

The Concept of Intellectual Property As *Al Mal*: An Islamic Perspective Approach

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ABSTRACT

The idea of legally acknowledging and protecting the intellectual property is prevalently known in any legal system in the world, but not many people know how this idea is dealt in Islam. Islam as the religion of wholeness (*syumul*), deals with almost all aspects of life and aims at protecting five main objectives of syariah³ (*maqasid al syariah*) namely religion (*al din*), life (*al nafs*), intellect (*al aqal*), lineage (*al nasl*) as well as property (*al mal*). As the time goes by, people started to realize that human intelligence and creativity shall not be the object of manipulation, thus necessitated them to come up with some sort of protection for their invention by legally acknowledging it as ‘intellectual property’. This paper will try to discuss the position of intellectual property in the Islamic jurisprudence by determining its ‘*maaliyyah*’ (capable of being considered as property).

Keywords: intellectual property, al mal, property

³ Syariah is an Arabic word which literally means way or path. It is the code of conduct or religious law of Islam that derived from two primary sources of Islamic law; the Holy Quran and the example set by the Prophet Muhammad in the al Sunnah.

RESEARCH METHODOLOGY

This article is based on the descriptive analysis research which involves library-based method. The method chosen is one of the best approaches to get the literature material such as books, articles and journals including the classical and modern syariah texts. These materials are scrutinized to develop the concept and scope of analysis to extract the views of distinguished Islamic scholars about the topic. Reference is also made by referring the websites of the highest Islamic authorities such as Majelis Ulama Indonesia (MUI) and few other websites.

THE CONCEPT OF PROPERTY (*AL MAL*) IN ISLAMIC PERSPECTIVE

Intellectual property is widely viewed as a type of property. As such, in order to better understand Islam's stance on the issue of protecting intellectual property, it is important to understand its position regarding property. Dealing with the definition of 'property', Muslims and western scholars have produced a variety of specific definitions to give clear and accurate information about what is meant by 'property'.

The word 'property' is equal to the word *al mal* in Arabic and the plural of the word is *al amwal*. The word *al mal* is originated from the Arabic verb *mala* which means tend or incline (Maan Z Madina 1973). *Al mal* literally means something that is possessed and controlled (*hiyazah*) by someone, be it physical (*'ain*) or usufruct (*manfaah*) (Al Zuhayli 1989). According to al Qamus al Muhit (Abadi 1999) and Lisan al Arab (Manzur 1975) *al malis* ordinarily means all things which are capable of being owned.

In terms of its conceptual definition, various opinions have been expressed by scholars especially Hanafi school which stated that property is something that man naturally inclines to and capable of being stored and used in the desired time (Maluf 1975). The Majallat al Ahkam al 'Adliyyah (normally known as al Mejelle) defines *al mal* as a thing which is naturally desired by man, and can be stored for the time of necessity either moveables or immoveables property (Tyser 1967). Wahbah Al Zuhaily in his view added that Hanafi School considered *al mal* as capable of being controlled and used of its usufruct (Al Zuhayli 1989). Meanwhile, according to the majority of Islamic scholars (*jumhur*) other than Hanafi, property is something of value and if a person damages it, he will be liable to pay compensation. Apart from that, modern scholar like Abdul Karim Zaydan highlights two important aspects in discussing the definition of mal i.e. capable of being controlled and utilized of its usufruct. Therefore, based on the definition, it can be summarized that, aspects to be considered in categorizing something as *al mal* are either the property is something can be controlled and can be used directly such as money, houses and others or something which still can be controlled though not directly but as long as it can be used such as minerals below the surface of the earth (Zaydan 1986).

However, something cannot be categorized *asal mal* if (Al Ibadi 1974));

1. Something that cannot be controlled even though it may take benefit from it.
2. Something that can be controlled but cannot be used.
3. Something that can be used but its usage is forbidden by Islam.
4. If something can be exploited by some groups of people it is still regarded as property for them, such as pig and alcohol, which is considered property for *kafir fi dhimmah*⁴ members but not for Muslim.

Based on the above explanations, it can be concluded that 'property' from the perspective of Islamic law are each which can be controlled, exploited, and lawful and in accordance with Islamic principles have value as well as humans tend to it.

DEFINITION OF INTELLECTUAL PROPERTY

Intellectual property, very broadly, means the legal rights, which result from intellectual activity in the industrial, scientific, literary and artistic fields. The laws of protecting intellectual property give the individual the right to protect his invention, grant him the power to dispose of it and prevent others from using this invention without his permission. In simple language, this means that one man cannot come along and take the science forward from where it is. According to the World Intellectual Property Organization (WIPO)⁵, intellectual property refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce (WIPO 1967). Meanwhile, according to Taqi Usmani (Grand Mufti of Pakistan), the theory of 'intellectual property' contemplates that whoever applies his mental labour to invent something is the owner of the fruits of his labour. If a person has invented a certain instrument, he does not own that instrument only, but he also owns the formula he has used for the first time to invent it. Therefore, nobody can use that formula without his permission. Similarly, if a person has written a book, he is the exclusive owner of the right to publish it, and nobody has any right to publish that book without his permission. This right of an author or an inventor is termed as his 'intellectual property' (Muhammad Taqi 2012).

⁴ The term *kafir fi dhimmah* refers to the non-Muslims who pledge their loyalty to the Islamic country.

⁵World Intellectual Property Organization (WIPO) is the global forum with 189 member states for intellectual property; services, policy, information and cooperation. Its mission is to lead the development of a balanced and effective international intellectual property system that enables innovation and creativity for the benefit of all. The mandate, governing bodies and procedures are set out in the WIPO Convention, which established WIPO in 1967.

INTELLECTUAL PROPERTY: CAN IT BE CONSIDERED AS *AL MAL*?

Intellectual property issues are not discussed in detail by the classical jurists' in their works. A decade ago, the world that was based on physical properties had changed to the information-based property world (Turner 2000). In line with these changes, there are some thoughts discussing thoroughly on the status of intellectual property. Fath alDurayni explained that intellectual property is one type of property that is recognized in syariah as it is considered as 'right' (*al haq*) or benefit (*al manfaah*) which is recognized by the majority of jurists as *al mal* (Al Durayni 1987). In Islamic jurisprudence, there are three types of property (*al mal*), which tangible assets (*al ayn*), debt (*al dayn*) and intangible assets (*al manfaah*). Examples of intangible assets that has often been said by the Islamic scholars is rentals and leases (*haqq al irtifaq*). But in all of these examples, the right of *al manfaah* is the right to enjoy the benefit which cannot be separated from its physical form. If the material is physically removed or damaged, the right of manfa'ah also will disappear. This is different to the intellectual property, in which the physical material is intermediate. If the physical material changed ownership, damaged or dissolved, intellectual property rights are not affected (Demsetz 1974).

Similarly, the opinion of Ibn 'Urfah, a Malikiyyah scholar who considered intellectual property in the form of ideas and inventions or rights to it, if disclosed in a media like paper, has a large property value, even exceeds the value of physical assets. According to him, even if the paper is worth, its value is very small compared to its value when filled with the results of thought or creation of an artist or creator. According to Assoc. Prof Dr. Ida Madieha Abdul Ghani Azmi from the International Islamic University Malaysia (IIUM), the past Islamic scholars did not say much comment and debate on intellectual property rights, copyrights and compared to other property rights. Therefore, in her view, some scholars conclude that contemporary intellectual property and copyrights as rights not recognized in Islam:

"This shallow opinion is likely to be affected by other's displeasure with the phenomenon of royalties' collection and high prices in copyright protected works such as computer software, compact discs of music and academic books. However, if we study the opinion of earlier scholars, a significant problem is the status of the intellectual property as one type of property recognized by Islam"

She accepted the idea that intellectual property is regarded as *mal* as acknowledged by syara' with reference to the opinion of al Durayni and Ibn 'Urfah. She further added that if an intellectual property right is accepted as *al mal*, it is in parallel with the essence of Islamic teachings which encourage the notion of knowledge propagation. If right of authors is recognized, it will encourage them to be more involved in the writing and plagiarism is not just limiting creativity, but also discouraging those since they felt that their efforts are not being appreciated (Ida Madieha 1995).

However, the opinion of alQarrafi did not consider any transactions which involved intellectual property as valid since intellectual property is not intangible (*al ayn*). Other than that, intellectual property such as knowledge and opinion which according to Imam Hanafi, is not considered as *al mal* because of it lacks capability of being controlled or even owned (Islam 1999). Classical Imam Hanafi only recognized tangible assets *asal mal* and not intangible assets such as *almanfaah* and *haw* but contemporary Imam Hanafi inclined to admit that there are *mal* because of the complexity of modern-day transactions (Ahmad 2007).

It is becoming more obvious that intellectual property in Islamic perspective is in fact bearing the value of *mal*, thus capable of being transacted as a subject matter (*ma'qud alaih*) in any contract and stealing intellectual property would be an infringement resulting the thief to be punished with prescribed punishment (*hadd*) (Al Zuhayli 1989). This is due to the fact that many modern-day scholars accepted intellectual property as *al mal* on the following grounds:

1. Creativity is a major aspect of intellectual property, required in any person whom we shall consider as author or creator. Thus, before applying the predicate 'author' or 'creator', five conditions should be fulfilled: i.e., vision, inspiration, long age, sharpness, and mastery.
2. Intellectual property does not curtail the flow of knowledge; rather it is a financial benefit, limited by time and place, for its author/ creator or for the person to whom it has been given.
3. Shaykh Salih Al-Husayyin, the Executive Chairman of the Custody of the Two Holy Places (*al Haramayn*), and Dr. Fathi Ad-Durayni researched this issue and concluded that intellectual property rights are legitimate and shall be owned by their author or creator. The financial benefits of intellectual property shall belong to its owner. If anyone wants to use these rights, he must first obtain a license; thereafter its owner must be referred to using citations and/or quotations-if the subject matter concerns copyrights-and any further publication should be done in a manner pleasing to the owner.
4. In the realm of ideas, intellectual property laws only stipulate that due credit be given to the source of the concept.
5. Shaykh Muhammad Bazmul, professor at 'Umm Al-Qurl University in Mekka, stresses not taking or publishing any copyrighted material without the owner's permission or without referring to its author. He suggests that blessings do not flow from such actions of theft "as has been reported from Abii lUbayd al-Qisim Ibn Sallam and others: From the blessings of knowledge is referencing each statement to the one who said.
6. Shaykh Abd Al Aziz Bin Baz has equated violations of intellectual property law with stealing, and even Shaykh Muhammad Bazmul argues that, if such stealing is associated with deception, then a crime has been committed against the owner of the intellectual property.
7. The Council for Islamic Jurisprudence, meeting in Kuwait in 1988, ruled that "nobody has the right to violate intellectual property claims".

8. Majelis Ulama' Indonesia (MUI) issued a judgment that intellectual property violations are forbidden (*haram*).

CONCLUSION

Furthermore, by looking at the attitude of classical scholars in defining property, there was no single accepted (consensus) definition of *al mal*. Some of them interpreted the term *al mal* only in physical form like Imam Hanafi while some others (*jumhur*) considered intangible assets like *al haq* and *al manfaah* as *al mal*. Difference and variety of definitions showed only one thing; that the concept of property in Islam is certainly wider and it can be extended from time to time in accordance with the tenets of Islam that is flexible. In addition, all three key elements in order to describe property i.e. can be owned, useful and valuable, appears to be present in the intellectual property.

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