

# ***Sharī'ah* Analysis of Theoretical Justification for Pharmaceutical Patent Protection; A Comparative Study of Western Thoughts with Islamic Law**

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## **Abstract**

More than 2 billion people do not have access to life saving medicines after advent of global intellectual property rights protection of patents under The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) 1994. Plight for availability of innovative scientific products is same in agriculture, genetics, arts, information technology, and other fields of science and technology. WTO, founding organisation of the agreement, justify it on various legal and theoretical grounds. Dispute Resolution System of WTO has repeatedly, decided priority of trade rights over public interest. Theoretical and legal literature on this topic stems from Western authors and a little is available from *Sharī'ah* perspective on protection of human life, religion, property, and race. Moreover, almost all Muslim countries are signatories to TRIPS Agreement without sufficient *Sharī'ah* reflections on intellectual property rights framework. This paper aims at presenting *Sharī'ah* theorisation of intellectual property rights.

**Keywords:** *Sharī'ah*, Intellectual Property Law, TRIPS Agreement, Public Interest, Theory.

## **Introduction:**

Intellectual property rights, especially pharmaceutical patent protection, are justified based upon various Western theories such as utilitarianism, labour theory, personhood theory, contract theory, and nature right theory. It is often felt that literature from Islamic point of view is missing from debate. This article includes to existing theories of defining normativity of justifying intellectual property rights with special focus on pharmaceutical patent with the view of Islamic jurisprudence.

The incentive for innovation is the theory behind the recent trend of patent protection as a monopoly over a period giving patentees the opportunity to benefit from the idea behind innovation. The monopoly right of intellectual property was normative only in the first year until the 15th century when the British common law system began to respect intellectual property rights including patent monopoly.<sup>1</sup> Identical trends, observed in other developed nations during 19<sup>th</sup> century.<sup>2</sup> To understand, intellectual property as legal rights to benefit owner by selling, marketing, or licensing other parties.<sup>3</sup> Intellectual property rights are not absolute, and inventors need to meet the criteria of that award. These conditions are novelty and its productive application.<sup>4</sup> The state regulates the permission and management of intellectual property rights, and standards for license grant, need decision according to requirements of the state. Generally, intellectual

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<sup>1</sup> Holger Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines*, (Oxford: Oxford University Press, 2008), 29.

<sup>2</sup> Ibid. 29.

<sup>3</sup> V.J. Taraporevala, *Law of Intellectual Property* (V.J. Taraporevala, 2005), 18.

<sup>4</sup> Lionel Bently Brad Sherman, *Intellectual Property Law* (Oxford: Oxford University Press 2004), 385.

property right for innovation is set for a certain period, after the expiration, the knowledge behind innovation is released, further research and development.<sup>5</sup> It is worth mentioning that the enforcement of patent rights is not designed for the production of medicines due to medicines and health services included in services to human beings instead of trade and commerce.<sup>6</sup> Introduction of indiscriminate IPRs and exclusive rights of all industrial products including medicines by adopting trade related aspects of intellectual property rights, which is an agreement to introduce globalization of IPRs under the WTO system It was done.<sup>7</sup> This development gives the advantage of managing and setting the price of intrinsic lifesaving medicines, including intellectual property holders, the majority of companies, and other products including wild cards.<sup>8</sup>

This article will present various theories in relation to protection of IPRs in initial part. Later, the authors aim at presenting *Sharī'ah* theorisation of intellectual property rights along with its effectiveness. Main question asked in this research is:

- How *Sharī'ah* theorisation can help enhancing enforcement of intellectual property rights along with public interest?

### Research Methodology:

This research uses the doctrinal legal analysis methodology, by asking 'what the law is in a particular area' for the tenacities of inspiring the subject matter. Moreover, it covers recent developments in the subject area. The work will also utilise comparative research methodology to highlight the domain of arguments from both developing and developed countries. This research examines how the diverse legal regimes deal with these areas and how these jurisdictions have applied their laws to the problematic aspects in order to achieve their objectives. Later, this work highlights the gap and presents Islamic Law Traditions on the issue highlighted.

### Theories on Intellectual Property Protection:

Discussions on protection of intellectual property rights require evaluation based on legal theory to justify the global protection under the WTO regime.<sup>9</sup> These theories help readers form the basic concept of the relationship between the domain of intellectual property protection and other rights. The legal aspect of patent rights may discuss restrictions on its legal domain after granting.<sup>10</sup> There may be some moral reasons for protecting intellectual property rights along with legal aspects. These legal arguments may include labour theory, personality, social plan and utilitarianism as a basis and reasonable

<sup>5</sup> David I. Bainbridge, *Intellectual Property* (London: Pearson 2010), 412.

<sup>6</sup> Condon. J. B., Sinha, T. "Global Diseases, Global Patents and Differential Treatment in WTO Law". (2015). Retrieved from: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=664621](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=664621). accessed 29 October 2018.

<sup>7</sup> Dickhut. M. S. "Ethical And Social Barriers To Accessing Critical Medicines". (2017). *Journal of Gender, Race and Justice*:20, 209-235, 227.

<sup>8</sup> HV Sandhya, "Evolution of Patent Laws". Retrieved from.

<http://shodhganga.inflibnet.ac.in/bitstream/10603/21666/5/chapter-ii.pdf>. Accessed on 3 January 2018

<sup>9</sup> Jeremy Bentham, *An Introduction To The Principles Of Morals And Legislation* (Batoche Books, 2000). Retrieved from <https://socialsciences.mcmaster.ca/econ/ugcm/3113/bentham/morals.pdf>. accessed 31 March 2018.

<sup>10</sup> Carlos M. Correa (2007). *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement*. (Oxford: Oxford University Press), 91.

ground for protection of intellectual property rights.<sup>11</sup> By explaining these theories, it helps to define the relationship between intellectual property rights and human rights.<sup>12</sup>

### **Utilitarianism on IPRs:**

Joh Stuart Mill, Jermyn Bentham are the two main supporters of the theory of conspiracy theory in law. Understanding of morality in law is based on productivity; the main problem concerning the moral basis of law is the amount of good contribution that contributed to social well-being.<sup>13</sup> Various writers and theorists define 'good' as concepts in different ways based on their social experience.<sup>14</sup> Overall, this theory focuses on the concept of cost and benefits to society in setting discussions on legal norms and discussing the grounds to justify intellectual property rights. A member of society has the freedom to choose the way in which his action contributes to social welfare.<sup>15</sup> The individual good ends in the end as a good thing for society because individuals are the basic pieces for creating a complete society.<sup>16</sup> For this reason, society focuses on the welfare of individuals and eventually ends up as social welfare.<sup>17</sup>

Intellectual property rights bring reasonable reasons from utilitarian theory as all components of intellectual property such as patents, copyrights, trademarks, designs, and circuits and based on individual rights or private rights. Although their global protection may deprive them in the fight against human rights, if a Utilitarian approach is adopted as in the case of the United States it will give priority.<sup>18</sup> Utilitarianism first calls for protection of private rights or personal rights to protect the rights of society. The patent and innovation related rights are protected by the US Constitution adopting the philosophy of conspiracy, the same approach adopted by the patent laws around the world.<sup>19</sup> Protection of individual or private rights as a prime legal mandate will lead to promoting competition to produce and innovate new ideas and products that eventually benefit society in scientific and industrial progress.<sup>20</sup> Alen and Sukhatme argue that "the economic infrastructure of the patent law is trying to maximize long-term social welfare by inducing optimal innovation."<sup>21</sup>

In the case of patent monopoly, there are certain conditions to see whether people are worthy of creation and innovation, and whether there is utility against social

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Stanford Encyclopedia of Philosophy, 'The History of Utilitarianism', accessed 31 March 2018 <https://plato.stanford.edu/entries/utilitarianism-history/>

<sup>14</sup> G. Scott Davis, Introduction to G.E. Moore's Principia Ethica, *Religious Studies*. Retrieved on. <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1038&context=religiousstudies-faculty-publications>. Accessed on 31 March 2018.

<sup>15</sup> Ibid.

<sup>16</sup> Jeremy Bentham, An Introduction To The Principles Of Morals And Legislation, In *Ethics: History, Theory And Contemporary Issues*. Accessed on 31 March 2018. Retrieved from: <http://www.earlymoderntexts.com/assets/pdfs/bentham1780.pdf>

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Alan Devlin & Neel Sukhatme, Self-Realizing Inventions and the Utilitarian Foundation of Patent Law' *William & MARY Law Review*: 51.1. P:897, 913

<sup>20</sup> David S. Olson, Taking the Utilitarian Basis for Patent Law Seriously: The Case for Restricting Patentable Subject Matter, *Temple Law Review* 81 (2), P:181-192

<sup>21</sup> Devlin & Sukhatme, Self-Realizing Inventions and the Utilitarian Foundation of Patent, 897-913

change and uplift, only when it is satisfied, the claimant has the right to profit.<sup>22</sup> In order to justify the protection of patents, the Utilitarian claim includes disclosing the secrets after innovation as benefits to society. Protection of individual rights leads to secret disclosure behind innovation and leads to further research and development of science and technology that brings benefits not only to society but also to human beings.<sup>23</sup> Therefore, we are seeking domestic and international protection of patent rights.

### Personhood Theory:

Idea, in this theory, is based on the concept of Hegel's personality and one wants to control important resources more than people control the ideas and ideas for self-protection as a unique personality. The basis of this theory is obtained from the work of Georg Wilhelm Friedrich Hegel and Immanuel Kant.<sup>24</sup> Since economic well-being plays a central role in protecting the identity of authors of certain ideas, incentives for innovation and ideas are important in the protection of innovator personality.<sup>25</sup> Ideas and inventions bring about authorship of authors, but personality requires Hegelian protection by controlling material interests therefrom for protection of them.<sup>26</sup> I feel that individuals are satisfied with innovation, and since I feel satisfied when incentives are directed to individuals, it helps individuals to defend their own ideas with the help of things. This theory divides the process of idea invention into those related to the internal morality of the author, but it was an incentive as a material to protect innovation from the world. Kent states the same idea as "tied to the exercise of individual's will, thereby promoting their personal freedom"<sup>27</sup> about innovation by personality theory which described creativity and innovative objectives. The idea needs to control it, which requires financial strength, guaranteed by incentives for innovation. The control of this idea is very important for inventors because his personality is based on his invention and influences innovation if it is not protected through the management of intellectual property.<sup>28</sup> In addition, the incentive for invention is protection of innovator's personality.

### Social Planning Theory:

Karl Marx's ideal found the foundation of this theory, and Thomas Jefferson used to share these thoughts before.<sup>29</sup> The theory mainly reflects the view of property as aimed at achieving and fostering an attractive society and culture. This conceptualization of culture and social trends of IPRs.<sup>30</sup> The exercise of intellectual property rights is done by the state to protect the rights of consumers. It is the responsibility of the government to protect interests of consumers and to form a socio-economic environment.<sup>31</sup> This will form a

<sup>22</sup> Bainbridge, I. D. (2010) *Intellectual Property*. London: Pearson, (2010). P.412.

<sup>23</sup> Ibid.

<sup>24</sup> William Fisher, Theories of Intellectual Property, accessed 31 March 2018 <https://pdfs.semanticscholar.org/173d/8747f2faaa06805dfd64a556fa2d776431f9.pdf>

<sup>25</sup> Margaret Jane Radin, Property and Personhood, *Stanford Law Review* 34 (1), P:957

<sup>26</sup> Ibid.

<sup>27</sup> Jeanne C. Fromer, Expressive Incentives in Intellectual Property, *Virginia Law Review* 98(1) 1745, 1753.

<sup>28</sup> Ibid.

<sup>29</sup> Elizabeth L. Rosenblatt, Intellectual Property's Negative Space: Beyond the Utilitarian, *Florida State University Law Review* 40 (1), 441, 457–58.

<sup>30</sup> Ibid.

<sup>31</sup> William Fisher, Theories of Intellectual Property. Retrieved from. <https://pdfs.semanticscholar.org/173d/8747f2faaa06805dfd64a556fa2d776431f9.pdf>, accessed 31 March 2018.

regular society based on the social plan formed by the national social policy.<sup>32</sup> Social planning theory is aimed at achieving the main objective for consumers to protect intellectual property rights. Sarah M. Dickhut has described the following elements to achieve the ideal that a society under principles of theory of social planning can bring defined social policies. Society seeks to achieve a developed IPRs, widespread access to new ideas, consumer welfare, access to ideas and information, democracy, and sociability.<sup>33</sup>

The theory of social planning does not justify regulating the protection of world intellectual property rights more extensively by social policy that aims consumer's welfare on behalf of producers. This theory calls for achieving targets through distributed justice for simply distributing resources. To summarize the discussion, it can be stated that patents and intellectual property rights are the subject of promoting the welfare of consumers and not the purpose of guiding welfare processes by incentives to inventors. This theory may be called as reversing the ideal of public utility.

### **Contract Theory:**

The justification of intellectual property rights, especially patents, is discussed based on Rousseau's social contract theory. This justification was introduced mainly in a common courtroom, after which the judicial knowledge of the United States continued. The main theme is to inform individuals the rationale for protection of intellectual property rights based on national social contracts.<sup>34</sup> The inventor provides services to the state by bringing new inventions to the existing knowledge on science and technology and in the return state it protects the exclusivity of the invention and incentives for patent owners. Furthermore, the inventor discloses the secret behind the present invention to the state authorities for further development, thus contributing to the advancement of the state.<sup>35</sup> Returning to withdraw the right beyond the idea after a certain time of protection, the patent owner will submit an open idea for development. Using contract theory, the state returns the inventor's contribution by providing the patent owner a certain period of exclusivity granting rights to sell, produce and sell blind incentive ideas. At the end of this contract relationship, the state will become the sole owner of the idea.

This theory has been criticized for pure theoretical conceptualization of the enforcement of intellectual property rights. In reality, it is claimed that there is no such contract between state and inventor during the operation of intellectual property rights.<sup>36</sup> Furthermore, the inventor's rights no longer exist after the expiration of the patent protection period, rather the disclosure is released for market competition.<sup>37</sup> Patents or other intellectual property rights are regulated by state law and are not direct individual contracts with state authorities.

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<sup>31</sup> Elizabeth L. Rosenblatt, (1992),. op.cit., 441.

<sup>32</sup> William Fisher., Op.cit., 2.

<sup>33</sup> Sarah M. Dickhut, Ethical And Procedural Barriers To Accessing Critical Medicines In Least Developed Countries: A Look At TRIPS And The Doha Documents, *Journal of Gender, Race and Justice* 20 (3).

<sup>34</sup> Jeremy Bentham, *An Introduction To The Principles Of Morals And Legislation* (Batoche Books, 2000), 22.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Sarah M. Dickhut, "Ethical And Procedural Barriers To Accessing Critical Medicines In Least Developed Countries: A Look At TRIPS And The Doha Documents" (2017) 20 *Journal of Gender, Race and Justice* 207-231, 213.

### Natural Rights Theory:

Basic theoretical foundation for protecting intellectual property rights concurrently with ordinary property is provided by Lock's labour and property rights theory.<sup>38</sup> After recognizing the property on Earth as common to all human beings, Lock, however, has the right to put his extra labour force to further build existing properties as a right to enjoy its progress.<sup>39</sup> The conceptualization of the property of Lock is linked to even better things and it does not abuse the condition of acquiring real estate for constructive use<sup>40</sup>. Since locks are constructive and there are elements such as property for good usage, the concept of property includes intellectual property rights. Furthermore, intellectual property rights pass the test of the creation of knowledge that the inventive idea and the construction of other types of human ideas are not expendable items in a sense, they will not decay. For the reason that it is property, Locke's conceptualization of intellectual property will be accessible under the control of inventor or patent owner. Furthermore, it may not be in vain that the long existence of knowledge rather develops further. Several innovations and information may be limited to a certain period, but are stated to be still valuable. Specifically, you may want to examine some drugs for a specific purpose and time.<sup>41</sup> Lock's intellectual property perspective includes an internal system of equilibrium between monopoly as rights and accessibility to his thinking of fair management. Lock seems to have recognized pharmaceutical monopoly problems such as expensive AIDS drugs. The conceptualization of Lock's intellectual property rights does not include absolute control of the invention, but if it contradicts public interest, the latter takes precedence over the former.<sup>42</sup> Property rights are always individual rights and the general principles of law explain that individual rights are sacrificed when fighting public rights. Lock explains this in terms of property by explaining the concept of his charity. He regards charity as an important element as a property owner's obligation and shares his rights when necessary, such as ensuring the survival of others. In the case of pharmaceutical patents, it is clear that the concept of property rights is more favorable to public interest than the protection of individual property rights. Pharmaceutical patent holders, individuals or companies are responsible for expanding the profit of their property to people facing life-threatening survival situations. In the case of pharmaceutical patents, it is confirmed that charitable organizations are being held in the form of donations to various countries for the purpose of ensuring survival without losing the exclusive right. This donation is not a matter of the rights of the people facing the survival situation but as the privilege of the patent owner or company. Human rights scholars and activists strive to prioritize the idea of property locking over a practical approach by establishing the superiority of human rights over the global protection of patent rights in pharmacology.

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<sup>38</sup> Peter Darhos, *A Philosophy of Intellectual Property* (Australian National University ANU eText, 2016), 48.

<sup>39</sup> Sarah M. Dickhut (2017), op. cit., 213.

<sup>40</sup> Seana Shiffrin, *Lockean Arguments for private intellectual property* in Stephen R. Munzer, *New essays in the Legal and Political Theory of Property* (Cambridge: Cambridge university press 2001) P:138, 139,

<sup>41</sup> Justin Hughes, The philosophy of intellectual property, *Georgetown Law journal* (77). Accessed 03 March 2018, <https://cyber.harvard.edu/IPCoop/88hugh.html>.

<sup>42</sup> Robert P. Merges, *Justifying intellectual property* (Oxford: Oxford University Press 2011), 274.

### **Doctrine of *Maslahah Mursala* and Protection of Intellectual Property:**

The justification for protection, based on the doctrine of Islamic law, *Maslahah Mursala* by the majority of scholars and theorists.<sup>43</sup> Nature and protection of intellectual property rights and ideas as property is discussed based on promotion of innovation in the scientific and technical aspects of Muslim society.<sup>44</sup> People are reluctant to innovate and contribute to knowledge without guaranteeing the protection of investment of time and effort with large amounts of capital.<sup>45</sup> Heba Raslan contributes to the idea by saying that preserving public interest in accordance with *Sharī'ah* perspective follows observance of IPRs. Intellectual creations such as computer programs, trademarks, books, and other need labour, time, and funding. Innovators deserve compensation and they have rightful interest in protecting their innovations for profit. IPRs, especially pharmaceutical patents allow creator to recover their investment and labour.<sup>46</sup>

Therefore, the enforcement of intellectual property rights interpreted similarly to the development of public interest in society.<sup>47</sup> Various other authors like Burton Weisbrod are observing the same approach of *Sharī'ah* to streamline the protection of intellectual property rights. Barton argues that public interest<sup>48</sup> is a term open to the scope of interpretation and different in its understanding in various situations, public interest is complex term for defining. Public interest may be used in context of its development through ages.<sup>49</sup>

In the case of protection of pharmaceutical patents, it is very close to the clue to Burton's public interest complexity. Muslim *Sharī'ah* built the foundation of intellectual property rights, including drug patent protection based on public interest, and similar grounds adopted in 2001 in the shape of the TRIPS Agreement and later the Doha Declaration.<sup>50</sup> Understanding and principles of *Maslahah Mursala*, defined by classical Muslim law scholars is the possibility of solving the paradox between human rights to health and medical access to health worldwide protection of pharmaceutical patent protection.<sup>51</sup>

### **Islamic States' Responsibility towards Intellectual Property Rights:**

In the Muhammad era (PBUH), we focused on two main functions to maintain dichotomy. We train our companions for spirituality and teach them for our daily lives. In addition to the Qur'an, the words of the Holy Prophet Muhammad (PBUH) briefly explained the behaviour of everyday life between trade and commerce.<sup>52</sup> Muslim *Sharī'ah*'s order initially defined the principles of civil transactions such as contracts, arbitration, mediation, and other civil matters of daily life. Civil transactions including trade and commerce were regulated by the state since the Prophet Food era. The sacred prophets described various kinds of contracts and led to the principle of legality of

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<sup>43</sup> Bashar H Malkaw, "Intellectual Property Protection From A Sharia Perspective" Retrieved from <http://www5.austlii.edu.au/au/journals/SCULawRw/2013/4.pdf>. Accessed on 14 January 2018.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Heba Raslan, *Sharia'h and the Protection of Intellectual Property, the Example of Egypt, Intellectual Property Law Review*, 528.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Heba Raslan, *Sharia'h and the Protection of Intellectual Property, the Example of Egypt*, 528.



contractual relations. One of the words of the Holy Prophet insists, “very agreement is lawful among Muslims, except one which is declared forbidden that which is allowed or declared allowed, that which is forbidden.”<sup>53</sup> Subsequently, in accordance with Islam Shire's standards explained in the Quran and Sunnah, a regulatory system was enacted by the Islamic civilization in order to confirm the smooth operation of civil transactions.<sup>54</sup> Judicial agencies are the centres of Qadi-ul-Qudat and some other local Qadis were appointed to solve issues related to civil transactions in various fields under Islamic law. The main purpose of this establishment was to minimize unfair trade practices. Sadiq Reza, one of the Islamic scholars, says that the Mutatab system was introduced to deal with civil matters under the Shire Rule of Muslims. The purpose of Muhtasib was to set up metrics and weighting criteria, paying attention to all fraud related to trade and commerce.<sup>55</sup> Muhtasib's role was to manage trade in the market. He was the supervisor of Muslim shire trade standards executed in the Quran and Sunnah and was the leader of the form of executive agency.<sup>56</sup>

Intellectual property rights, especially patent rights, are ideas belonging to people. These ideas take time and effort to create. This way of thinking indicates that both tangible and intangible assets need time and effort if they wish to obtain ownership.<sup>57</sup> *Shari'ah* will not allow one to gain any benefit or ownership of property without any effort.<sup>58</sup> We may take examples of exploitation of Arabs, which were considered form of most valuable innovation. Infringement in the form of copying text and context was disliked both ethically and legally. Therefore, patents need time and effort along with financial investment.<sup>59</sup> Therefore product ideas and innovation depend on the same level of wealth. During the Abbasid era, the state paid attention to R & D and founded Bait-ul-Hikma, an organization that mainly deals with innovation in nearly all areas of science, technology, art and social science. This institution not only focused on innovation, but also protected the best brain from forgery of my idea. The state appreciated their thoughts and contributions by awarding huge money and status in society.<sup>60</sup> Ezieddin Mustafa Elmahjub quotes Hassan and Hiri, which explains the moral status of protection of intellectual property rights in his doctoral work-condemning coping as it is not in consonance with principles of creativity. Originality and creativity are highly rated in Islamic history as academia and scholarship condemned it as stealing

<sup>53</sup> Accessed on 28 March, 2018, Retrieved from <https://islamicbankers.files.wordpress.com/2015/09/ilt-islamic-law-of-transaction.pdf>.

<sup>54</sup> Kristen Stilt, *Islamic Law in Action: Authority, Discretion, and Every Day Experiences in Mamluk Egypt* (Oxford: Oxford University Press, 2012), 96–112.

<sup>55</sup> Ibid.

<sup>56</sup> Sadiq Raza, Islam's Fourth Amendment: Search and Seizure in Islamic Doctrine and Muslim Practice, *Georgetown Journal of International Law* 40, Accessed on 3 April, 2018, Retrieved from <https://ssrn.com/abstract=1426152>.

<sup>57</sup> Silvia Beltramitti, The Legality of Intellectual Property Rights Under Islamic Law, *Prague Yearbook of Comparative Law*, 56.

<sup>58</sup> *Al-Qur'an*, Chapter 53, *Al-Qur'an*, Najm:39.

<sup>59</sup> Steven. D. Jamar, The Protection of Intellectual Property Under Islamic Law, *Capital University Law Review* 21: 1079, 1992. Accessed, 4 April, 2018, Retrieved from <https://ssrn.com/abstract=1148735>.

<sup>60</sup> Ezieddin Mustafa Elmahjub, Protection Of Intellectual Property In Islamic Shari'a And The Development Of The Libyan Intellectual Property System (Doctoral Thesis, Queensland: Queensland University) Accessed on 8 April 2018, Retrieved from [https://eprints.qut.edu.au/76106/1/Ezieddin%20M.%20Jaballa\\_Elmahjub\\_Thesis.pdf](https://eprints.qut.edu.au/76106/1/Ezieddin%20M.%20Jaballa_Elmahjub_Thesis.pdf).



property. The creators with date and manufacturing place that indicated rights of innovator signed textiles, craft, pottery, and book writing.<sup>61</sup>

The contemporary framework of intellectual property rights including patent rights has been inspired to some extent by the Islamic tradition that libraries and research institutions have followed standards of piracy and innovation misuse.<sup>62</sup> In traditional Islamic provinces, we adopted protection standards for intellectual property rights on copyrights, patents, and other trade-related intellectual property rights.

Apart from the protection of patents and other intellectual property rights, Islamic Law has always followed the basic standards of trade and commerce stated under the Quran and Sunnah.<sup>63</sup> Muslim *Sharī'ah* provides equitable freedom to trade unless it conflicts with public interests and massive protection of society. In threatening the majority, you may understand that private rights in Muslim Shire sacrificed for public rights.

### **Extent of Protection of Property in Islamic Law:**

Concept of property in *Sharī'ah* is not absolute. Ownership in property rendered for both individual and public benefit. As contended earlier that Islamic Law justifies intellectual property right of an individual through public interest, in the same way it protects interest of society from all mal-practices related to monopoly created on idea leading towards property. Criticism against protection of intellectual property rights among Muslim intellectual circles revolves around intangible nature of intellectual property and *gharar* related to its further transactions.<sup>64</sup> On the other hand, scholars justify it for its value based upon fundamental concept of property in Islam.

Collective ownership of property belongs to Allah (SWT) as per core Islamic conceptualisation of property laws.<sup>65</sup> Doctrine of public interest, in no way, support the idea of monopoly leading towards denial of access to product of public interest based upon making it unavailable, inaccessible, and unaffordable to public.<sup>66</sup> Intellectual property framework of *Sharī'ah* focused three main ideals; protection of property as individual right, contract with state for its protection, and public interest both in personam and rem.<sup>67</sup>

Among various Muslim States, Civil Transactions Law of United Arab Emirates law dealing intellectual property rights adopts *Sharī'ah* spirit by stating as, “[t]he exercise of a right shall be unlawful [...] if the interests desired are disproportionate to the harm that will be suffered by others”.<sup>68</sup> Construction of this legislation clearly puts protection of individual rights subservient to public interest and in case of any disproportionate harm happens by protection of intellectual property rights, interest of

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<sup>61</sup> Ezieddin Mustafa Elmahjub, op.cit., 66.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Bashar H. Malkawi, The Alliance Between Islamic Law and Intellectual Property: Structure and Practice, *University of St. Thomas Law Journal* 10 (3). Accessed on 7 April 2018, retrieved from <https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1318&context=ustlj>.

<sup>66</sup> Heba Raslan, op.cit., 528.

<sup>67</sup> Steven. D. Jamar, op.cit., 1080.

<sup>68</sup> David Price, *The Development Of Intellectual Property Regimes In The Arabian Gulf States: Infidels At The Gates* (London : Routledge-Cavendish, 2009), 47.

society will prevail.<sup>69</sup> This provision, somehow, puts a check on protection of monopolies such as pharmaceutical patents in case of protection of health and access to medicine. Moreover, this clause is limitation upon enforcement of TRIPS Agreement beyond public interest and human rights.

### Conclusion:

*Shari'ah* theorisation of intellectual property rights remains distinct from existing theories related to protecting of individual intellectual property rights along with protection of public interest as collective right. Protecting intellectual property rights as monopoly for a certain period has always remained an issue of debate among academics defending access as basic human right. Paradox in protecting pharmaceutical patents is clear where monopolies raise question of accessibility, affordability, and availability of life saving medicines. Adoption of *Shari'ah* legal framework on intellectual property rights may achieve the milestone of harmonising protection of intellectual property rights with public interest. Muslim countries have included *Shari'ah* on supra-constitutional status in their constitutional frameworks and adoption of *Shari'ah* theorisation of intellectual property law will help them sort both international obligations and local needs towards developing scientific and technological standards. Some suggestions:

1. Muslim countries may include framework of intellectual property rights based upon model of United Arab Emirates as mentioned earlier in this paper.
2. A balanced theoretical framework on intellectual property rights will not only help Muslim countries improving national standards of science and technology but it will help them facilitating access towards innovative products.
3. *Shari'ah* theoretical framework looks ideal for dissolving paradox between monopolies based upon intellectual property rights with issue of access stressed by various human rights writers.
4. Understanding intellectual property laws with reference to *Shari'ah* will help building trust of non-Muslim communities in Islamic Law.

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<sup>69</sup> Steven. D. Jamar, op.cit., , 1080.