Concept of Classical Jurists about Property and Intellectual Property Rights

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Abstract:

The study examines the views of classical jurists on property as well as intellectual property (IP) rights within the context of Sharī'ah. It examines classical Islamic legal texts, including the Qur'ān, Hadith, and prominent jurists. Islamic Sharī'ah values both private and public property rights, condemning transgressions on others' property. Islamic institutions like the Fiqh Islamic Academy Council and Al-Azhar Fatwa Committee sanction IP adoption and protection based on Sharī'ah. Despite controversies, the study demonstrates that IP principles do not inherently lead to the concealment of knowledge, aligning with the teachings of the Prophet Muhammad (s.a.w)

Keywords: *Classical, Mal, Intellectual, Rights, Sharī'ah*

Introduction:

The Islamic View on Intellectual Property (IP) is based on the fundamental sources of Islamic *Sharī'ah*. These sources mainly include the *Quaran*, the tradition of the Prophet Muhammad (SAW) known as the *Sunnah*, and the legal methods used to derive the rules from the *Quaran* and the *Sunnah*, such as legal analogies (qiyās) and take into account the public interest.

In about 57 countries around the world, the influence of Islamic *Sharī'ah* on the culture and legal system is to some extent. However, almost all Muslim-majority countries recognize and uphold the importance of intellectual property rights. Prominent Islamic organizations such as the Fiqh Islamic Academy Council[1] and the Al-Azhar Fatwa[2] Committee have issued statements based on *Sharī'ah* (Fatawa) encouraging the adoption and

[1] Resolutions and Recommendations of the International Islamic Fiqh Academy

[2] Al-Azhar – Egypt**.** The Fatwa Committee of Al Azhar, Egypt states that "Islam gives the owner the freedom to dispense of the property owned thereby as he wishes; no other person may dispose of, copy, enjoy, use, or attribute such property without the prior consent of the owner, whether for a compensation or not." A Fatwa from Sheikh Al Azhar and The Fatwa Committee of Al Azhar has also prohibited any violation of rights in a computer software, though in many countries of the Middle East, such rights are still protected under the Copyright Laws

protection of intellectual property. Although *Fiqh's* classical writings do not explicitly deal with intellectual property, general principles derived from legitimate sources and established by jurists include it as a form of legal property that guarantees protection under the Islamic legal regime. Islamic jurists have deduced and drawn from legitimate sources that intellectual property constitutes a right of use and can be fully retained, protected, enjoyed, and utilized.

Types of Property in Islamic Law:

In Islamic law (*Sharī'ah*), property can be classified into three broad categories:

1. **'Ayn (عين):** 'Ayn refers to tangible or physical properties that have a material existence. These assets can be seen, touched, and owned. These include assets such as land, buildings, vehicles, livestock, and other physical assets. The concept of 'Ayn in Islamic law is similar to the concept of real estate or tangible property in conventional legal systems (Khan, 2003).

2. **Manfi' (منفع)**: Manfi' is an intangible or incorporeal property, also known as usufruct. These are rights and interests attached to certain assets or properties rather than the physical assets themselves. The owner of Manfi' has the right to use, enjoy and receive the benefits or income derived from the property without necessarily owning the physical object. Intellectual property rights, such as patents, copyrights, trademarks, and trade secrets, fall under this category in Islamic law (Kamali, 2008). The concept of Manfi' closely resembles intangible property in conventional legal systems.

3. ***Māl* (مال):** *Māl* is a general term that includes all forms of property, including both 'Ayn (tangible) and Manfi' (intangible). It refers to anything that holds value and can be owned, possessed, or transferred by individuals or entities.

Islamic law emphasizes the ethical use and distribution of property and wealth, with provisions on fair distribution, charitable donations *(zakāt*), prohibition of interest (*rībā*), and illicit enrichment (*Ibn Ābidīn,* 2008). The principles of Islamic economics and finance are rooted in these ethical considerations when dealing with different types of assets (*Siddiqi,* 1981).

Definitions of Property According to Classical Jurists:

According to Ḥanāfī jurists:

"Property (Mal,"مال") is defined as any tangible asset or possession that holds value and is subject to ownership, control, and transfer by individuals or legal entities. It includes both movable and immovable assets." [3]

***Wahbah al-Ẓuhailī* presented the typical definition as follows:**

"Whatever can be possessed, collected, and utilized for one's needs is considered property (Mal,"مال")."[4]

According to the Majallah:

"The property is something that is sought after and kept until the time of its necessity, whether it is movable or immovable." [5]

According to *Shafi'i* and Hanbali jurists, this is quite similar to the definition in Hanafi fiqh:

"Mal, مال" refers to any tangible asset or possession that holds value and can be owned, controlled, and transferred by individuals. It includes both movable and immovable assets".[6]

Fungible Property in Sharī'ah:

In *Sharī'ah*, the concept of fungible property is called "Mīthlī -مثلی), which refers to property or assets that are identical in nature and interchangeable. Substitutable goods are considered to be of the same type, quality, and quantity, and one unit of one good can easily be exchanged for another without loss of value or without discrimination.

Though the term "Mithlī" is not commonly used in contemporary Islamic legal discussions, the concept of substitutable property is well understood and recognized in classical Islamic jurisprudence. Various classical Islamic law texts and sources discuss the principles of ownership and transactions and recognize the concept of fungible property. Hadith on Substitutable Goods:

The Prophet Muhammad (PBUH) conducted and approved various transactions involving fungible goods, such as dates, grains, and other commodities. He (PBUH) said:

"If the two assets are gold or silver, and if they are different, then sell as you wish if the payment is made hands to hands."[7]

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[3] "Al-Hidayah" by Burhan al-Din al-Marghinani

[4] Dr,Wahaba al Ẓūhailī, al Fiqh al Islamī, 1st edition/1984/Damascus: Dār al Fikr/4:40-41

[5] Majallah al Aḥkām Al Adaliyah/ Section:126

[6] Al-Umm by Imam Shafi; Al-Mughni by Ibn Qudamah al-Maqdisi

[7] Islamic Sahih 1587

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Non-Fungible Property in Sharī'ah:

Non-fungible property refers to assets or goods that are unique and cannot be exchanged or replaced on a one-to-one basis with other items of the same type, quality, or quantity. In contrast to fungible properties, non-fungible properties have diverse characteristics that make them different from one another, and each item holds a unique value. Non-fungible property items are not interchangeable and cannot be easily substituted for one another. Examples of non-fungible properties are described below.

- **Art work**: Original pieces of art, such as paintings or sculptures, are considered non-fungible because each piece is unique and cannot be replaced with another identical piece.

- **Real Estate**: Each parcel of land or property is unique in terms of location, size, and features, making real estate non-fungible.

- **Collectibles**: Rare or limited-edition collectibles, such as trading cards, rare coins, or unique stamps, are non-fungible due to their individual characteristics and scarcity.

- **Intellectual Property**: Original works protected by intellectual property rights, such as a specific copyrighted book or a patented invention, are non-fungible because they are unique and have distinct legal protections.

- **Domain Names**: Internet domain names are non-fungible assets as each domain name is unique and has its own value based on factors like relevance and demand.

Property Rights in Islam:

Islam highly values both private and public property rights, and it strictly prohibits infringing on the rights of others, whether material or intellectual. Taking the efforts of others without permission is explicitly condemned, as stated in the Holy Qur'ān:

"وَلَا تَأۡكُلُوٓاْ أَمۡوَٰلَكُم بَيۡنَكُم بِٱلۡبَٰطِلِ وَتُدۡلُواْ بِهَآ إِلَى ٱلۡحُكَّامِ لِتَأۡكُلُواْ فَرِيقٗا مِّنۡ أَمۡوَٰلِ ٱلنَّاسِ بِٱلۡإِثۡمِ وَأَنتُمۡ تَعۡلَمُونَ"

‘‘Do not *eat up your property among yourselves for vanities, nor use it as bait for the judges with the intent that ye may eat up wrongfully and knowingly a little of (other) people's property.”*[8]
Haith supports ‘Ayn (**عين**) property rights and the Prophet Muhammad (PBUH) said:

"Your life, your properties, and your honor are as sacred to one another as this day of yours in this month of yours." [9]
The Prophet also stressed the sanctity of property, saying:

"It is not permissible for anyone to take the property of a Muslim without his consent." [10]

Rights of Fungible Property in *Sharī’ah*:
In Islamic and Sharia finance, fungible assets are used to refer to assets that are identical and indistinguishable from one another, such as silver, gold, or grain. These assets are considered equivalent and can be used in different transactions without a difference. Sharia-compliant transactions involving interchangeable items are subject to certain guidelines to ensure fair and ethical practice. Here are a few key rights and principles regarding fungible property in Sharī’ah:

- **Ownership:** Ownership is a fundamental principle of Islamic finance. Ownership of fungible property is recognized and protected, and no one may take or use another person's property without their consent[11].

- **Prohibition of Rība**: The prohibition of riba is one of the central tenets of Islamic finance. It applies to transactions involving fungible assets, such as money or commodities. Charging or paying interest is considered exploitative and unethical[12].

- **Prohibit Gharr**: Sharia prohibits transactions involving excessive uncertainty or ambiguity. In the context of fungible assets, this means that the specific quantity, quality, or identity of the traded asset must be known and clearly identified[13].

[8] Al-Qur’ān, surah, al- Baqarah, 2:188
[9] Sahih Bukhari 67
[10] Sunan Ibn Majah 2340
[11] Ibn Qudamah, Al-Mughni, Volume 3, page 155
[12] Al Quran 2:275-279
[13] Sahih Muslim, Book 10, Hadith 3836

- **Prohibited haram items**: Some items are considered haram in Islam and their sale or use is not permitted. For example, alcohol, pork, and other items deemed impure or harmful are not allowed in any transaction, even if they are interchangeable[14].

- **Prohibition of short selling**: The *Sharī'ah* principle discourages short selling when a person sells an asset, they do not own with the intention of buying it back at a lower price later. Short selling can create uncertainty and expose parties to undue risk[15].

- **Fair Trade Rights**: *Sharī'ah* emphasizes fair trade practices and prohibits any form of exploitation or injustice in transactions involving interchangeable goods. Both parties must be fully aware of the terms and conditions of the transaction and agree to them voluntarily[16].

- **Obligations of Ẓākāt**: Fungible goods, especially money, may be subject to *zakat*, which is a mandatory charitable contribution in Islam. Eligible people pay a certain percentage of their fortune every year to support those less fortunate[17].

Rights of Non-Fungible Property in *Sharī'ah*:

Sharī'ah principles regarding non-fungible property, such as real estate, land, or unique property, are generally similar to the principles of non-fungible. However, certain considerations and decisions are specific to non-fungible assets. The key points regarding non-fungible asset rights in *Sharī'ah* are discussed below.

- **Ownership**: Similar to fungible ownership, ownership of non-fungible assets is fundamental in Islamic finance. Ownership of non-fungible property is recognized and protected, and individuals have the right to own, use and benefit from their property[18].

- **Ribā Prohibition**: The prohibition on riba applies to transactions involving non-fungible goods, just as it applies to fungible goods.

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[14] Al Quran, surah al-Maīdah, 5:90-91
[15] Ibn Majah, Book 12, Hadith 2338
[16] Al-Qur'ān surah al-baqarah, 2:188
[17] Al-Qur'ān 9:60
[18] Al-Qur'ān 2:188

The collection or payment of interest on real estate or other non-fungible assets is not permitted[19].

- **Prohibition of Gharār**: *Sharī'ah* prohibits transactions involving undue uncertainty or ambiguity, which is even more severe when dealing with non-fungible assets. Parties to transactions involving real estate or unique assets should be fully aware of the terms and conditions and clearly define the characteristics of the property[20].

- **Prohibited use of *ḥarām***: Non-fungible goods used for *ḥarām* purposes, such as gambling, loan sharking, or other illegal activities, are not permitted in Islam. Any income or benefits derived from these activities are considered impure and unacceptable[21].

- **Right to Fair Trade**: Sharia emphasizes fair trade practices and ethical behavior in transactions involving non-fungible goods. Both parties must agree to the transaction and all terms must clearly and voluntarily agree. Exploitation and unfair dealings are strictly prohibited[22].

- **Ẓākāt Obligations**: non-fungible assets, such as real estate or valuables, may be subject to Ẓakāt under certain conditions. Eligible individuals must pay a specified percentage of their fortune annually as a charitable contribution to assist those in need[23].

Intellectual Property Rights:

In classical Islamic law, there is no specific term or idea that directly resembles the modern legal concept of intellectual property. However, Islamic principles and teachings can be applied to solve problems related to creativity, knowledge, and innovation, which are related to some aspects of intellectual property. Here are some arguments that can explain the concept of intellectual property in Islamic law.

- **Admiration for Knowledge and Scholars**: Islam places great emphasis on the pursuit of knowledge, and scholars are highly regarded in the Islamic tradition:

[19] Al-Qur'ān 2:275-279
[20] Sahih Muslim, Book 10, Hadith 3836
[21] Al-Qur'ān 2:219
[22] Sahih al-Bukhari, Book 3, Hadith 42
[23] Al-Qur'ān 9:60

The Qur'ān encourages believers to acquire knowledge and seek understanding[24].

- **Reward of Work**: Islamic teachings emphasize the right of individuals to be rewarded for their efforts and work. Prophet Muhammad (PBUH) said:

  "Pay the worker before his sweat dries up."[25]

- **Prohibition of Theft and Plagiarism**: Islam prohibits theft and dishonesty, which indirectly relate to the idea of respecting intellectual creations and attributing them to their rightful owners.

  "The person who attributes his genealogy to someone other than his father and his master (will be entitled to) the curse of Allah, the angels, and all the people."[26]

- **Utilization of Knowledge for the Betterment**: Islamic teachings encourage the acquisition and dissemination of knowledge for the betterment of society. Scholars claim that knowledge should be used to advantage humanity while giving due credit to its originators.

  "Read in the name of your Lord who created. Created man from a clinging substance. Read, and your Lord is the most Generous - Who taught by the pen. Taught man that which he knew not."[27]

- **Islamic Copyright Concepts**: A few modern Muslim researchers have attempted to originate principles from Islamic teachings to support the idea of copyright and intellectual property rights. They claim that the concepts of ownership and property rights in Islam can be applied to intellectual conceptions.[28]

- **Open Access and Public Domain**: Some scholars champion open access and the public domain. They advocate for loosening restrictions on intellectual property to promote the widespread dissemination of knowledge, particularly in the academic and scientific domains. Open-access proponents argue that making research and creative works freely available can accelerate progress and benefit society as a whole.[29]

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[24] Al-Qur'ān 20:114, 39:9, 58:11
[25] Sunan Ibn Majah 2442
[26] Sahih Muslim, Book 42, Hadith 7128
[27] Al-Qur'ān,surah al-alāq 96:1-5
[28] Hashim, R. I. "Islam and Copyright: Legal and Cultural Perspectives." Arab Law Quarterly 21, no. 4 (2007): 322-346.
[29] Suber, P. Open Access. MIT Press, 2012.

- **Strong Support for Intellectual Property Rights**: Some scholars argue in favor of strong intellectual property rights, believing that these rights encourage innovation and creativity. They contend that granting exclusive rights to creators incentivizes them to invest time and resources in developing new ideas, products, and technologies. This perspective is often associated with proponents of stringent copyright, patent, and trademark laws.[30]

- **Analysis of Deceiving Intellectual Property Protection**: Other scholars criticize excessive protection of intellectual property, claiming that it can hinder innovation and smother creativity. They argue that overly restrictive copyright, patent, and trademark laws can lead to monopolies and discourage follow-on innovation by limiting access to knowledge and ideas. This viewpoint often advocates for balanced intellectual property regimes that consider both creator rights and the public interest.[31]

- **Cultural and Native Perspectives on Intellectual Property**: Certain scholars argue for the recognition of traditional knowledge and cultural expressions from indigenous communities. They contend that the current intellectual property framework does not adequately protect the rights of these communities and may even lead to cultural appropriation and exploitation.[32]

- **Technological Challenges to Intellectual Property Rights**: A few scholars discuss the challenges posed by digital technologies and the internet to the enforcement of intellectual property rights. They explore how developments in technology have made it easier to copy and distribute copyrighted materials, leading to debates about the efficiency of traditional copyright enforcement strategies (Litman, 2001).[33]

[30] Landes, W. M., and R. A. Posner. The Economic Structure of Intellectual Property Law. Harvard University Press, 2003.
[31] Lessig, L. Free Culture: How Big Media Utilizes Technology and the Law to Restrict Culture and Regulate Creativity. Penguin Press, 2004.
[32] Sundara Rajan, M. Indigenous Peoples' Innovation: Intellectual Property Pathways to Development. Cambridge University Press, 2003.
[33] Litman, J. Digital Copyright. Prometheus Books, 2001.

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Regarding Islamic literature, there are arguments against the concept of intellectual property rights, positing potential ambiguities between certain aspects of the Qur'ān, Sunnah, and the ideas of intellectual property. These criticisms may affect the nature and extent of safeguards associated with specific forms of intellectual property rights. One such argument stems from the Qur'ān's prohibition of concealing anything beneficial to society. For instance, the Holy Qur'ān emphasizes the importance of sharing knowledge, as Prophet Muhammad (SAW) advised Muslims against hiding knowledge, considering it a common possession and heritage of humankind. A hadith further emphasizes the consequences of concealing knowledge on the day of resurrection:

"وَلَا تَلْبِسُوا الْحَقَّ بِالْبَاطِلِ وَتَكْتُمُوا الْحَقَّ وَاَنْتُمْ تَعْلَمُوْنَ"[34]

"And cover not Truth with falsehood, nor conceal the Truth when ye know (what it is)."

"تِلْكَ اُمَّةٌ قَدْ خَلَتْ ۚ لَهَا مَا كَسَبَتْ وَلَكُمْ مَّا كَسَبْتُمْ ۚ وَلَا تُسْـَٔلُوْنَ عَمَّا كَانُوْا يَعْمَلُوْنَ"[35]

"That was a people that hath passed away. They shall reap the fruit of what they did, and ye of what ye do! Of their merits, there is no question in your case."

"يٰٓاَهْلَ الْكِتٰبِ لِمَ تَلْبِسُوْنَ الْحَقَّ بِالْبَاطِلِ وَتَكْتُمُوْنَ الْحَقَّ وَاَنْتُمْ تَعْلَمُوْنَ"[36]

"Ye People of the Book! Why do ye clothe Truth with falsehood, and conceal the Truth, while ye have knowledge?"

This hadith has been read by some scholars to contend against intellectual property rights, suggesting that knowledge concealment contradicts Sharia. The question arises whether intellectual property rights practices lead to concealing knowledge, thereby conflicting with the teachings of Prophet Muhammad (SAW). However, a closer examination of the functioning of intellectual property reveals that its fundamental structure and guiding principles do not inherently encourage knowledge withholding.

Advocates of intellectual property rights argue that creators should have the right to profit from their creations and imaginative works, as a reward for their imagination and efforts. This is essential to prevent others from using innovations in a way that harms the legitimate benefits of the creator. Such protection does not necessarily imply total secrecy, as unauthorized access

[34] Al-Qur'ān,surah, al-baqarah 2:42
[35] Al-Qur'ān, surah, al-baqarah 2:141
[36] Al-Qur'ān, surah, āle- Imrān 3:71

to relevant intellectual property can still occur despite these safeguards. Thus, Sharī'ah does not inherently prohibit knowledge-related transactions alongside the rule against concealing information.

Though classical Islamic jurisprudence does not provide a specific legal framework for intellectual property as it exists in modern legal systems, the said principles provide insight into how ethics can be applied. It is noted that Islamic law (fiqh) is a dynamic and flexible system that can adapt to contemporary challenges. Several Muslim-majority countries have developed their own legal frameworks that incorporate Islamic principles while applying modern intellectual property law to deal with the complexities of the contemporary world.

Conclusion:

While there are arguments for intellectual property rights in Islamic literature, a comprehensive analysis reveals that the fundamental principles of intellectual property do not inherently lead to knowledge concealment, which aligns with the teachings of Prophet Muhammad (SAW). Balancing the right to profit from one's creations and the broader benefit to society remains an ongoing discussion within the context of Islamic perspectives on intellectual property.