THE RELATIONSHIP BETWEEN VALUES AND INTERESTS

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ABSTRACT

Some writers equate values with interests. Philipp Heck defines interests, which he treats as synonymous with values, as "all things that man holds dear, and all ideals which guide man's life."[1] There are many writers who distinguish between the two concepts and go into the details of the distinction, as is explained below. There is an apparent relationship between interests, principles, rules, values, objectives and other similar terms. Our main purpose is to find the link between interests and values, because the term interest dominates all legal discourse. In simple terms, interests recognized and enforced by law become rights. To elaborate the meaning of interests in relation to values, we need to refer to the work of Roscoe Pound, however briefly. There are very few writers who have written as much about law, and in such detail, as Roscoe Pound. We will, however, refer to just one publication to understand what he has to say about interests.[2] Pound says interests are sometimes referred to in a general way when these are "individual wants, individual claims, individual interests, which it is felt ought to be secured by law, through legal rights or through some other legal machinery."[3] As compared to this when the term public policy is used it refers to social interests. The two are related and "The whole body of commmon law is made up of compromises of conflicting individual interests in which we turn to some social interest, frequently under the name of public policy to determine the limits of a reasonable adjustment."[4] These social interests have not been worked out properly, nor has the term "public policy" been sufficiently elaborated. Accordingly, he advocated that the social interests should be worked out in the same manner as individual interests had been worked out in the law. These social interests should be secured by the law. Further, resulting legal policies must be identified,

[1] Philipp Heck, *The Jurisprudence of Interests: An Outline*, in THE JURISPRUDENCE OF INTERESTS: SELECTED WRITINGS OF MAX RÜMELIN, PHILIPP HECK, PAUL OERTMANN, HEINRICH STOLL, JULIUS BINDER AND HERMANN ISAY 29, 33 (M. Magdalena Schoch ed. & trans., 1948).
[2] Roscoe Pound, *A Theory of Social Interests,* 15 PAPERS AND PROCEEDINGS OF THE AMERICAN SOCIOLOGICAL SOCIETIES (1921).
[3] *Id.* at 16.
[4] *Id.* at 17.

because they govern the delimitation and securing of individual claims. He then defines interests as follows:

For the purposes of the science of law we may say that an interest is a claim, a want, a demand, of a human being or group of human beings which the human being or group of human beings seeks to satisfy and of which social engineering in civilized society must therefore take account. So defined, the interests which the legal order secures may be claims or wants or demands of individual human beings immediately as such (individual interests) of the political organization of a society as such, conceived as a person (public interests) or of the whole social group as such (social interests).[5]

Keywords: *Values, Interests, public policy, Value judgements.*

INTRODUCTION

1. The Nature of Values and Interests in Islamic Law

Following Kelsen's argument that values of each society will differ in some respects, we may safely say that the value system determined by the jurists in Islamic law is decidedly different from the one followed in Western legal systems, or indeed any other legal system. This is the first major difference between Islamic law and Western law. Professor Nyazee has pointed out other major differences between these values systems in his book *Theories of Islamic Law*. We will first summarize these differences and then quote the author to show the crucial difference between the Western and the Islamic approaches.

The first point to note is that being a religious system, it is relatively easier in a Muslim society to arrive at a consensus about the values that the society upholds. In a Western society, on the other hand, it is difficult to arrive at such a consensus as there is no single binding philosophy or vision that the society is pursuing; the confusion that exists about the use of values is perhaps due to this reason.[6] In Islamic law, on the other hand, the Muslim jurists clearly determined the values that the *sharī'ah* pursues. They were able to do this after working on the texts for a few centuries, although some tend to attribute the discovery to the Companions of the Prophet. The jurists have claimed that the determination of the values is based on a process of induction that operates on the texts. It is also for this reason that they

[5] *Id.* at 29

[6] See generally, NYAZEE, THEORIES OF ISLAMIC LAW. These ideas are spread all over the book and it will be difficult to provide a pinpoint citation, unless it is a direct quotation or a specific idea.

claim that the values are definitive and there can be no confusion about these values.[7] In the Western system or any secular system, such a consensus is inconceivable.

The second distinction that Professor Nyazee makes is based on the source of these values. He maintains that values in Islamic law are determined by the Lawgiver and, therefore, have a divine origin. He quotes al-Ghazālī to prove the point.

As for *maṣlaḥah*, it is essentially an expression for the acquisition of *manfa'ah* (benefit) or the repulsion of *maḍarrah* (injury, harm), but that is not what we mean by it, because acquisition of *manfa'ah* and the repulsion of *maḍarrah* represent human goals, that is, the welfare of humans through the attainment of these goals. What we mean by *maṣlaḥah*, however, is the preservation of the ends (purposes) of the *sharī'ah.*[8]

Thus, values do not represent human goals that are determined by human reason, rather these are goals determined by the Lawgiver for human beings, that is, the vision to be pursued. The limitations of human reason to determine such values or ultimate principles has been pointed out by legal philosophers. For example, Bodenheimer says:

Reason is the (limited) ability of the human intellect to comprehend and cope with reality. The reasonable man is capable of discerning general principles and of grasping certain essential relations of things …. Since the relations of men and things are often complex, ambiguous, and subject to appraisal from different points of view, it is by no means possible for human reason, in the majority of cases, to discover one and only one final and correct answer to a problematic situation presented by human social life …. It was therefore erroneous on the part of some representatives of the classical law of nature school to believe that a universally valid and perfect system of law could be devised, in all of its details, by a pure exercise of the human reasoning faculty operating *in abstracto*.[9]

In the light of this, we may emphasize that the position taken by Islamic law on the recognition of interests is also the same as that discussed for the independent role of reason. Consequently, the systems proposed by Bentham or Roscoe Pound for the recognition of interests is by and large acceptable to Islamic law with the essential difference that human reason is not independently capable of recognizing all interests.

Yet another distinction drawn by Professor Nyazee, and perhaps the most crucial, about the order in which values are taken up in the two systems of the priorities that are set by each society within the value structure. He states in several

[7] See generally AL-SHĀṬABĪ, AL-MUWĀFAQĀT, vol. 1, trans. IMRAN A. NYAZEE, THE RECONCILIATION OF THE FUNDAMENTALS OF ISLAMIC LAW (2010).
[8] AL-GHAZĀLĪ, AL-MUSTAṢFĀ MIN 'ILM AL-UṢŪL 286 (1877).
[9] EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHODOLOGY OF THE LAW 358 (Rev. ed., 1974).

places in his book, *Theories of Islamic Law*, that Imām al-Ghazālī considers the five fundamental values to be essential for every society and civilization, because without the preservation of these values the society will collapse and lose its vitality. This statement is quite different from what has been asserted by Kelsen, to the effect that every society, especially one that is religious, has its own value system. On examination, we find al-Ghazālī's statement to be true, because every society attempts to preserve life, national integrity, freedom of intellect and private property. The interests or values stated by Pound, Kelsen, or Bodenheimer appear to be no different. Nevertheless says Nyazee that there is a crucial difference. It is essential to quote his entire passage, so that the meaning is clearly grasped. The passage is the following:

We now have a clear picture of the priorities postulated by the *maqāṣid al-sharī'ah* or the purposes of Islamic law. If we try to compare these with the priorities, actual or estimated, in Western countries it would help in understanding some of the differences between the two communities better. This may be done briefly here, because a detailed analysis would require an exhaustive study.

We have seen above that the highest priority is assigned to the interest of *Dīn* by the jurists of Islam. Religion in the West, on the other hand, has been reduced to a level with a lowest priority. In fact, it is not even a public interest; it is a personal affair. Some Western scholars have hinted that the Muslim community should follow suit and reduce religion to a private affair. The privatization of Islam will alter the structure of the *maqāṣid* as seen by the *fuqahā'*.

When we examine the priorities in certain Western countries as a whole, especially in countries like the United States of America, we get the impression that the priorities may be entirely reversed as compared to those for the *maqāṣid.* Consider, for example, the statement: What is good for General Motors is good for the United States. This would imply that the preservation and protection of wealth has the highest priority in the United States. Consider the preservation and protection of *'aql.* This is a lower category in the Islamic system, but it could be a higher category in the United States when viewed in terms of freedom of expression.

As such a comparison needs to be based on accurate and reliable information requiring exhaustive research, we will not pursue the matter any further. The general idea was no more than to indicate that the priorities for the West might be visible in the reverse order.

He makes the point that if the priorities are converted to those in the West, the nature of the values determined for Islamic law will change. He also suggests that the number one priority in the West is wealth and property, which is accorded the last priority in the Islamic system. If we examine what Richard Posner says, the statement appears to be quite true. Posner makes the following statement:

Economists …have tried to make of economics a source of moral guidance by proposing, often under the influence of utilitarianism, that the goal of a society should be to maximize average utility, or total utility, or wealth, or freedom, or equality …or some combination of these things. These are doomed efforts …. [Economists] could not tell policymakers how much weight to give costs and benefits as a matter of social justice.[10]

What he means thereby is that even Utilitarians assign the highest priority to wealth maximization, it is difficult to measure the exact costs and benefits, but economic analysis of law can do so in precise dollar terms to show "the maximization of average utility." Voices are being raised against the pursuit of this kind of approach, and one such writer is Joseph William Singer. He says: "How much is democracy worth, for example? Are we willing to pay what it costs to hold elections? What are the benefits of electing leaders rather than using heredity or some other selection criterion? Just asking the question seems inappropriate. This is not the way we judge the appropriateness of democracy."[11] He maintains that money cannot be used as a basis for measuring values.

Nyazee uses this distinction in another place to point the differences in the Western and Islamic approach to human rights. The text is as follows:

The differences are understood when we notice that individual rights mean very little in themselves, unless they are related to other competing rights and interests. The system of rights is an integrated whole. The rights support each other and clash with each other often requiring delicate balancing by the lawmaker and judge. In other words, it is all a question of reconciliation, preference and priorities that a legal system has determined for itself. The priorities within the two systems we are considering are quite different. This can be grasped by examining the jurisprudential interests or the value-system within the Western legal systems and the purposes of Islamic law called the *maqāṣid al-sharī'ah*. In the Islamic legal system there are five purposes that the system seeks to secure: preservation of the religious system (*dīn*), preservation of life, preservation of the family unit and its values, preservation of the intellect and the preservation of wealth. The priority assigned to these purposes exists in the order these have been stated. Thus, a child's right to information, which falls under the preservation of his intellect, is limited by the interests that are superior to it; namely, family, life and religious system. Likewise, freedom of expression, again represented by intellect, will be restrained if it attempts to demolish an interest that is superior to it. In another work we suggested that these interests are different from those upheld in the West, and those in the West may be in

[10] RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999), 46–47.
[11] JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000), 129.

the reverse order. Whether or not this is proved to be true, the two systems are different, and the distinction lies in the priorities followed within the two systems.[12]

The main distinctions between the meaning of values have now been understood. We may now turn to issues that pertain to the time when reasoning on the basis of values can be undertaken. After doing so, a few examples will be undertaken that may prove helpful for the reader and elaborate the significance of the use of values. Before we do this the issue of rationality of values needs to be addressed.

2. The rationality of values and justice

Scholars have maintained that even after we apply all the rules studied in the previous discussions, there is still a large element of discretion even in statutory interpretation, precedent and customs, and that in reality valid rules do not decide cases. It is for this reason that we hear statements like "general propositions do not decide cases," (Holmes) and that "one of the most important interpretive factors is a trained sense of discretionary justice" (Allen).[13] These discussions take place within the context of justice according to law. Justice according to law is provided through values, and this too is expressed by Holmes as "the inarticulate major premise of legal reasoning."[14] The word inarticulate indicates that the use and influence of values in legal reasoning is never openly acknowledged, and we have indicated a possible reason in the previous section. Dias maintains that the reason why courts prefer not to stress the influence of justice is that people think that law is law and judges have to apply it. The image people have in mind is that of a blind goddess maintaining the balance of law and delivering impartial justice.[15] The very idea that some kind of discretion is creeping into legal reasoning is likely to give the impression that cases are being decided on personal whims.

There is indeed a personal element, but this is not capricious; judges do have to administer laws as they find them, but there is more discretion in the process than is popularly supposed. This discretion, however, is controlled by a sense of values, which constitutes a consensual domain that keeps prejudice in check. Every decision reflects a value judgement on conflicting interests.[16] If interests did not conflict there would be no disputes. "Values" consist of those considerations, which are viewed as objectives of the legal order and which shape the decisions of courts and guide their handling of the law by providing yardsticks for measuring the conflicting interests. By value judgement is signified the particular yardstick of valuation as well as the result of measuring interests with reference to the chosen value.[17] What Dias is trying

[12] Nyazee, *Islamic Law and Human Rights* ISLAMABAD LAW REVIEW (2003) 1:62.
[13] See the chapter on values in R.W.M. DIAS, JURISPRUDENCE (London: 1979).
[14] As quoted in *id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*

to say in the above paragraphs is that there is a large element of "discretion" enjoyed by the judge whether he is interpreting a statute or whether he is interpreting and applying a precedent. When he faces this void, the judge relies on his "trained sense of discretionary justice" guided by values. Others have gone so far as to say that rules and principles do not decide cases, but it is the inarticulate "major premise of legal reasoning" or the sense of justice on which a decision depends. We keep on talking about the judge, but all those dealing with the legal system require this trained sense of discretionary justice, especially the lawyer who argues before the judge and tries to convince him as to what is just in a particular case. The sense of discretionary justice is no less important for those settling administrative issues.

What the judge needs is this trained sense of discretionary justice guided by values. Is it something purely subjective or are there certain basic things on which all agree, starting from the meaning of justice. Bodenheimer has, therefore, focused mostly on the broad methodology that can be called the sense of justice. He has also tried to examine and justify the rationality of values on which this sense of justice is based.[18]

In the light of the ever-changing conceptions in different ages and different nations and cultures, some jurists have maintained that theories of justice represent no more than the personal preferences of thinkers. Kelsen stated that the content of justice cannot be analysed in a rational manner. He gives a number of arguments. He says first that it is impossible to resolve certain types of conflicts in ethical convictions or values.[19] For example, one fundamental ethical conviction is that human life is the highest of a all values. Existing side by side with this is the conviction that the highest value is the interest and honour of the nation.[20] Next, everybody is obliged to sacrifice his own life and to kill other human beings in times of war. It is also deemed justified in the collective interest to inflict capital punishment as a sanction against criminal conduct. Further, according to Kelsen, it is impossible to decide this conflict regarding justice of killing human beings, in a rational scientific way.[21] It is also not possible to identify in a meaningful manner the other supreme values which a just order of social life should attempt to promote. One person may regard the guarantee and enhancement of individual freedom as the foremost goal of legal ordering, another equality, and yet another security. Accordingly, the norms which are used as standards of justice vary from person to person, from group to group, and they are often mutually irreconcilable. Rational inquiry cannot validate social goals which justice is supposed to serve; all it can do is determine what means are necessary or conducive to the accomplishment of these

[18] EDGAR BODENHEIMER, JURISPRUDENCE, 201.
[19] *Id.* at 202
[20] *Id.*
[21] *Id.*

ends of human effort. Kelsen reaches the conclusion that conceptions of justice must, under these circumstances, be viewed as irrational ideals.[22]

At this stage it would be helpful to note what Kelsen's arguments mean in terms of the purposes of Islamic law or the *maqāṣid al-sharī'ah*. These purposes have a determined priority with religion being on top, followed by life, progeny, intellect and property; in that order. What Kelsen is saying is that the priority determined here does not appear to work all the time. In the case of the punishment of *sariqah* (theft), for example, we are really going against the determined priority and preferring property over life. In the case of the penalty for drinking *khamr* (wine), we prefer intellect over life, which again is contrary to the determined priority. This should lead to the raising of the following questions: Why does Islamic justice require the giving up of life for religion? Why is it just to give up life for progeny in the case of *rajm* (stoning to death)? Why is it just to cut off hands (life) for *māl* (property)?

Bodenheimer trying to answer Kelsen's argument about the irrationality of justice tries to say that rationality has two meanings. The first meaning of rationality is that which leads to definitive conclusions. The other meaning of rationality is one that leads to probable conclusions, but these are persuasive enough. It is on the basis of the second type of rationality that Bodenheimer builds his arguments. Kelsen, in his view, relies on the first type of rationality. For the first type of conception of rationality, he maintains that the intellectual history of Western civilisation offers a great deal of authority in favour of the proposition that judgements or conclusions can qualify as "rational" only in the event that it is based on certain, infallible, and indubitable knowledge.[23] This is what is called *qaṭ'ī* (definitive) in Islamic law. As was stated earlier quoting al-Shāṭibī, the Muslim jurists derived the values on the basis of induction, which in their view leads to definitive conclusions. In other words, values in Islamic law are based on this first concept of rationality.

Discussing the second concept of rationality, Bodenheimer states that there exists a broader conception of rationality in which we seek convincing grounds for our opinions and proofs for our conclusions. This conviction is proved in two ways: (a) On a thorough consideration of all factual angles, which are relevant to the solution of a normative problem. (b) A defence of the value judgements in the light of the historical experiences, psychological findings, and sociological insights. A rational argument and judgement of this character may be neither deductive not inductive nor strictly compelling from the logical point of view. If the extended notion of rationality is adopted, he says, the door is opened widely to rational inquiries about the issues of justice. Such inquiries may revolve around two sets problems: (i) those concerned with the discussion and determination of matters of empirical fact that have a bearing upon the answer to normative questions of justice.

[22] *Id.*
[23] *Id.*

(ii) The making of choices between conflicting or potentially conflicting values of social order.[24]

We may conclude from the above discussion that these problems exist for Western law, because the determination of values is based on human reason, and opinions differ about the conclusive nature of these values. In Islamic law, as the source is religious and divine, the rationality of the values and the priorities determined are not questioned.

3. At what stage are values and interests used in Western law?

The use of values in law was not acknowledged openly up until recently. There are writers who say that values should acknowledged openly in decisions and should be used frequently in law. Thus, Felix Cohen has written:

When we recognize that legal rules are simply formulae describing uniformities of judicial decision, that legal concepts likewise are patterns or functions of judicial decisions, that decisions themselves are not products of logical parthenogenesis born of pre-existing legal principles but are social events with social causes and consequences, then we are ready for the serious business of appraising law and legal institutions in terms of some standard of human values.[25]

In the previous discussion, we traced the use of value-oriented jurisprudence, which has been advocated by many legal philosophers. We also said that Bodenheimer has devoted a substantial part of his book to describe the development of these ideas. In modern times, the germs of such thinking are found in Kant, his student Rudolph Stammler, and Gustav Radbruch. In the United States, Bodenheimer begins with the work of Lasswell and McDougal, Edmond Cahn, Lon Fuller, Jerome Hall, and others.[26] Even those who were not talking directly about values were indirectly concerned with them. Accordingly, introducing the chapter on "The Revival of Natural Law and Vaue-Oriented Jurisprudence," Bodenheimer made the following statement:

The twentieth century, however, witnessed a revival of natural-law thinking and value-oriented jurisprudence. Certain elements of legal idealism can be noticed already in some versions of sociological jurisprudence. Joseph Kohler saw the end of legal regulation in the promotion of culture but held an entirely relativistic view with respect to the ethical values to be served by a law dedicated to culture. Roscoe Pound defined the aim of the law in terms of the maximum satisfaction of human wants through ordering of human conduct by politically organized society. Although he viewed the rise of a new philosophy of values with sympathy, his own theory of law did not go much beyond a quantitative surveying of the multifarious interests

[24] See *id.* on pages 203 to 206.
[25] Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 847 (1935).
[26] See EDGAR BODENHEIMER, JURISPRUDENCE 134–68.

demanding satisfaction or requiring adjustment though the art of legal "engineering." Twentieth century legal realism was well aware of the role which value judgements and considerations of social policy actually play in the legal process, but it refrained from building up a rational and objective theory of legal ends and social ideals.[27]

It was also stated in that chapter by Bodenheimer that values belong to the field of the "ought." Thus, Kelsen had said, "A judgement that an actual behaviour is such as it ought to be or ought not to be according to a valid norm is a value judgement."[28] This means that values belong to the "ought" of the law and the "is" of the law. Alf Ross had also opposed the use of values. Thus, he said: "To invoke justice is the same thing as banging on the table: an emotional expression which turns one's demands into an absolute postulate."[29] Bodenheimer does not agree with Kelsen and Alf Ross. He explains that their arguments should be interpreted in the light of the different meanings of the term rationality. All this has been discussed in the previous section.

The main point facing us is: when exactly are values given a role in legal decisions? when do values really come into play. Although a limited role is acknowledged for values, Bodenheimer maintains that the evaluative factor—the use of values—is excluded from judicial decision-making when a norm is unambiguous in its core. If this core meaning is clearly applicable to the facts of the case, a recourse to values is not called for.[30] The relationship of values with the core meaning shows us again the usefulness of the discussions about the core and the penumbra. As an example, Bodenheimer states that when homicide has been proved through uncontested evidence, the conclusion that the defendant committed murder can be proved by the logical method of syllogistic deduction. Likewise, where analogy or dialectical reasoning is used by the judge, the need for recourse to values is minimal if not totally unrequired.[31] If, however, no historical precedent or similar guidance is available to the court for resolving the problem, the court has to rely on its own resources to fill the gap. In such a case, the court has to make a value judgement.[32] He summarises the position as follows:

The evaluative element in the judicial process is operative at its maximum level when judges fashion new norms in the unprovided case or discard obsolete rules in favour of timely ones. In such situations, the dialectical reasoning used by judges in weighing the advantages and drawbacks of contemplated courses of action often lacks the relative certainty and sometimes irrebuttable cogency of deductive,

[27] *Id.* at 135.
[28] EDGAR BODENHEIMER, JURISPRUDENCE 397, relying on Kelsen, *Norm and Value*, 54 Cal. L. Rev. 1624 (1966).
[29] EDGAR BODENHEIMER, JURISPRUDENCE 203, quoting ALF ROSS, LAW AND JUSTICE 274 (Berkely, 1959).
[30] EDGAR BODENHEIMER, JURISPRUDENCE 398.
[31] *Id.*
[32] *Id.*

inductive, and analogical reasoning. Choices between conflicting interests which are not directed by preexisting norms and principles require the making of value judgements.[33]

He also maintains that over time, these value judgements become incorporated within the constitutional provisions, statutes and other types of sources, but then they may start losing their generality and start becoming rigid. A restriction that may be visible in the use of value judgements is that their incorporation is limited by a particular culture and its requirements.[34]

We conclude from the above that values are activated when the core meaning is not applicable to the case under consideration and the usual methods of extension the meaning, already discussed, have been exahausted. This is what Bodenheimer has called the "unprovided case." In the next section, we will see that the position in Islamic law is quite similar.

4. At what stage are values employed in Islamic law?

The theory of the purposes of law or the theory of the use of values was developed and refined in the 5th century of the Hijra, that is, around the tenth century C.E. The main corpus of the law had already been developed, and this new theory did not really affect the laws of the different schools of law. Claims have been made by some that the values were actually being used without express acknowledgement.[35] It has also been suggested that the use of these values is confined to the area of law that has to be developed by the state. What the earlier jurists did was confined to the core meanings found in the texts as well as their extension by means of accepted methods.[36] Values have, therefore, never been used effectively to develop or change the law that attained maturity much before the time of development of the theory of values.[37] One reason assigned for not using these ideas was that the Muslim nations began falling prey to the colonial onslaught.[38]

Today, when the Muslim nations are free and scholars have started reexamining Islamic law, a tremendous amount of literature has been generated on the topic of *maqāṣid*. The use of values is being advocted by everyone, whether or not these advocates really understand the nature of these values or are skilled in their use. The subject is now assigned an independent status in university courses all over the world. The reason for this immense interest is that the objectives provide a rough and ready guide. Nevertheless, the actual cases in courts will obviously be much more complex. We may mention that the courts in Pakistan have started noting the

[33] *Id.* at 399.
[34] *Id.*
[35] For a detailed exposition of all this development, see NYAZEE, THEORIES OF ISLAMIC LAW.
[36] *Id.*
[37] *Id.*
[38] *Id.*

significance of the *maqāṣid*. Thus, in *Kaniz Fatima v. Farooq Tariq and others*, a case of defamation against a newspaper, the learned Court had the following to say:

I am therefore, of the considered opinion that no attempt on the part of any person individually, jointly or collectively to detract, defame or disgrace another person, thereby diminishing, decreasing and degrading the dignity, respect, reputation and value of life *and more particularly on the part of a journalist, should be allowed to go with impunity.* The situation is aggravated if it affects the honour and respect of any person in public life or in any concerned with collective good of the public, in any walk of life. There are six basic Maqasid-ul-Shari'ah, which are to be protected and they are Hifzul Din (protection of faith), Hifzul Nafs (protection of life), Hifzul Mal (protection of property), Hifzul Aql (protection of intellect), Hifzul Irz (protection of honour and dignity) and Hifzul Nasl (prosecution of paternity). In extreme case of causing damages to the honour and dignity and defaming by way of false allegations on the basis of sexual illicit relationship, it is punishable with Qazf, which provides punishment of 80 stripes and the evidence of such person is not to be accepted at all. In the case of other kinds of attack on the honour or dignity, the person who makes any such attempt should be saddled with financial liability by way of penalty or fine. Any such attempt is punishable in criminal as well as civil law both. In the present case a civil liability is under consideration.[39]

The main purpose of the above quotation was to show that even if the judges do not understand the value system and its approach, they are beginning to become aware of the values, however, they still need to learn how to use them. Our main purpose so far has been to show the stage at which the purposes of the *sharī'ah* or values as they are called are to be used for settling cases. This has been discussed above at some length, and the position is quite similar to that in Western law. A few points may be elaborated further to show the two areas where values come into operation. These are discussed below.

The first is the case, where an interest conforms with the purposes of law, is compatible with the general principles of the law and *has a specific text supporting its operation*. This is the extended analogy that is designated as *mulā'im* (compatible) by al-Ghazālī. What happens here is that a cause at the level of the genus operates on a rule at the level of the lower category. In other words, this is a case where the cause or attribute identified is compatible with the purposes of the *sharī'ah*, it is compatible with the general propositions or general principles of the *sharī'ah*, and it is supported by some individual text of the Qur'ān and the *Sunnah*.[40] Three conditions are set here. In Arabic, the language used for describing this is that the attribute identified should be: *munāṣib* (compatible with the purposes of the law); *mulā'im* (compatible with the general propositions of the *sharī'ah*; and it should

[39] *Mst. Kaniz Fatima v. Farooq Tariq and others,* PLD 2002 Karachi 20 (emphasis added).
[40] IMRAN NYAZEE, THEORIES OF ISLAMIC LAW, 283

have a *shahādat al-aṣl* (support of an individual text).[41] As the terms used are technical and may become difficult to understand, Nyazee has stated that in this type of analogy a general principle is used where the general principle has been derived directly from the texts.[42] General principles always exist at a level that is higher than the rules that are subsumed under them. The method that this analogy employs is to assimilate two different rules under this principle. He compares the method in detail to show its similarity with the method used in Western law.[43]

The second situation is where an interest conforms with the purposes of law, is compatible with the general principles of the law, *but has no specific text supporting its operation*. Within the attributes recognized at the level of the genus, there is a second type of analogy, which is also tested on the basis of the three standards listed above. The cause identified is tested to see if it is *munāṣib* (compatible with the purposes of the law); *mulā'im* (compatible with the general propositions of the *sharī'ah*; and whether it is supported by a *shahādat al-aṣl* (support of an individual text). The difference between this and the previous type of analogy is that the third condition is not met. Thus, cause is *munāṣib* or it is compatible with the purposes of the law; it is *mulā'im* or is compatible with the general propositions of the *sharī'ah*; however, there is no *shahādat al-aṣl* or support of an individual text for this type of analogy.

In this case too Nyazee simplifies the type of analogy by stating that a general principle is used, but the general principle not been derived by the jurist directly from the texts.[44] Analogy in this case too takes place in the same way, that is, the method that this analogy employs is to assimilate two different rules under this principle. The main difference between this method and the one described above is in the method of the identification of the general principle. In the previous method, the general principle is not stated expressly in the text, but is derived by the jurist from the implications of the texts. In the present case, the general principle is neither expressly stated in the texts nor is it derived from the implications of the texts: it is a general principle that the jurist conjures up, so to say, and verifies whether it is compatible with the purposes of the law as well as the general propositions of the *sharī'ah*. *It is this second type of analogy that is similar to the occasion in Western law when values are used.*

This completes our comparison of the use of values in the two systems, that is, of the methods of such use. After this comparison, we hope that a modern lawyer, judge or jurist will not find it difficult to relate modern law to the methods used in Islamic law. What remains is to provide a few examples in which values have actually been used or may be used. These are essentially two cases in the light of all

[41] *Id.*
[42] *Id.*
[43] The reader may have recoure to the text in *id.* after page 283.
[44] *Id.*

that has preceded. The first is the case where a rule adopted by the existing law is changed in the light of the values of Islamic law. The second is the case where there is no provision in Islamic law for the issue and a principle may be derived to decide the case. In law, we can find many examples of cases in which values have been in the forefront. In particular, we may mention two American cases. These are *State v. Shack*[45] and *United States v. Progressive*.[46] We will focus on Islamic law in the following issues.

5. Application of values to alter an existing rule adopted by Islamic law

The offence of rape under the *ḥudūd* laws prevalent in Pakistan was considered to be part of the offence of *zinā liable to ḥadd*. It was referred to as *zinā bi'l-jabr*, which is the same thing as rape. The Protection of Women (Criminal Laws Amendment) Act, 2006, altered this rule and converted this offence to rape, as it existed prior to the enforcement of *ḥudūd* laws in 1979. There was a considerable debate about the issue as the offence had been considered part of the *ḥadd* for fourteen centuries. The offence of rape or *zinā bi'l-jabr* is not mentioned in these terms either in the Qur'ān or in the *Sunnah*, although indirect references are found in the *Sunnah*. Thus, one of the conditions of using values that the new provision should not go against the text of the Qur'ān and the *Sunnah* was met.[47]

In the existing *Ḥūdūd* laws, the philosophy of Islamic law of concealing sex offences as far as possible had been reversed and the focus was erroneously shifted to the punishment of the offence rather than the protection of the accused. Thus, under the Zinā Ordinance, 1979, there was an underlying attempt to trap the accused in every possible way and to punish him. The focus should have been on the protection of the accused. Likewise, the Qadhf Ordinance, which was supposed to protect the accused, incorporated a diluted form of the law of Qadhf. This had resulted in the erosion of the design and structure of the entire Islamic law on the subject. Further, the Qadhf Ordinance has borrowed phrases and provisions from the law of defamation given in the PPC. This has changed the nature of the law of Qadhf and made it ineffective.

The main issue of academic interest was first: Why did the early jurists consider *zinā bi'l-jabr* to be similar to the offence of *zinā* as regards proof?

- The reason is obvious; it is for the protection of an innocent person, who may be falsely accused of *zinā* in one of its forms. The protection is claimed as of right and it is a right given by God Almighty. Separating rape from *zinā* will amount to denying such protection to an innocent person and to the extinction of his God-given right. The jurists, therefore, considered the two offences as one. This translates into the

[45] 58 N.J. 297 (N.J. 1971).
[46] 467 F.Supp. 990 (W.D. Wis. 1979).
[47] The explanation that follows is excerpted from a report provided by Professor Nyazee that he submitted to the Ministry of Law, while he was a consultant there in 2006. Most of the text has been reproduced verbatim.

statement that the value of *'irḍ* (reputation of a person)[48] prefers the interest of the accused rapist in his reputation over the bodily harm caused to the female accused.

• The use of the word "zinā," whether it is consensual or *bil-jabr*, invokes the provisions of *qadhf* along with its proof requirements (four witnesses) for consensual sex or rape. The Qur'ān does not qualify or make an exception in the case of rape. The moment the word "*zinā*" is used in the law, the Qur'ānic provisions of *qadhf* are invoked. The word *zinā* has been used in the Qur'ān as a general word. It has not been restricted by any text. The penalty for the slave girl has been halved by the Qur'ān, but it does not amount to restriction of the generality of the word *zinā*. Consequently, whether we designate *zinā* as consensual *zinā* or *zinā bi 'l-jabr*, the meaning still remains that of *zina*, and the provisions of *qadhf* will be invoked if an accusation pertaining to any of these offences turns out to be false.

The next issue was: Is a person accused of rape entitled to the protection of the provisions of qadhf, that is, proof by four witnesses? In this case, the interests of an innocent man, falsely accused of rape, and those of the victim of rape, a woman, stand pitted against each other. This is the clash of interests represented by this case. The decision of the *fuqahā'* to include *zinā bi 'l-jabr* within the broader meaning of *zinā* is in line with the assertion, so often heard in the context of law and justice, that "it is preferable to let an innocent man go free than to punish a large number of criminals." To understand this clash of interests, the offence of rape may be conceived as giving rise to four possible situations.

• In the first case, we assume that a man has actually raped a woman and she accuses him of rape.

• In the second case, we assume that a couple are having an affair and they are discovered in a compromising position. The *zinā* here was consensual, but the woman either on her own or on the insistence of her family (honour being at stake) accuses her paramour of rape.

• In the third case, which is similar to the second, the man is unfaithful to the woman and does not wish to marry her. This angers her (hell hath no fury like a woman scorned) and using some appropriate situation she accuses him of rape.

• In the fourth case, a man hires a prostitute and they are caught indulging in sex. The prostitute turns around and accuses the man of rape.

• There is a fifth case too where a young couple elopes and they get married. This leads to cases of abduction and *zinā liable to ta'zīr*.[49] We will not consider the fifth case here. It is also to be emphasized that we are considering the law that existed prior to 2006, because the current law has changed.

[48] Sometimes considered a sixth value.
[49] *Ta'zīr* is the penalty prescribed by the state and is not found in the texts of the Qur'ān and the Sunnah.

When we consider all four cases, we can easily say that, while making law, except for the first case of actual rape, the remaining three cases give a clear right of protection to the accused under the *qadhf* provisions, that is, the production of four witnesses. Yes, there is a chance that even in the first case, the accusation is false (due to mistake), just as there is a slight chance that rape did take place in the remaining three cases as well. It can be readily seen that the situation is quite difficult for purposes of separating the offence of *zinā* from rape, and denying the accused the protection accorded to him by the strict proof of four witnesses is not that easy; the accused can claim this as his God-given right. It was for this reason that the earlier jurists did not separate the two offences as regards proof. In most such cases, the texts of the *sharī'ah* would appear to grant the accused such protection. Does this mean that a rapist will go scott-free if four witnesses cannot be produced? The answer is a resounding yes, if rape is retained under the title of *zinā bi 'l-jabr*.

The only solution appears to be to remove the offence called "*zinā-bil-jabr*" from the statute book and insert instead the offence of "rape," with an appropriate Urdu equivalent without using the word *zinā*. Rape should then be interpreted to mean the "intent to cause severe bodily injury (or grievous hurt)." In other words, this offence should not be associated with the term *zinā* in any of its forms. This would not conflict with the Qur'ān or the Sunnah, as the texts do not mention *zinā-bil-jabr*. In fact, the offence of *zinā bi 'l-jabr* has been created on the basis of analogy (*qiyās*) and crimes cannot be created on the basis of analogy in Islamic law (as that will permit the creation of ex-post facto offences by the *qāḍī*).[50]

Those who claim that this offence has been created through the implication of the text (*dalālat al-naṣṣ*) should realise that the attribute of sex (third value) has been given priority over bodily harm (second value).[51] This goes against the *maqāṣid al-sharī'ah*. Interpretation is undertaken according the the purposes of the *sharī'ah* (*maqāṣid*), and the *maqāṣid* maintain that priority must always be accorded to bodily harm over matters of sex. Accordingly, rape, which is an attack on the physical person of the victim (including mental agony) cannot be included in the offence of *zinā*. It is an offence that falls in the category of *ḥifẓ 'alā 'n-nafs* (protection of life).

As the ofence has not been defined by the texts, it will be considered a *siyāsah* offence (modern writings have removed the distinction between *siyāsah* and *ta'zīr*). It can, therefore, be proved by oral testimony of the victim and by any form of circumstantial or forensic evidence. As the victim is claiming bodily harm in the form of rape, the contrary inference of confessing to the offence of *zinā* cannot be drawn.[52] If it is considered bodily injury, which it is, the accused does not have the

[50] This has been discussed in some detail in the previous chapter.
[51] It is here that Professor Nyazee's arguments on the basis of values commence.
[52] The explanation of this statement is that when a woman complained of rape and then could not produce four witnesses, she was herself considered to have confessed to the offence of consensual sex or *zinā*.

protection of the provisions of *qadhf* The reason is obvious; he is similar to a murderer or an assailant. In this way, by preferring the value of bodily harm over that of reputation the interest of the victim, the woman attaked, can be preferred over that of the reputation over the accused, the rapist.

The above were the arguments provided on the basis of values, towards the end, to treat the offence as an offence of rape. The Protection of Women Act, 2006 did exactly as was proposed and the old offence of rape has now been revived. Thus, a rule existing on the statute book and in the traditional texts of the jurists was altered on the basis of values among other arguments and technical reasons.

6. Application of the rules for interests to the "unprovided" case

In this section we will consider the case of intellectual property from the perspective of Islamic law, that is, whether intellectual property can be considered property and have a commercial value. The texts of the Qur'ān and the *Sunnah* do not indicate that such property can have value, nor do the writings of the jurists acknowledge it. It is, therefore, an "unprovided case," as Bodenheirmer would call it, or it is a case that does not have an express basis (*shahādat al-aṣl*) as the Muslim jurists would say. The description is based on a prior study undertaken by this writer.[53] It is a case in which the reasoning adopted was inadequate, and could have been much better if it was based on values rather than being right-based. A brief description follows, which has been excerpted from our artice that was published in *Hamdard Islamicus* in its 2010 issue.

"The importance of intellectual property in the modern world goes far beyond the protection of the creations of the mind. It affects virtually all aspects of economic and cultural life."[54] This statement applies to the underdeveloped world as well, which includes the Muslim world, yet many in the underdeveloped countries tolerate the widespread sale of counterfeit versions of IP products. The Islamic world continues to be part of this illegal activity with some claiming that such rights are un-Islamic.

It is imperative that Muslims internalize concepts of IP so that they can participate in and carve out a share in this enormous source of wealth. Realising this need, some Muslim scholars have tried to justify the use of intellectual property from the perspective of the Islamic *sharī'ah*. The attempts made so far have been inadequate; indeed, superficial. Verdicts have been issued, but without even understanding fully what intellectual property means and how it is to be dealt with. The complexity and uniqueness of this form of property is ignored in such verdicts.

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[53] *See* Samia Maqbool Niazi, *The Poverty of Ijtihād: A Case Study of Intellectual Property Rights*, HAMDARD ISLAMICUS 33:3 & 4, 103–150(2010).

[54] WIPO, WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE, 2nd ed. (Geneva: WIPO Publication No. 489 (E), 2004), 422.

It is pertinent to state at the outset that Pakistan, like most Muslim countries, has a comprehensive set of intellectual property laws, and these laws are periodically updated to conform to international standards and norms of the intellectual property law.[55] Enforcement mechanisms are weak, but progress is slowly and painfully being made. Only a few cases come up to the level of the High Courts and the Supreme Court, and most issues are settled at the lower level.[56] Our issue, however, is somewhat different. The Constitution of the Islamic Republic of Pakistan, 1973 requires that "no law shall be made that is repugnant to the injunctions of the Qur'ān and the Sunnah." This provision is the basis of what is called the "Islamisation of laws in Pakistan." In 1980, a special court called the Federal Shariat Court of Pakistan was created, outside the regular hierarchy of courts in Pakistan, to "strike down" all those laws that conflict with or are repugnant to the injunctions of Islam. This Court of its own accord[57] took up the matter of intellectual property rights in a case that we consider at length in this paper. Since that landmark case, the scope of intellectual property rights in Pakistan has been widened, and it is expected that a petition will be filed, sooner rather than later, to strike down some of these laws as they are against the principles of Islamic law. This means that forward looking interpretation, or *ijtihād*, has to be undertaken by Muslim scholars before such a petition is filed. The arguments given so far are not adequate. Much more has to be done before the laws are challenged in the Federal Shariat Court.

Contemporary Muslim jurists are divided over the issue of IP. Those who fervently stick to the position of the classical scholars augment their position against the concept of IP by arguing that knowledge belongs to Allah alone, and is merely a trust for humans to use and share with others. They also rely on the tradition of the Prophet (SAW) which says, "Do not sell what you do not have," thus implying that IP rights cannot be possessed and owned and, therefore, cannot be sold. In addition, they allude to uncertainty (*gharar*), which may be an important attribute of almost all IPRs. On the other hand, there are scholars who have accepted the premise that ideas

[55] The intellectual property system is implemented by the Intellectual Property Organisation of Pakistan. The different laws include: Trademarks Act 1940, Trademarks Ordinance 2001, Patents & Designs Act, 1911(as amended by the Patents Ordinance 2002 & Designs Ordinance, 2000), Designs Ordinance 2000, Registered Layout-Designs of Integrated Circuits Ordinance, 2000, Copyrights Ordinance 1962 (constantly amended). Work is underway at the IPO Pakistan on "Geographical Indications," a draft Plant Breeders' Rights (PBR) Bill of Pakistan has been submitted to the parliament for enactment. Work is also being undertaken on preparing laws for "Genetic Resources," "Traditional Knowledge," "Folklore" and other areas.

[56] Some of the cases that dealt directly or indirectly with intellectual property rights have been: *Hotel Metropole Ltd v. Performing Rights Society*, PLD 1967 Kar 168 (copyrights); *Carl Zeiss Stiftung v. Carl Zeiss Stiftung, Jena,* PLD 1968 Karachi 276 (trademarks); *Societe De Fabrication v. Deputy Registrar of Trademarks and another*, PLD 1979 Kar. 83; *Alpha Sewing Machine v. Registrar of Trademarks and another,* PLD 1990 SC 1074; *Morphy Richards Ltd v. Registrar of Trademark and another,* 1992 MLD 2506; *Select Sports* case, PLD 1998 Lah 69; *Glaxo v. Evron*, 1992 CLC 2382; *Cooper's Incorporated v. Pakistan General Stores*, 1981 SCMR 1039; *Bolan Beverages v. Pepsico Inc.*, 2004 CLD 1530; *Concentrate Mfg. Co. v. Seven-up Bottling*, 2002 CLD 77; *Roomi Enterprises v. Stafford Miller*, 2005 CLD 1805 (DB); and *Acer Inc. v. Acer Computers*, 2004 CLD 1131.

[57] In most other cases petitions are filed in the Court to strike down the questioned laws.

and methods can be protected under the rubric of intellectual property. Nevertheless, their arguments have not been found to be very convincing by the majority of Muslims.

Most analyses of intellectual property rights by Muslim scholars focus on a few well known types; namely, copyright, patents, trademarks and trade secrets. The concept of intellectual property has now expanded to include many other things.[58] Today, a few questions may be raised that require answers. As copyright law protects only *the form of expression of ideas, not the ideas themselves,* the questions to be raised are: Can expression alone be protected under Islamic law? Does it give rise to some kind of right that requires protection? If so, what is the nature of such a right? In patents and industrial designs, *it is the underlying idea that is protected.* How does Islamic law protect an idea? In other things, it is either a mark, name, geographical name and so on. Each requires separate analysis from the Islamic perspective. In copyrights, moral rights remain with the original author, even when he has transferred his economic rights to another. Can this be permitted under Islamic law? Does this amount to a conditional transfer and will Islamic law permit this? Most intellectual property is limited by time. Copyright has a duration of 50 years after the death of the owner. In some countries this has been extended to 70 years. This is for the benefit of the heirs. The question is: can such a limit be imposed on the basis of the *sharī'ah*? A trade name or mark may be renewed forever it appears (for a fee), but what is its real life? Again, will Islamic law acknowledge a right in a work that is based on musical compositions and performances? Can the rights of performers be intermingled with this right? What is the basis according to Islamic law? The expression protected by copyright can be sold again and again. What kind of right is involved here? Can one thing be sold again and again under the *sharī'ah*? Most of these questions have not been addressed by Muslim scholars.

The main problem faced by Muslim scholars is that the earlier jurists followed the same old idea of property that was followed by the rest of the world up until a hundred years ago. It is a narrow concept and considers property to be confined to corporeal things that can be taken into physical possession. Some jurists extend it to the usufruct or the benefit emerging from them as well. This concept cannot work for intellectual property, which is now considered and analyzed in terms of rights. The Federal Shariat Court of Pakistan and some well known scholars tried to overturn this narrow concept and to bring it in line with modern concepts. The reasoning of the Court are first recorded and analyzed followed by the reasoning provided by Mawlana Taqi Uthmani a well known scholar. Finally, a suggestion will be made as to why value based reasoning would have been much more effective rather than a rights based reasoning.

[58] Intellectual property "means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields." WIPO, *WIPO Handbook*, 3.

The Federal Shariat Court invited comments of the public about the Trade Marks Act, 1940 and twenty-two other Acts, through a notice dated 15. 7. 1982. The Ulema did not respond to the notice, therefore, the Court proceed to examine the law on its own.[59] The issue, with respect to the Trade Mark Act, was: Whether a trade mark, a copyright or patent is property that is assignable and tranferable.[60] The Court observed that as the concepts underlying such property were developed after the Industrial Revolution, it is not possible to find a precedent for such property in the *sharī'ah*. The Court then proceeded to trace the development of the concepts of property and ownership, trying to show that these concepts have changed with the change in ideas.[61] Until the 19th century these concepts were limited to corporeal property. The elements of such ownership were identified as control and exclusive use along with the right to exclude others from enjoyment.[62] This changed too, and the Court quoted Roscoe Pound to show that formerly there were no reservations about the absolute rights of the owner, but gradually the restrictions on these rights as well as the rights of others were recognised.[63] The Court noted that the initial concept of property was that of tangible or intangible property, or movable and immovable property in Europe, but in English law the main classification was that of real and personal property, which meant choses in possession and choses in action.[64] The reasons for such a classification were identified by the Court through a number of definitions.

According to the Court, it was John Salmond, who for the first time widened the definition of property to include intellectual property rights.[65] The Court considered this "a vast improvement upon the law of property,"[66] Paton, as the Court notes, disagrees. He states: "The distinction between land, houses and things under the land (which are corporeal) and such things as rents (which are incorporeal) may be a convenient one but tends to confuse."[67] After this Paton raises another objection, which should have been the major focus of Muslim scholars undertaking *ijtihād* today. The Court notes this, and Paton says:

Once we speak of ownership of things, which are not corporeal, where are we to stop? My reputation is in a broad sense but it would be straining language to say that I own that incorporeal *res*. **It is perhaps a pity that the word "ownership" was not confined to corporeal things and another term used where incorporeal *res* are concerned.**[68]

[59] PLD 1983 FSC 125, 127.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 128.
[64] *Id.*
[65] JOHN SALMOND, JURISPRUDENCE, 12th ed., 110 quoted in PLD 1983 FSC 125, 129.
[66] *Id.*.
[67] PATON, JURISPRUDENCE, 458 quoted in PLD 1983 FSC 125, 129.
[68] PATON, JURISPRUDENCE, 458 as quoted in PLD 1983 FSC 125, 129–30 (emphasis added).

Thereafter, the Court makes an observation to identify the latest meaning property current in the West, especially in the U.S.A.[69]

The Court then turns to the meaning of property in Islamic law. Relying on some source, the Court observes that property or *māl* in Islamic law is "a thing which one desires and which can be stored to meet the future requirements."[70] The Court then notes the crucial point that property is something that is assigned a value by the people. "The criteria for determining whether a thing is property is that it be treated by mankind as property (*māl*) and a thing of value."[71]

The Court then notes the distinction drawn by the Ḥanafī jurists between a thing and its usufruct. There is ownership (*milk*) in the case of usufruct, but it is not property. The Court then dwells on the view of Imām al-Shāfi'ī as elaborated by Yūsuf Mūsā. Referring to his opinion, the Court observes, "He approved of this definition because the object is not really the corporeality of the property but the benefit derived from it and this is also in accordance with the usage and customs among people. This according to his opinion also corresponds to contemporary law."[72] The Court adds further that according to Yūsuf Mūsā. "Everything from which benefit can be derived is property provided that the acquisition of benefit therefrom is not prohibited in Sharia."[73]

The Court, after describing what is perfect and imperfect ownership according to the Ḥanafīs, moves on to the views of 'Abd al-Raḥmān Sābūnī. "Sabooni says that the definition of the jurists [that is, of property] is rather limited than the definition of mal or property in the contemporary law."[74] The Court then comments on this saying: "But this view is fallacious since it does not appear to take into account the much wider definition of Imam Shafie that everything is *māl* which fetches value if it is sold and if it is destroyed raises a liability for reparation."[75] The Court then implies that trade-marks, trade-names, patents and copyrights can all be included in this definition.[76] In support the Court refers to Yūsuf al-Qarḍāwī, who appears to agree with this view.

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[69] PLD 1983 FSC 125, 130. The Court cites a number of cases in support of this statement: *Eric v. Walsh*, 61 A 2d 1, (4); 135 Conn. 85; *Todeva v. Iron Min co.,* 45 N.W. 2d 782 (788); 232 Minn. 422; *Waring v. Dunlea,* DCNC 26 F. Supp. 338 (340); *Button v. Hikes*, 176 S W 2d 112 (115, 117) 296 Ky. 163; 150 ALR 779; *Bogan v. Wiley,* 202 P. 2d 824, (827); 90 Cal. App. 2d 288; *Department of Insurance v. Motors Ins. Corpn. Ind.* 138 NE 2d 157 (163); *Button v. Drake,* 195 SW 2d 66 (68, 69); 302 Ky. 517; 167 ALR 1046; and *Downing v. Municipal Court of City and County of San Fransisco,* 198 P. 2d 293 (926, 927); 88 Cal. App. 2d 345.

[70] In our view, the source is IBN 'ĀBIDĪN, RADD AL-MUḤTĀR (Cairo, 1386–89/1966–69), vol. 4, 3.

[71] PLD 1983 FSC 125, 131.

[72] The reference is to the work of Yūsuf Mūsā, *al-Amwāl wa Naẓariyyat al-'Aqd*, 162, quoted in PLD 1983 FSC 125, 132.

[73] *Id.*

[74] *Id.* at 134.

[75] *Id.*

[76] *Id.*

The Court also refers to Mawlāna Ashraf Ali Thanwī, to Muftī Kifayatullah, and also to the adverse comments in Fatawa Rashidia and the work of Mufti Shafi.[77] Thereafter, the Court refers to an adverse comment published in a journal where validity of copyright is opposed on the ground that it is not lawful to sell knowledge. The article is by Dr. Ahmad al-Hijji Kurdi. The detailed views of the writer are reproduced and then the views are rejected by the Court. What is of interest for us here is that this analysis is quite similar to the analysis presented by Taqi Usmani, but the analysis of the learned Court came earlier.

In the end, the Court gives its conclusion as follows:

It is important to note that the definition of Imam Shafie as accepted by Malikies and Hamblies has included in the category of *Mal* (property), everything which has a money value. It was a great advance on the jurisprudence in the world of that age since for the first time only Salmond could arrive at an analogous definition. The definition from Imam Shafie corresponds to the modern definition which is found in the precedents referred to above from the judgments of the Courts. The provisions of the Act are not repugnant to Shariah.[78]

The main points relied upon by the Court, for its conclusion, are, first, that intellectual property rights are a new category of rights, and with the changing times the definition of property has to change to accept the new types as was done in the law, otherwise it will kill all kinds of incentive for creative activity. Second, that the definition of *māl* is not based upon the Qur'ān and the Sunnah and has been given by each jurist "according to his own lights."[79] Third, that property is considered as such when people assign it such a value according to their usage and custom. Fourth, and finally, that the definition of *māl* given by Imām al-Shāfi'ī is quite flexible and wide and should obviously, and does, include this new category of rights. As such this definition represents a great advance and matches the definition given much later by Salmond.

The effort by the Court is commendable. In fact, this case (decided in 1983) appears to provide source material for much of what Justice Taqi Usmani said later.

Consequently, there is no point in repeating the arguments advanced by Justice Taqi Usmani, as well as the sources relied upon him, are quite similar to those stated in the case decided by the Federal Shariat Court in 1983 and discussed above. The only difference is that Justice Usmani has presented the arguments with greater sophistication based upon his superior knowledge of Islamic law.[80] Just to give a flavour of his reasoning, we may reproduce the following words:

[77] *Id.* at 135.
[78] *Id.* at 137–38.
[79] *Id.* at 137. For this the Court relies on the comments of Sābūnī.
[80] The detailed arguments may be examined in MUHAMMAD TAQI USMANI, BAY' AL-ḤUQŪQ AL-MUJARRADAH, vol. 1, 125.

It appears to this humble servant, may Allāh protect him, that the right to a trade name or trademark, even though it was originally a pure right that was not established in an existing tangible property, but after governmental registration which requires immense efforts and the incurring of substantial amounts, acquires a legal form that resembles transcribed certificates in the hand of the bearer. In the official registers it resembles a right established in tangible property. It is, therefore, linked in mercantile practice with tangible property. It is, therefore, necessary that compensation be paid in lieu of it by way of sale as well.

With due respect for the erudition of Justice Usmani, we find it difficult to accept these arguments. First of all certificates are not tangible property, they are choses in action. The Companies Ordinance, 1984, following an Indian amendment, declares a share certificate as movable property, but that rule has not been tested by the courts nor is its rationale visible.[81] Second, these are not legal arguments. They may be adequate to convince a layman, but they cannot be considered legal reasoning. Third, even if this argument is considered adequate legal reasoning, it has nothing to do with Islamic law. It amounts to saying the following: "The Government of the United States has registered it and issued a receipt or a certificate, therefore, it is Islamic and can be sold under the provisions of Islamic law." How can such an argument hold water? The learned Justice Usmani then adds that the registration should be done in a lawful way and there should be no element of deception. This, we feel, is merely window-dressing for a very weak legal argument.

We would like to conclude by saying that had the court taken up arguments on the basis of the purposes of the *sharī'ah* or the values upheld by the legal system, especially the fifth purpose of protection of property, the arguments would have gained immense strength. The fifth purpose of protection of property would require that anything that protects property must be protected; and, intellectual property today is doing exactly that.

7. General rule about interests and values

In the end, we may recall a general rule that should be noted for the use of value based arguments in courts. This rule requires that values be invoked, in particular, for creating new rules when there is no identifiable basis in the texts for deciding a case. This rule applies to both law and to Islamic law, and has been elaborated in detail in the description that has proceeded.

This brings to close our comparative study about the techniques and methods used by judges and jurists in the law as well as Islamic Law.

[81] Perhaps, it is to impose the punishment of theft in the criminal law.