests of the developed countries, and promoting objectives and concepts which are inappropriate for the distinct situations of Islamic countries. The results of this perception can apparently be seen in copying and infringing activities in different Islamic societies. Moreover, a significant number of Islamic countries regularly exist in the United States' Watch List and Priority Watch List of infringing nations (Malkawi, 2013).

The rules of Islamic religion influence the formation and enforcement of laws as well as shaping culture. Because IP law is originally a Western legal concept, it is perceived by many not to be sourced in Islamic *Shari'a*. It is therefore seen as permissible to engage in actions amounting to the duplication of intellectual goods, especially those of foreign origin. Laws are sensitive to their local and cultural context. To ensure the effectiveness of a given law, it has to

be relevant to the social and cultural context of the society it addresses. The adoption of IP within Islamic *Shari'a* requires more than establishing the compatibility of notions of ownership over ideas with the principles of Islamic *Shari'a*. Also, the research must develop a practical dimension to discover how the sources and objectives of Islamic *Shari'a* interact with the powerful applications of IP as contained in its international framework (Elmahjub,2014).

This paper addresses those issues by employing an approach based on the primary five objectives (*Maqasid al-Shari'a*) and general principles of ownership and comparatively analysis the fundamentals of IP system to emphasize an overlooked dissimilarity between the current IP framework and the Islamic one. Accordingly, the remainder of this paper is organized into three sections. Section one highlights the main problematic issues under the current system; section two provides a discussion over *Maqasid al-Shari'a*, the general principles of ownership and related sources of *Fiqh*, namely *maslaha mursalah* (consideration of public interest) and their appropriateness to address IP related issues. Section 3 elaborates on the possible application of these principles in an integrated framework congruent to *Shari'a* as well as the welfare of the society.

2.0 THE PROBLEMATIC ASPECTS OF IP IN THE ISLAMIC CONTEXT

Historically, many manifestations confirm the higher place that was conferred to innovators and indicates the appreciation of Islamic civilization to the intellectual labour throughout different eras.

It is safe to say that within the Islamic scholarship few arguments support the view that Islamic *Shari'a* opposes IP. The majority of contemporary Muslim scholars confirm the recognition of Islamic *Shari'a* of IPR. Whereby, the principles based on al-Qur'an and *Sunnah* beside the non-textual sources of *Shari'a* provide robust support for the protection of IP. These include the concepts of (*milkiyah* & labour) and the principles of *Shari'a* on encouraging productivity and forestalling 'free-riding.' The non-textual sources also provide additional support for the concept of IP, especially *maslaha mursalah* (consideration of public interest), (Malkawi, 2013). However, they may not give grounds to the present regulation as stipulated in international treaties. The major problematic aspects in this regards can be summarised in the following points:

a.) *Maslaha mursalah* is a source of Islamic *Shari'a* designed to operate as a normative framework to ensure that law and policy-making promote the public interest. Currently, dominant IP systems would be acceptable only if they promote the public interest. Nevertheless, taking into consideration the fact that, all Islamic countries are developing ones, an assertion that "intellectual property laws have the society's interest at heart and accordingly should be accepted under the *maslaha mursalah* in *Shari'a* might be erroneous" (Elmahjub, 2015).

Arguably, a differentiation should be made between providing grounds for IPR under Islamic *Shari'a* based on *maslaha mursalah*, and employing it to justify the current international IP system. While, the codifying of IP may foster development, and therefore, is justified under *maslaha mursalah*. Nevertheless, this does not extend to the currently dominant IP system which may not support development as *maslaha mursalah* requires.

The international IP system was not designed to safeguard the interests of developing countries in general and Muslim Countries in particular. Therefore, it is questionable to argue

that it is congruent with the *maslaha mursalah* because it secures the interests of the society. Developing countries which are supposed to benefit the most from that system were either absent when it was built or were under irresistible pressure. The result according to Okediji (2006) is “an Agreement that in many respects reflected prevailing United States law and policy and ‘is not a reflection of the need to encourage creativity or to promote the public welfare in developing countries”.

Therefore, a study of IP and Islamic *Shari’a* has to treat the assertions of a positive relationship between the current IP system, *maslaha mursalah* and Islamic *Shari’a* with considerable scepticism. That is because what promoted the development of DCs was not the type of protection offered by the current IP system; rather it was lenient IP protection that was sensitive to their level of development. Olwan (2011) wrote comprehensively on the relationship between IP and development from both theoretical as well as practical aspects. He asserted throughout his thesis that IP alone has no direct positive effect on the process of development and it has to be considered among other policy reforms.

b.) The current regulation of IP is not entirely consistent with the principles of Islamic *Shari’a*. Particularly, regarding aspects related to the dissemination of knowledge. The banning of knowledge concealment under Islamic *Shari’a* may pose particular challenges for the current standardised IP framework. Furthermore, the scope of protected works is extensive compared to what could be accepted as protectable according to Islamic *Shari’a*. The scope is limited only by public order and morals of personal freedom which is per se *la* concepts and significantly influenced by the liberal understanding. Islamic *Shari’a* provides a distinct concept of morality, which is considered to be much narrower than that of the West. That has a bearing on the protection of IP. Even if we concluded that Islamic *Shari’a* could accept the existing international IP model, such acceptance might be limited by certain dictates from the primary sources of Islamic *Shari’a*.

As such, various copyrighted works based on the current international standards are problematic when considered from the Islamic perspective. To set an example, literary and artistic works which contain what *Shari’a* considers as obscene language or content are not protectable as the ideas underlying them are not accepted in Islamic *Shari’a*. Accordingly, any idea or form of expression which is worthy of punishment in Islamic *Shari’a* cannot be protected according to its rules.

Additionally, patent raises problematic concerns. As such, the Council of the Islamic *Fiqh* Academy (1997) confirmed that while Islam encourages the freedom of scientific research, however, stresses some restrictions concerning examining the outcomes of that research in the light of *Shari’a* to authorise what is lawful (*halal*) and prohibit what is unlawful (*haram*). Thereby, no discovery shall be allowed because only its application is technically possible.

That *fatwa* confronts the prevailing Western belief that whatsoever on the earth made by humans can be patentable. Hence, some innovations may be regarded as *haram* (prohibited). As such, any alteration to the living organism in a way that contradicts the order established by Allah is denounced. Thus, inventions that involve the human body or parts of it, and those include procedures for modifying the identity of the human gene shall be excluded from patentability. Additionally, invented devices which promote activities that run counter to the dictates of *Shari’a*, such as gambling, will not be granted patent protection according to any *Shari’a*-compliant patent act.

Similarly, Trademarks. The rules of Islamic *Shari'a* prohibit the consumption and trading of certain products and services such as alcoholic beverages, pork, and casinos. In any *Shari'a*-compliant trademark law, the registration, and accordingly the protection, of any trademarks connected with such types of products would be denied.

Evidently, the impact of the rules of Islamic *Shari'a* on IP means the exclusion of some innovations and items from protection, as described above. However, it does not mean Islamic *Shari'a* cannot recognise and protect the ownership of ideas in general.

c.) The protection of human life (*nafsi*), intellect (*aqal*) and wealth (*mal*), are prime objectives of Islamic *Shari'a*. One or more of which is required to be promoted by any new ruling under *maslaha mursalah*. That can be translated to include the right to attain essential health care, access to educational resources and a decent level of income. These three objectives come in line with the fundamentals of the modern concept of development (Elmahjub, 2014).

The TRIPs Agreement was the first international treaty to provide protection supported by sanctions for pharmaceutical products. This protection is mainly designed to fulfil the objectives of the pharmaceutical industry in the developed countries without giving due consideration to the needs of the poor to medical access. A developing country that aspires to produce a patented live-saving drug, it must wait 20 years. Acting outside the scope of the TRIPs could be considered as a 'theft.' Accompanied by the risk of being brought to the WTO-Dispute Settlement Panel for noncompliance with TRIPs, as was the case with South Africa and Brazil.

IP and access to educational materials are a further concern. Education is the cornerstone of development. It always has been so, and its importance is increasing in the age of the information economy, where the driving factor of prosperity and rapid change is knowledge-based innovation. Education is a key to developing that knowledge and the sense of personal efficacy needed to adjust to rapid change. As indicated above, the objective of Islamic *Shari'a* in safeguarding intellect (*aqal*) encompasses promoting education. Fundamental to the right to education is access to educational materials, namely textbooks and journal articles. The international copyright system is fundamentally concerned with the authors' privileges which require uplifting the extent of protection that is given to them. As for the sake of the developing countries, which are in vital need of access to educational materials, the system does not seem to be responsive enough.

According to Ricketson and Ginsburg (2006), the problem is that the publishers and providers of the most necessary educational materials are located in the developed world. Those publishers and vendors have strong copyright protection on their materials, both in their own countries and under the international copyright system. Evidently, that causes problems for developing countries, which lack the financial resources to purchase those materials or to obtain licenses to reproduce, translate or utilise them for their purposes. Additionally, and on a practical level, the actual process of obtaining educational material through permissions- which may always be denied- may involve significant time delays or even prove impossible.

The international copyright system makes the educational materials the property of the authors, who are not obliged to treat users in developing countries in a favourable way, since they are not in the business of providing free assistance to those countries. If a citizen in a developing country attempted to act outside the scope of the current international IP system by copying any of the educational materials needed for a school or university education, such action obliges his country under its international commitments to seize the infringing copies or even sanction the infringer with imprisonment and monetary fines. Apparently, the top-down

approach of the current IP system seems to run afoul of the objective of Islamic *Shari'a* to safeguard *aql*.

Concerning the relationship between IP and economic growth in general, economists have employed empirical studies that included both developed and developing countries. Such as Braga and Willmore (1991), Rivera, Batiz and Romer (1991); Gould, and Gruben (1996); Park and Ginarte (1997) and Patricia Higino (2005). Despite the different analytic methods used by these researchers, they all concluded that high IP protection might positively affect the growth rates in the developed countries but not for those of less developed economies. Almeida and Fernandes (2008) studied 43 developing countries from Africa, Asia, and Latin America and surveyed 17,667 firms across a wide range of manufacturing industries, found that the driving factor behind innovation and its accompanying economic growth does not rest in the protection of IP. It is fundamentally linked to policies that promote liberalisation of the trade regimes, enhance partnerships with foreign firms through joint ventures and the level of corporate absorptive infrastructure of the local companies.

Consequently, the implementation of *maslaha mursalah* to adopt the current IP systems calls for an examination of IP's sensitivity to development through the promotion of its factors, namely, health, education and economic growth. These factors are, simultaneously, at the heart of objectives of Islamic *Shari'a* for the process of lawmaking. If the findings discussed above inform us that current IP systems do not promote these objectives, it can be argued that they are insensitive to the public interest as required, therefore, may not be compatible with Islamic *Shari'a*. However, it is not sufficient to establish the incompatibility of the current predominant IP system with Islamic *Shari'a*. It is imperative to explore the way in which ownership over ideas can be regulated from an Islamic perspective

3.0 The appropriateness of Maqasid Al-Shari'a to frame an IP System

Islam played a decisive role in the development of Muslim societies in the past. That can be attributed to the strong linkage that Islam draws between deeds that should be done in this world (*Dunya*) and its reward or punishment in the Hereafter (*akhirah*). This linkage paved the way for a steady and rapid progress for the Muslim society where believers were not only motivated by economic interests but also with reward in the Afterlife from the Supreme Creator of the universe.

Islamic *Shari'a* has a sustainable relevance in modern Muslim societies, shaping and influencing legal, social and cultural life. At the same time, Islamic *Shari'a* has its framework for regulating property institutions. Thus, it is inaccurate to argue that IP as developed in the West, specifically the current systems, is compatible with the concepts of *mal* and property according to Islamic sources. Various principles based on the sources of *Shari'a* pull largely in different directions from several aspects of the IP systems as developed in the West (Elmahjub, 2014).

The benchmark for law and policy-making from an Islamic perspective is securing the public interest by promoting the welfare and preventing harm from being inflicted upon society. This encompasses the utilitarian approaches but goes far beyond them. Maximising the economic well-being is part of the Islamic concept of the public interest, but there are other considerations as well (Elmahjub, 2014). Islamic *Shari'a* directs policymakers to design laws and policies that preserve religion (*Dim*), human life (*nafs*), human intellect (*aql*), lineage (*nasl*) and human wealth (*mal*). Those are regarded as the major *Maqasid* (objectives) that Islamic *Shari'a* revolves around them.

The main driving factors of development (good health, education, and income) are strongly linked to *maqasid al-Shari'a* (objectives of Islamic *Shari'a*), particularly its objectives in maintaining life (*nafs*), intellect (*aql*) and wealth (*mal*). Muslim law and policymakers are directed to promote these human capabilities through the normative framework of *maqasid al-Shari'a*. For instance, pursuing Islamic *Sharia's* objective in maintaining *nafs* includes promoting good health as one of the main factors of development. Similarly, preserving *aql* and *mal* encompasses good education and increasing income. The relation between *maqasid* and the driving factors of development has a significant bearing on defining the relationship between the current regulation of IP and Islamic *Shari'a*.

Furthermore, the rules of Islamic *Shari'a* are a complete way of life that regulate — in addition to devotional matters — the relationships among individuals, between individuals and the state and among states at the international level. Accordingly, in a country where the dominant population is Muslim, it is a matter of social security to make sure that the rules of *Shari'a* have a bearing on what is considered to be in their interests in the process of state-building. Policymakers, as continually emphasised in *Fiqh al-siyasa al-shar' iyya* (jurisprudence of Islamic legal policy), are supposed to consider the role of Islam in building institutions within the state and in the operation of these establishments. That should be done by enacting laws and regulations whenever needed. There, the role of *maslaha mursalah* comes in handy.

Maslaha mursalah is a dynamic source of Islamic *Shari'a* that operates on the consideration of unregulated public interest. The eminent Muslim scholar al-izz Ibn Abd al-Salam, (2003) asserts that “all the teachings of Islamic *Shari'a* are advice to humankind to prevent any potential harm that they might encounter, or bring about public interests”. Ibn al-Qayyim (2002) and Ibn Taymiyyah (2004) have made the same observation.

The Arabic term *maslaha* means interest/benefit and *mursalah* means unregulated (Ibn Manzur, 1993). The combined terms indicate the consideration of public interest (development) in adopting new issues within the society into Islamic *Shari'a*. *Maslaha mursalah* expresses the practical aspect of the process of lawmaking in *Shari'a* since the central intent of its operation is the overall welfare of the community.

Hamadi (2009) has studied the role of *maslaha mursalah* in the formation of human society through the classic writings of both: Ibn Khaldun and Imam al-Shatibi. He concluded that *al-maslaha al- mursala* doctrine is relevant in the process of lawmaking as well as in the (*imarab*) (development) of society. He depended on a traditional presumption in the Principles of Islamic Jurisprudence. That is, the entire purpose of Islamic *Shari'a* (*maqasid al-Shari'a*) is to secure the interests of the community through preserving religion (*Din*), life (*nafs*), intellect (‘ *aql*), lineage (*nasl*) and wealth (*mal*). He takes into consideration that whatever preserves these five purposes is an interest that could be considered to be *maslaha mursalah*. Moreover, he draws upon the theory of Imam al-Shatibi regarding *maslaha mursalah* in actualising the legal reform needed for the progress of society.

Al-Shatibi (1997) provides lawmakers with broad parameters for applying the *maslaha mursalah* to the unregulated issues that might face the community as a result of the elapse of time, the change of location and human knowledge. Al-Shatibi's theory offers guidance regarding the classification of the interests that can be considered, the different scope of such consideration and the conditions that need to be met.

On the other hand, *maslaha mursalah* has influenced Ibn Khaldun's perspective on development (*imarab*) contained in his renowned work *al-Muqaddima*. Hamadi (2009) maintains

that the *maslaha* is embodied in all that which serves human beings concerning their livelihood, scientific and industrial advancement. Thereby, the prime goal is to elevate the society from only seeking survival to one of common welfare. In this context, he cites Ibn Khaldun (2005) who argues that development (*al-umran*) is a necessity for humans, and securing its foundations is a prerequisite for achieving it.

Summing up, *maslaha mursalah* is one of the most efficient tools for helping the Muslim community to build modern states based on active political systems, contemporary economic structures, and intelligent educational systems by applying the new ideas that emerge in recent times to the sources of Islamic *Shari'a*. It works as a thread that links the beliefs of Muslims that developed fourteen hundred years ago to the sophistication of the modern day.

In this respect, al-Qaradawi (2011) observes that what made Muslim scholars insist on the necessity of *maslaha mursalah* in the process of law-making and in building the judiciary system, is the need they felt that doing so would be in the best interest of Muslims in the modern day. He further indicates that Islamic government (*waliu al-amr*) may use *maslaha mursalah* in carrying out the community's affairs in a way that brings about welfare and prevents harm. That applies particularly to those interests that *Shari'a* came mainly to preserve (religion, life, intellect, lineage, and wealth) through the issuance of modern legislation based on *maslaha mursalah* in all fields of public affairs. That, in turn, will secure individual well-being, family happiness, social stability, development and the flourishing of civilisation.

Another fundamental aspect of the Islamic perspective on the regulation of society, including the regulation of property rights in both tangible and intangible assets is Vicegerency (*Khilafah*). It can be used to place limits on IP rights and ensure that the regulation of IP takes into consideration the broader public interest and not only the exclusive rights of IP holders. According to the Islamic faith, Allah created the earth for the settlement of humankind. The Qur'an says:

"He (Allah) brought you forth from the earth and settled you therein" (Verse 61, ch. 11, Surah Hud).

Modern Muslim economists understand this text to be a benchmark for the concept of development in Islam. Al-Fangari (2006) observes that the term (*imarah*) in the Arabic version of the text encompasses the modern concept of development. It connotes that individuals are instructed to develop the earth by labouring on the resources found in the commons to provide each member of the community (*ummah*) with their needs. Meanwhile, in Islam it is understood that individuals need motivation; accordingly, for the *imarah* to be actualised, recognition of private property is essential as people will be reluctant to labour on resources if they will be denied ownership over the resultant end product. However, this ownership is linked to a principle which is deemed as one of the fundamental aspects of the Islamic faith, that is, the principle of vicegerency (*Khilafah*).

Khilafah or *Istihikhlaf* can be translated to mean stewardship, successorship or vicegerency. According to this concept, the ultimate ownership of resources and end products should be considered for Allah who created these resources and created the human who labours on these resources. Allah says in the Qur'an:

"And remember when He made you successors after the people of Noah and increased you in stature extensively. So remember the favours of Allah that might succeed you. He is the dominion of the heavens and earth. And to Allah are returned all matters." (Verse 69, ch.8, Surah al-A'raf).

“Believe in Allah and His Messenger and spend out of that in which He has made you successors. For those who have believed among you and spent, there will be a great reward.” (Verse 7, ch.27, Surah al-Hadid)

Accordingly, the ultimate ownership of all assets, which are possessed by individuals, is for Allah who created these assets. Allah grants those assets to humankind as trustees with permission to enjoy the fruits of these assets. Therefore, believers are called to spend from these assets with ease in the cause of public interest, as if they were granted permission to spend from another person’s wealth. Al-Qarafi (2007) and Imam al-Shatibi (1997) argue to the same effect.

Al-Qaradawi (2011) asserts that *Istihlak* is a central concept of the Islamic economy. Individuals are granted the rights to make transactions on the assets they possess. However, these rights should be practiced considering the ultimate owner of wealth is the Creator.

Allah’s ultimate ownership according to the Qur’an is not confined to tangible assets; it equally extends to knowledge. Furthermore, attribution of knowledge to human beings without reference to Allah, as the giver of such knowledge, is condemned in al- Qur’an. The following verses can be invoked to support the claim that, according to Islamic *Shari’a*, knowledge is a grant from Allah. Al- Qur’an narrates:

“Read! And your Lord is the Most Generous. Who has taught by the pen. He has taught human that which he/she knew not” (Verses 3-5, ch.30, Surah al-‘alaq).

Accordingly, those who possess knowledge have a responsibility to society to allow the state to take some or even much of their knowledge for redistribution. In Islamic *Shari’a*, such state intervention could be justified under the concept of accountability.

The concept of vicegerency is linked with the idea of accountability. Al-Qur’an states: *“Then We made you successors in the land after them so that We may observe how you will do” (verse 14, ch. 11, Surah Yunus).*

Therefore, humans, as vicegerents of Allah, are expected to exploit the property bestowed on them by Allah in conformity with the dictates of Islamic *Shari’a*, which aim at the full and efficient utilisation of resources for the general welfare of society.

Allah’s ultimate ownership as prescribed in the Qur’an lays the foundations for the constraints on private property. Among these constraints is the general prohibition of the hoarding of wealth. It is regarded as a fundamental principle of Islamic economic policy. Islam strictly condemns the concentration of wealth in the hands of few members of society. Al-Ghazali (2005 a) argues that Islam encourages the circulation of wealth among all sectors of society and does not accept that any particular group should hold a monopoly on such wealth. Further, he highlighted the importance of development (*imarah*) as a priority for the Islamic society. Al-Ghazali (2005 b) equates the necessity of development with the importance of devotions (*ibadah*) in Islam. He observes that it is pointless to preach to a community with the moral commandments of the religion without establishing the foundations of corporate economic reform as well as joint development.

The notion of social justice is a core concern in the Islamic concept of development. Law and policy makers are directed by the sources and objectives of Islamic *Shari’a* not only to ensure the maximisation of wealth but also to empower people to lead meaningful lives regarding the fulfilment of the general need, full employment, and fair allocation of income, without inordinately large or prolonged imbalances. The Islamic perspective on development also implies positive progress as noted by Ahmed (2003) “collective civilizational improvement through a

balanced interaction among spiritual, social and economic factors that lead to a rise in the need fulfilment for the community, gradually and sustainably.”

Based on the above discussion the following section elaborates on the current and dominant IP system and the extent of its relevance and fit into Islamic *Shari'a*'s idea of developed society.

4.0 The outlines of Maqasid-based IP System

IP law and policy on an international level are primarily based on incentive rhetoric. IP rights are essentially seen as an economic tool to incentivise the production of more goods. Strong and more extensive IP rights are seen by those who influence IP law and policy-making on an international level as tools for promoting welfare for all. This mindset fails to account for broader development concerns, particularly in less developed nations, which include all the countries with predominantly Islamic populations.

This analysis is known in the IP scholarship as the utilitarian justification for IP. Recently, it has been increasingly criticised by a growing body of research (Sen, 1999; Nussbaum, 2000; Lessig, 2001; 2004). Nevertheless, the Islamic perspective on the public interest, development, and welfare rejects this single economic analysis of IP. The Islamic concept of *imarah* includes pursuing economic progress but goes beyond that. It entails systematic efforts to qualify the society to serve the purposes of Allah Almighty. In achieving that, the development process must enhance the overall well-being of society. As such, promoting health, employment, education training and technological progress.

Economic efficiency and wealth accumulation is only one of the objectives of Islamic *Shari'a*. For instance, the objective of *Shari'a* which aims at preserving human life requires that any legislation enacted must not restrict access to essential and life-saving medicine. The objective which seeks to maintain human intellect obliges policymakers to consider providing full access to educational materials. The objective of protecting wealth requires policymakers to consider the enactment of laws that contribute to the economic growth of the society.

The failure of the dominant IP systems to account for development concerns can be attributed to their singular and overwhelming focus on economic analysis. Law and policy-making must go beyond the narrow vision of incentives to account for broader social, cultural and ethical considerations. The consideration of public interest (development) from an Islamic perspective might mean not only granting exclusive rights to incentivise innovation and creativity but also — and equally — considering IP systems which empower people's capabilities to access knowledge products and participate in the creation of those products.

A common feature of the various IP systems is that they contain measures designed to manage the interests of those who own the IPRs and those who use the materials that are the subject of those rights (Idris & Hisamitsu, 2006). However, the measures used in current IP systems have increasingly been criticised for focussing overly on owners' exclusive rights while giving insufficient weight to the interests of users. Giving more rights for IP holders is seen as a driving force for innovation and creativity. Nevertheless, the more rights-approach led to concentrating the power of controlling knowledge in the hands of few stakeholders. There is a strong case in the literature against the dominant IP systems for being highly restrictive. A substantial part of the current IP scholarship, prominent scholars, and experts argue that IP laws and policy-making on an international and domestic level, particularly in developed countries, are contributing to the concentration of private power in the hands of a few within our societies.

Lessig refers to statistics showing that in 2001 ownership of American culture in literary and artistic works was concentrated in less than 20 firms (Lessig, 2001).

Greater access and participation may promote the kind of development required by Islamic *Shari'a*. Various principles derived from the sources and objectives of Islamic *Shari'a* support the view that IP laws and policies should not be solely based on economic incentives.

Hence, as the case with the concentration of tangible assets, Islamic *Shari'a* does not seem to approve IP laws and policies that lead to concentrating the control of knowledge and culture in the hands of a few. To neutralise the adverse effects of the concentration of private powers, policymakers within Islamic states must intervene to prevent it. One essential mechanism for doing that is by implementing the principles of social and distributive justice (Elmahjub, 2015). There are myriad of principles procured from the sources and objectives of Islamic *Shari'a* that should be observed in constructing a normative framework for a *Shari'a*-based IP system. These principles place significant emphasis on third parties' interests against those of the IP owner.

The concepts of social justice in Islamic *Shari'a* can influence the regulation and management of IP in, at least two different ways. Firstly, they can be used to adjust the structure of IP laws to curb the mechanisms of concentration and exclusion they allow. That can be achieved by empowering the users of materials protected by IP. Secondly, these concepts, which promote sharing and collaboration, can be used to support alternative modalities of knowledge and cultural management and production which are based on sharing and cooperation such as open source projects and access to knowledge (Elmahjub, 2014).

Sayed Qutb, one of the influential Islamic thinkers of the 20th century, was the first to articulate a theory of social justice based on Islamic *Shari'a*. Qutb (1993) states that the concept of justice in Islam is not limited to economic justice but is fundamentally framed by spiritual values as reflected in the Islamic perception of life, wherein ideals such as compassion, amiability, and cooperation must be reflected in all institutions of society. He further asserts that Islam recognises that individuals have a natural disposition to possess as much wealth as they can — whether personal or productive — thereby preventing others from joining them. Simultaneously, Islam contains instructions, systems, and regulations designed to ensure that the higher objectives of society (including fair distribution of wealth) are integrated within any social institution including the institution of property.

Appropriation of property and wealth is subject to the established principle of *Shari'a*, which is justice (*'adl*) which necessitates equality of opportunity by emphasising a bundle of societal values. Accordingly, regulating the institution of property from an Islamic perspective has to take into consideration economic and social values that not only ensure fairness within the institution of property but guarantee the fairness of property itself. In other words, for the institution of property to be fair, the public system of rules should be designed to make sure that the rights of owners do not impinge on the greater public good, particularly, regarding fair distribution of wealth and equality of opportunity. This is not to say that everybody has to have equal shares of the wealth appropriated by others, but that the exercise of ownership rights over wealth has to benefit society collectively.

According to the Islamic concept of *Khilafah*, wealth is a gift from Allah to individuals. Labouring to appropriate wealth justifies establishing ownership rights but does not stand as a valid reason to reject re-distribution arrangements for the greater public interest. From an Islamic perspective, the concept of distributive justice takes the form of what is known as *takaful* (solidarity or commonality). The Arabic term *takaful* comes from the root word *tafa'ul*, which

means mutual interaction. In social justice context, it connotes a meaning of joint responsibility. Sheikh Shaltut (2001) understands *takaful* to mean shared collective responsibility by which each member of the society is responsible for the other members in a way that practically contributes to the public welfare.

Based on that understanding, individuals who possess wealth - especially in the productive form of property - have a responsibility towards society. Further, the state has a religious responsibility to ensure that wealth is not concentrated among a few individuals or entities and that it is appropriately distributed for the welfare of the larger public. *Waqf* is an essential aspect of the concept of *takaful* wherein the rich among Muslims, motivated by the promise of great reward in the Hereafter, allocate a portion of their wealth to provide services to the rest of community. In this way, it assists in redistributing wealth in the interest of the society collectively. With its ubiquitous presence in Islamic societies, the institution of *waqf* contributed in promoting socio-economic development by providing funds to educational institutions, health centers and infrastructure projects (Elmahjub, 2014).

The most important aspect of *takaful* and social justice in Islamic *Shari'a* is the system of almsgiving (*zakat*). The term *zakat* comes from the root word *zaka*. It is used in the Qur'an to mean purity and increase. *Zakat* plays a significant role in realising the doctrine of distributive justice. It aims to promote a spirit of cooperation and collaboration between two sectors of society: the rich and the poor. The wealthy members of society share some of their wealth with the destitute, so they can obtain an opportunity to appropriate wealth for themselves. For this reason, the best approach to giving *zakat* is to assist the impoverished to establish an independent business instead of giving them money. Considerations of social justice are an inseparable part of the Islamic approach to the regulation of property; they carry more weight than the factors surrounding the protection of private property i.e., economic efficiency.

This means that the ideals and values of *takaful* have to be woven into the structure of the laws and institutions of the state, among which is the institution of property. In the same context, al-Qaradawi (1995) indicates that it is the duty of the state to ensure that the values and the ethical ideals of Islamic *Shari'a* are transformed into practical laws and regulations and to establish institutions and devices to guard and promote these ideals and values. To be responsive to the values of *takaful* and social justice in Islam, the rules and doctrines of the IP system should reflect third-party interests in a clearer and more robust manner. That should take place by embracing reforms and policies oriented toward wider distributional features and general fairness considerations, not only within the IP system but of the system itself.

Cohen (2006) argues that an appropriate balance of interests can be achieved if only the benefit of users, in addition to those of authors, are accommodated in the theoretical foundations of copyright. An IP regime that is more faithful to social justice considerations will distribute the fundamental rights and duties of IP holders and users in a different manner to the dominant system. A balanced IP regime will not only be designed according to economic considerations but also in a way that prevents the excessive concentration of private powers and does not impinge on the equality of opportunity of third parties (Cohen, 2005). Fair IP laws, according to Mtima and Jamar (2010) 'should be crafted and administered so that marginalised and disadvantaged groups, 'the others' can become more involved in the social, cultural, and economic contributions and benefits that flow from IP protection.

In deciding how to prioritise public interests and private rights, there should be an objective weighing of the benefit of the individuals, in exercising their individual rights, against the public interest in limiting those rights. Where exercising the private right leads to the promotion of the

individual's interest and, at the same time, leads to equal or stronger harm to the public interest, then the public interest should prevail. In this context, al-Durini (1977) refers to monopoly (*ihhtikar*) as an application of the mentioned analysis. Islamic *Shari'a* prohibits *ihhtikar* because it undermines the public interest in the wide availability of goods and services, in favour of individual interests.

Al-Durini (1988) was among the first contemporary Muslim scholars to emphasise the importance of the doctrine of abuse of rights in striking the appropriate balance between private rights and public interests. He initially established the existence of a comprehensive theory of abuse of rights in Islamic *Shari'a* by relying on interpretations of the Qur'an, the *Sunnah*, and Islamic jurisprudence. Then, al-Durini put forward the following argument: a) Allah is the source of all rights. b) The main objective of Islamic *Shari'a* is preventing harm and securing the interests of society. c) The exercise of rights (including property rights) should not run afoul of that objective; accordingly; d) when the exercise of property rights conflicts with the public interest (e.g., education, public health, and economic competition) the public interest takes precedence.

Hence, the application of the doctrine of abuse of rights in Islamic *Shari'a* would assist in striking a balance between the exclusive rights of the IP holder and the public interest. Thereby contribute to an IP system that is more responsive to the sources and objectives of Islamic *Shari'a*. If the exercise of exclusive rights leads the IP holder to misuse his patent or copyright by employing anti-competitive practices the doctrine can be used to justify state intervention to curb the exclusive rights as the public interest dictates (Elmahjub, 2014).

Moreover, an IP system that is more compatible with the principle of dissemination of knowledge in Islamic *Shari'a* would be less restrictive than the one currently in place. Azmi (1996) concludes that "dissemination of knowledge is encouraged and in particular circumstances compulsory in Islam". Therefore, there is a need to mediate between control of and access to ideas. Thus, any calls for the limitation of property rights over ideas based on efficiency, justice and education as postulated by (Lessig, 2001; Boyle, 2010; Netanel, 2003; Azmi, 2004) and several others merit serious consideration by Muslim scholars.

Summing up, according to the abovementioned principles, Islamic *Shari'a* would support a system that is less restrictive than the current system. Rather, Islamic *Shari'a* supports an IP system that recognises distributive justice concerns, carefully monitors the exclusive rights of the IP owner, allows for the wide dissemination of knowledge and cultural products and promotes modalities of knowledge and cultural production based on sharing and cooperation. Elmahjub (2015) asserts that the principles of *Khilafah*, non-concentration of wealth, social justice, and abuse of rights and dissemination of knowledge as regarded by *Shari'a* provides a normative framework to issue an IP system that is more suitable for the well-being of Muslim societies. Whereby, the integration of the principles of *Shari'a* to achieve these objectives has the potential to promote the overall development and social welfare as required by Islam. The proposed legislative reforms and policy considerations aim at constructing an IP system that allocates rights and obligations by principles of fairness and justice. Such a system is not owner-centred system rather one that ensures and supports the following criteria:

- Developing models of sharing, collaboration, and participation
- Considering knowledge as a public good and, therefore recognises the rights of society in intellectual creation.

- Recognising the stimulating needs and nurture of less developed communities.
- Realising a distinctive set of rights for users.

It is safe to say that if Islamic *Shari'a* does not fully support the current IP system, it will support a system that considers the above propositions.

5.0 CONCLUSION

It is a belief within Muslim communities that Islamic *Shari'a* should be the only source of legislation in Islamic countries. This view can be attributed to two interrelated reasons. Firstly, Islam does not separate devotional and legal matters. Secondly, through the lapse of time, Islamic *Shari'a* has become a cultural component of the lives of Muslims which affects every aspect of their lives including the lawmaking process. It is a pillar of Islamic faith that the rules which regulate civil transactions, marriage, and criminal conduct stem from the same sources which govern devotional issues such as prayers and fasting. Adhering to the Islamic regulation of transactions and devotions is a prerequisite for any individual to be a Muslim. Unlike the general secular thought developed in Western nations, which explicitly separates church and state, Islam does not allow for this separation.

Consequently, safeguarding the interests of society is a fundamental aspect of lawmaking in Islamic *Shari'a*. If *maslaha mursalah* is to be applied to validate the adoption of a given institution, that institution must conform to the Islamic conception of public interests. A comprehensive study of IP and Islamic *Shari'a* has to consider not only providing justifications for *Shari'a's* recognition of ownership of ideas but also how Islamic *Shari'a* might interact with the current framework of IP. It must take into account how the sources, principles, and objectives of Islamic *Shari'a* view the effects of the existing structure of IP on the interests of society in areas such as education, public health, and economic growth.

References

Al-Qur'an

Acemoglu, D, Akcigit, U., Bloom, N., and Kerr, WR. (2013). Innovation, Reallocation, and Growth. *Harvard Business School Working Paper Series* No. 13-088, April.

Ahmed, Fuad A. (2003). *al-Siyāsa al-Shar'īyya wa Alaqatuha bi al-Tanmia*, Islamic Bank for Development, The Islamic Institute for Research and Training

Al-Durini, Fathi. (1977). *Haq al-Ibtikar fi al-Fiqh al-Islami al-Muqāran*, *al-Risalah Foundation*, Beirut

Al-Durini F. (1988). *Nazariyat al-Ta'asuf fi isti 'mal al-Hagg*. *Muassasah al-Risalah*, Beirut

Al-Fangari, Muhammed. (2006). *al-Madhab al-Iqtisādi fi al-Islam*, al-Hay'a al-Misriyya li al-Kitab, Cairo.

Al-Ghazali, Mohammed. (2005 a). *al-Islam wa al-Manāhij al-Ishtirākīyya*, Nahdat Misr, Cairo 4th ed.

Al-Ghazali Muhammed. (2005 b). *al-Islam wa al-Awda' al-Iqtisādiyya*, Nahdat Misr, Cairo 3rd ed..

Al-‘izz Ibn Abd al-Salam. (2003). *Qaw'aid al-Abkām fi Islāh al-Anām*, Dār ibn Hazm, Cairo.

Almeida, R. and Fernandes, AM. (2008) Openness and Technological Innovations in Developing Countries: Evidence from Firm-Level Surveys. *The journal of Development Studies*, Vol 44(5): Technology, Institutions and Development.

Al-Qaradawi, Yusuf. (2011). *al-Siyāsa al-Shar'īyya*, Maktabat Wahba, Cairo, Egypt

- Al-Qaradawi, Yusuf. (1995). *Dawr al-Qiyam wa al-Akblaq fi al-Iqtisad al-Islami*, Maktabat Wahba, Cairo
- Al Qarafi, Shehab al-Din. (2007). *Kitab al-Furūq*, Dār al-Salam, Cairo, vol 1.
- Al-Shatibi. (1997). *al-muwafaqat fi Usul al-Shari'a*, Dār ibn Affan, Vol. 1,12.
- Azmi IM.bt.Abdul Gahni (1996). Basis for the recognition of intellectual property in light of the Shari'ah. *Int Rev Ind Prop* 27
- Azmi I.M.bt. Abdul Gahni (2004). The philosophy of intellectual property rights over ideas in cyberspace: a comparative analysis of the western jurisprudence and the Shari'ah. *Arab Law Quarterly*
- Braga, H. and Willmore, L. (1991). Technological Imports and Technological Effort:: An Analysis of Their Determinants in Brazilian Firms. *The Journal of Industrial Economics*, 39, 421-432.
- Boyle, James. (2010). *The Public Domain: Enclosing the Commons of the Mind*, Yale University Press.
- Cammaerts, B. (2011). The Hegemonic Copyright-Regime vs. the Sharing Copyright Users of Music? *Media, Culture & Society*, 33(3), 491–502.
- Cohen, Julie E, 'Copyright. (2006). Commodification, and Culture: Locating the Public Domain in Copyright' in L. Guibault & P.B. Hugenholtz, *The Future of the Public Domain: Identifying the Commons in Information Law*, Kluwer Law International.
- Cohen, Julie E. (2005). 'The Place of the User in Copyright Law' *Fordham, L. Rev.*
- Elmahjub E. (2015). An Islamic Perspective on the Theories of Intellectual Property. In: Fitzgerald B., Gilchrist J. (eds) *Copyright Perspectives*. Springer, Cham
- Elmahjub, E. (2014). Protection Of Intellectual Property In Islamic Shari'a And The Development Of The Libyan Intellectual Property System, Faculty of Law, Queensland University of Technology, Brisbane, Australia
- Goldsmith, Jack, Lessig, L. (2010). Anti-counterfeiting agreement raises constitutional concerns, <http://www.washingtonpost.com/wpdyn/content/article/2010/03/25/AR2010032502403.htm>
- Gould, D.M., & Gruben, W.C. (1996). The Role of Intellectual Property Rights in Economic Growth. *Journal of Development Economics*, 48(2), 323-350.
- Hamadi Idris. (2009). *al-Masālih al-Mursala wa bina' al-Mujtama' al-Insani (al-Ma'aref al-Jadedda, Morocco)*.
- Ibn Al-Qayyim. (2002). *a'lam al-muwaqi'in*, Dār ibn al-Jawzi.
- Ibn Khaldun. (2005). *al-Muqaddimah, Bayt al-'ulūm wa al-Funūn wa al-Adab*, Vol 2.
- Ibn Manzur. (1993). *Lisan al-Arab (Dār sadir)* Bierut, Lebanon
- Ibn Taymiyah. (2004). *Majmu' al-Fatawa*. Saudi 'Arabia: Mujamma' Al-Malik Fahd li Tiba'at al-Mushaf al-Sharif.
- Idris, Kamil, and Hisamitsu, Arai. (2006). *The Intellectual Property Protection Nations: Mapping the Path from Developing to Developed*, WIPO, Geneva
- Lessig L. (2004). *How big media uses technology and the law to lock down culture and control creativity*. Penguin Books, New York
- Lessig L. (2001). *The future of ideas: the fate of the commons in a connected world*. Random House
- Malkawi, B. H. (2013). The Alliance Between Islamic Law And Intellectual Property: Structure And Practice. *University of St.Thomas Law Journal*, 10(3), 618–649.

- Mtima, L. and Jamar, Steven D. (2010). Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information' (2010) *New York Law School Law Review*, Vol. 55, No. 1, 108.
- Netanel, Net. (2003). Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing, *Harvard Journal of Law & Technology*, Vol. 17.
- Nussbaum, M. (2000). *Women and Human Development: The Capabilities Approach*. Cambridge University Press Cambridge, New York
- Okediji RL. (2006). The international copyright system: limitations, exceptions and public interest considerations for developing countries. *International Centre for Trade and Sustainable Development (ICTSD)*
- Olwan, R. (2011). *Intellectual Property And Development: Theory And Practice*, Thesis, Faculty Of Law, Queensland University Of Technology, Brisbane, Australia.
- Park, W. and Ginarte, J.C. (1997). Intellectual Property Rights and Economic Growth. *Contemporary Economic Policy*, 15(3), 51-61.
- Patricia, H. (2005). International Trade, Economic Growth and Intellectual Property Rights: A Panel Data Study of Developed And Developing Countries. *Journal of Development Economics*, 78(2), 529-547.
- Price D. (2009). *The Development of Intellectual Property Regimes in the Arabian Gulf States: Infidels at the gates*. Routledge, London
- Qutb Sayīd. (1993). *al-'adalab al-Ijtima'iyya fi al-Islam*, Dār al-Shuruq, Cairo, Egypt, 13th ed.
- Ricketson, S. and Ginsburg, J. (2006). *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, Oxford University Press, vol ii,
- Rivera-Batiz, L.A. and Romer, P.M. (1991). International Trade With Endogenous Technological Change. *European Economic Review*, 35(4), 971-1001.
- Rogers, M., Tomalin, J., & Corrigan, R. (2009). The economic impact of consumer copyright exceptions: A literature review. *Consumer Focus*, 1–40.
- Sen, Amartya K. (1999), *Development as Freedom*, Oxford: Oxford University Press.
- Shaltut Muhammed. (2001). *al-Islam 'aqīda wa Shari'a* (Dār al-Shurūq, Cairo
- The Council of the Islamic Fiqh Academy. (1997). Resolution No 100/2/10 on Human Cloning. Tenth Session, Jeddah, KSA