

Share'a: Intellectual Theft or Intellectual Infringement?

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Abstract. In this we seek to address the resemblance between Islamic rules and Western systems in terms of the criminal protection of IPRs. The significance of tackling this issue at this particular time is that there have been increasing calls in Western societies for the implementation of the rules of *Share'a* in their own Western territories. This article aims to situate this argument within the course of the criminal protection of IPRs, so as to prove that IPRs are one aspect of *Share'a* which does not conflict with the Western principles of protection. The main theme in this article is to establish that criminal protection of IPRs shall not result in severe physical punishments, but rather, would generate adequate protection to owners of intellectual creations. It shall be argued that intellectual theft could not be considered as a conventional theft which could result in the amputation of hand. Therefore, criminal protection in Islam could be accommodated with protection in Western societies, and shall not amount to what may be considered –from a Western point of view– to be severe physical punishment.

1. Introduction

*“What destroyed the nations preceding you, was that if a noble amongst them stole, they would forgive him, and if a poor person amongst them stole, they would inflict Allah’s Legal punishment on him. By Allah, if Fatima, the daughter of Muhammad stole, I would cut off her hand.”*²

Prophet Muhammad (PBUH)

In a previous article,³ we established a justification for intellectual property rights (IPRs) being based on the public authorship model, a view which accords with Islamic rules. It was shown here that significant outcomes were concluded on the basis of the Islamic justification of IPRs, especially in relation to the legislative harmonization and enforcement of IPRs. However, the aspects discussed throughout this Islamic justification of IPRs, in the above-mentioned article, were primarily directed towards civil protection. In this article, on the other hand, we seek to address the resemblance between Islamic rules and Western systems in terms of the criminal protection of IPRs.

The significance of tackling this issue at this particular time is that there have been increasing calls in Western societies for the implementation of the rules of *Share'a* in their own Western territories. For example, the Archbishop of Canterbury has ‘advocated the adoption of parts of Sharia, or Islamic law, in Britain.’⁴ This shows clear evidence as to the need to accommodate Islamic rules within the context of other legal and legislative systems. More recently, the lord chief justice, Lord Phillips, observed that he was ‘willing to see sharia law operate in the country, so long as it did not conflict with the laws of England and Wales, or lead to the imposition of severe physical punishments.’⁵

This article departs from this final point, aiming rather to situate this argument within the course of the criminal protection of IPRs, so as to prove that IPRs are one aspect of *Share'a* which does not conflict with the Western principles of protection. The main theme in this article is to establish that criminal protection of IPRs shall not result in severe physical punishments, but rather, would generate adequate protection to owners of intellectual creations. It shall be argued that intellectual theft could not be considered as a conventional theft which

¹ Moh’d Naser & Walid Muhaisen are Ph.D candidates at the University of Leicester, UK. We are indebted to Lior Zemer, Andreas Rahmatian and Camilla Andersen for their support and advice.

² MUHAMMAD TAQI-UD-DIN AL-HILALI & MUHAMMAD MUHSIN KHAN, *THE NOBLE QURAN IN THE ENGLISH LANGUAGE: A SUMMARIZED VERSION OF AT-TABARI, AL-QURTUBI AND IBN KATHIR WITH COMMENTS FROM SAHIH AL-BUKHARI* (MSA-USC Darussalam Publications 2002) (citing AL BUKHARI AND MUSLIM, *AL SAHIHAYN* Volume 4, Book 56, Number 681).

³ M.A. Naser and W.H. Muhaisen, *Intellectual Property: An Islamic Perspective*, J. OF THE COPYRIGHT SOC’Y OF THE U.S.A. (forthcoming 2008).

⁴ Editorial, *Archbishop of Canterbury argues for Islamic law in Britain*, Times online, Feb. 8, 2008. Available at: <<http://www.timesonline.co.uk/tol/comment/faith/article3328024.ece>> (18-07-08).

⁵ Patrick Wintour and Riazat Butt, *Sharia law could have UK role, says lord chief justice*, guardian.co.uk, Jul 4, 2008. Available at: <<http://www.guardian.co.uk/uk/2008/jul/04/law-islam>> (18-07-08).

could result in the amputation of hand. Therefore, criminal protection in Islam could be accommodated with protection in Western societies, and shall not amount to what may be considered –from a Western point of view– to be severe physical punishment.

In so doing, we shall first start with an illustration of the Islamic criminal system ‘*Uqubat*’. Such an outline is essential in order to be able to situate ‘intellectual theft’ within the Islamic criminal system. This will serve to illustrate the resemblance between the Islamic criminal system and criminal protection of IPRs in the West.

2. Sanctions in Islam ‘*Uqubat*’

In *Share’a*, the Islamic term used for the punishment of ‘*Uqubat*’, issued for violating people’s rights, is ‘*Had*’ (plural ‘*Hudud*’).⁶ The *Hudud* of Allah consists of two categories; the first includes statutes prescribed to humanity in terms of what is lawful and what is unlawful, in respect of food and drinks, marriages, and divorce, etc. The second category consists of punishments which prescribed or appointed to be inflicted upon an individual who does that which he/she has been forbidden to do.⁷ In Islamic jurisprudence, the word *Hudud* is limited to the punishment of crimes mentioned in the Quran or the *Sunnah* of the Prophet Muhammad (PBUH). Meanwhile, other punishments are left to the discretion of the *Qadi*, or to rules which are (referred to as ‘disgracing the criminal’, or) ‘*Tazir*’.⁸

Those crimes punishable in *Share’a* are those that affect society.⁹ The Quran has enumerated them as murder (‘*Qatl*’), dacoity¹⁰ or highway robbery (‘*Hirabah*’), theft (‘*Sariqa*’), adultery, or fornication (‘*Zina*’), and accusation of adultery (‘*Qathf*’). However, the punishment for theft shall form the core of discussion in this article.

According to Islam, the Quran lays down a general law for the punishment of offences, through the following words:

“The recompense for an evil is an evil like thereof, but whoever forgives and makes reconciliation, his reward is due from Allah. Verily, He likes not the Zalimun (oppressors, polytheists, and wrong-doers, etc.)”.¹¹

This principle is of great importance, and applies both to individual wrong done by one person to another and to offences committed against society.¹² There are a number of Quranic injunctions concerning the punishment of offenders which guide the Islamic nation ‘*Ummah*’:

“The sacred month is for the sacred month, and for the prohibited things, there is the Law of Equality (Qisas). Then whoever transgresses the prohibition against you, you transgress likewise against him. In addition, fear Allah, and know that Allah is with Al-Muttaqun (the pious)”.¹³

As can be seen in the verses quoted above, it is for this reason that Muslims are asked to have their rights issued either on private or public grounds, through due process, so as to bring the issue before the competent judge’s *Qadi* court, as opposed to taking the taking law into their own hands; if they were to do the latter, they would count themselves among the wrongdoers. In any private defence, they must also be just in using the judge

⁶ See generally, WILLIAM H. MACNAGHTEN, PRINCIPLES AND PRECEDENTS OF MOOHUMMUDAN LAW (9th ed. Law Pub. Co. 1977).

⁷ JAMES SETH, A STUDY OF ETHICAL PRINCIPLES 322-323 (Kessinger Publishing LLC 2007).

⁸ *Tazir* literally means ‘disgracing the criminal for his/her shameful criminal act’. In *Tazir*, law has no fixed punishment, and the *Qadi* is allowed discretion both as to the form in which such punishment is to be inflicted and its measure. This kind of punishment by discretion has been provided in special consideration of the various factors affecting social change in human civilization and which vary based on variations in the methods of commission or the kind of criminal conduct indictable under the law. Offences punishable by this method are those against human life, property, and public peace and tranquility. The general structure of the Criminal Law of Muslims today is based on the principles of *Tazir*. *Tazir* form discretionary penalties inflicted by the judge himself, either for an offence whose punishment is not determined, or for prejudice done to one’s neighbour. The punishment can take the form of lashes, imprisonment, fine, warning etc.

⁹ M.M. BRAVMANN, STUDIES IN SEMITIC PHILOLOGY 515 (Leiden: E. J. Brill 1977). See also, M.M. BRAVMANN, THE SPIRITUAL BACKGROUND OF EARLY ISLAM: STUDIES IN ANCIENT ARAB CONCEPTS 315-334 (Leiden: Brill 1972).

¹⁰ Mahmoud M. Ayoub, *Dhimmah in Qur’an and Hadith*, 5 ARAB STUD. Q. 172, 177 (1983). The word ‘Dacoity’ is the anglicized version of the Indian word *dakaitee*, which comes from *Dakoo*, meaning armed robber.

¹¹ Quran, ch. 42:40.

¹² ANWARULLAH, THE CRIMINAL LAW OF ISLAM 31 (Kitab Bhavan 2006).

¹³ Quran, ch. 2:194.

to deem the stolen property as a donation to the accused, and in this scenario, punishment of amputation will not be applied.¹⁴

The Maliki¹⁵ and Shafi¹⁶ schools differ on this point, conceding that once the complainant requests that the Judge's court consider applying the '*Had*', it is no longer left to the discretion of the complainant to intervene at a later stage. They base their argument on a case decided by the Prophet Muhammad (PBUH) himself.¹⁷

A further important feature, when issuing '*Had*' punishment, is the stipulation of two mature, male witnesses of high moral probity. It is not always easy to find such witnesses present at the scene of the crime. If the accused confesses to the crime, the punishment will be accorded. Even in this regard, Imam Abu Yusuf of the Hanifa School and Imam Ahmad bin Hanbal suggest that two, or even three sustained confessions are needed prior to conviction.¹⁸

In addition to the above measures, it must also be proven, before issuing the *Had* punishment, that, in an incident of theft, the accused forced entry into the house and actually entered it. It is also a requirement that money, gold, silver, ornaments, diamonds, pearls and other valuables must be securely locked away. In addition, storage must be guarded and houses must be locked, to reduce and deter potential theft. Failure to take appropriate precautions can result in the victim taking partial blame, due to negligence, for the theft occurring. In such cases where these requirements are not satisfied, but sufficient grounds for conviction exist, *Tazir* will be applied instead of *Had* punishment. Additionally, if the stolen property is food, fruit, grass or wooden items, *Had* punishment shall not be applied.¹⁹

According to Islam, '*Had*' punishment applies in seven instances, from which punishment for theft is amputation of a hand. In all other cases, *Tazir* will be applied.²⁰ The main issue of this article is to assess whether the infringement of IPRs is a theft that requires the amputation of the thief's hand. This could be achieved by situating the infringements of IPRs within the Islamic criminal sanction system.

3. Situating 'intellectual theft' within the Islamic sanctions system

After having examined the Islamic criminal hierarchy, it seems to be of crucial importance to situate intellectual theft within this system of protection. This is vital because if the conclusion were to be directed towards applying the *Had* to intellectual theft, then as Lord Phillips provides, this would generate severe physical punishment which would not be accepted in Western society. This is because it would be considered –according to Western standards– as an unacceptable penalty. If this is true, it shall also affect the possibility of harmonization of IPRs in the world. In contrast, it will be argued that this perception is far from true. Intellectual theft cannot be classified as the subject-matter of *Had*. Rather, such a kind of theft falls under *Tazir*, and from this point indicates the possibility of providing criminal offences such as fines and imprisonment, which accord with a more modern notion of remedies.

In order for the *Had* of theft to be applied, in general, several conditions need to be met. Some of the conditions are related to the individual thief. He/she must be sane, adult, and must not have been compelled to commit theft.²¹ Other conditions concern the stolen property, which should be met prior to hand amputation. The stolen property must reach the *Nisab*,²² it must be valuable, in custody, and owned by someone.²³ Some of these conditions can also be applicable to intellectual theft; however, others cannot. Therefore, it would be inappropriate

¹⁴ MOHAMED SALIM EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 97-98 (American Trust Publications 2000).

¹⁵ Imam Malik bin Anas is the founder of the Maliki School, which holds its influence largely in North Africa.

¹⁶ Imam Muhammad Idris Al Shafi is the founder of the Shafi School, which exerts control over South India, Southeast Asia, and East Africa, as well as the Arabian coastline.

¹⁷ Najwa Al-Qattan, *Dhimmis in the Muslim Court: Legal Autonomy and Religious Discrimination*, 31 THE INT'L J. OF MIDDLE E. STUD. 429, 433(1999).

¹⁸ ABD AL-QADIR AWDAH, CRIMINAL LAW OF ISLAM (TRANSLATED BY S. ZAKIR ALJAZ) (International Islamic Publishers 2000), see- Crime and Religious Aspects of Islam.

¹⁹ YUSUF AL-QARADAWI, AL-HALAL WAL-HARAM FIL ISLAM (THE LAWFUL AND THE PROHIBITED IN ISLAM - TRANSLATED BY ZAYNAB ALAWIYE) 320 (Al-Birr Foundation 2003).

²⁰ BASIA SPALEK, ISLAM, CRIME AND CRIMINAL JUSTICE 44, 47 (Willan Pub 2002). See also, AL-QARADAWI, *supra* note 19, at 321.

²¹ ABDUR RAHMAN I. DOI, SHARI'AH: THE ISLAMIC LAW 221 (Ta-Ha Publishers Ltd. 1984). See generally, FARHAD MALEKIAN, THE CONCEPT OF ISLAMIC CRIMINAL LAW: A COMPARATIVE STUDY (Graham & Trotman Ltd. 1994).

²² Nisab is the amount which savings, capital, or product must exceed in order for the Muslim owner to be obliged to give Zakat. In general, Nisab is considered an amount equal to the essential needs of a person or family for one year. See generally, MATTHEW LIPPMAN, SEAN MCCONVILLE, AND MORDECHAI YERUSHALMI, ISLAMIC CRIMINAL LAW AND PROCEDURE: AN INTRODUCTION (Praeger Publishers 1988).

²³ DOI, *supra* note 21, at 222. See also generally, KIKI KENNEDY-DAY, BOOKS OF DEFINITION IN ISLAMIC PHILOSOPHY: THE LIMITS OF WORDS (RoutledgeCurzon 2003).

to connect the theft of tangible property with intellectual property theft, given that the nature of both properties differs.

From a *Share'a* perspective, the nature of intellectual property differs from 'actual' or tangible property in a number of important respects. Amongst these is the key point that intellectual creations are directed towards the public. There must be some kind of disclosure to the public, requiring the recognition of the public, while in tangible property, individuals can limit the enjoyment of their property to their own. Accordingly, *Share'a* requires that in order for the *Had*, of theft to be applied, the owner should place his/her property in custody.²⁴ This is considered to be a strict condition for applying the rigid punishment of amputation of the thief's hand.

Applying this condition over IPRs seems problematic; it is not imaginable that an intellectual creation could be placed in custody as such. After all, the value of any work of intellect derives from the public's recognition, and insofar as the work could be acknowledged by the public, the work derives value and appreciation. Therefore, the first condition for applying the *Had* of theft is unfounded.

More crucially is the condition that the stolen subject should be owned by the owner.²⁵ It has been argued that the proper justification of IPRs, which is accepted by *Share'a* principles, lies in the public authorship model. It has been provided that the public plays a fundamental role in the process of creating IPRs. It has also been concluded that intellectual creations are the co-authorship of the registrant and the public; thus, both of them shall enjoy the co-ownership of such creation.²⁶ As a result, the registrant of an intellectual property right is not the sole owner of the work. In consequence, this is another ground which exempts the application of the *Had* punishment in cases of infringement.

Finally, *Share'a* considers that in order to apply the punishment of *Had*, there needs to be an explicit text in Quran or *Sunnah*, which is unavailable in regards to the infringement of IPRs. Unfortunately, for more than 1429 years since the provenance of Islam, there has been no precedent regarding intellectual theft. However, from this fact emerges the very merit of this article's proposition, namely the attempt to resolve this controversial issue. It was only recently, for instance, that a Fatwa was issued by the Al-Azhar *Fatwa* Committee relating to Copyright infringement:

"As for paraphrasing other's thoughts in a new form, this is not considered intellectual theft, but honesty requires citing the original author. Otherwise, it would be regarded as a kind of cheating which is forbidden, but does not entail a stated penalty or even a disciplinary punishment. ... Quoting portions of a book, a magazine, or any other piece of writing is lawful on the condition that the original authors of these writings are cited. Copying others' writings and presenting them as one's own thoughts is a kind of plagiarism that is unlawful both in the *Share'a* and in man-made laws".²⁷

This however, does not automatically mean that registrants of IPRs shall not enjoy criminal protection. Any intellectual infringement shall be punished through *Tazir*. The criminal sanctions provided in Western legal systems are forms of criminal offence which could fall under the classification of *Tazir*.²⁸ *Share'a* has left this to the Islamic states and courts to regulate.

4. Conclusion

The rationale for the Islamic system of sanctions is not directed towards torturing individuals. Rather, it aims to be strict as regards acts which violate the rights of others. However, this article does not aim to rationalize the Islamic criminal sanctions. It has been argued that although *Share'a* does not regulate criminal offences for infringement of intellectual creations, the *Had* punishment for theft could not be applied in this context. The adoption of the public authorship model for the justification of IPRs in an Islamic context prevents the possibility of amputation of hand in cases of IPRs infringement. This is because such intellectual creations are, effectively, the co-ownership of the public and the registrant, and thus, the conditions for the amputation of hand are not met. This article thus provides an element of support for the statement of Lord Philips, and could form, along with the civil part of the argument, an appropriate move towards the harmonization of IPRs between Western and Eastern societies. Therefore, according to *Share'a*, the criminal offence in IPRs would be that of intellectual infringement *not* intellectual theft.

²⁴ AKHTAR A. AWAN, EQUALITY, EFFICIENCY, AND PROPERTY OWNERSHIP IN THE ISLAMIC ECONOMIC SYSTEM 5 (University Press Of America 1984). See also, DOI, *supra* note 21, at 222.

²⁵ DOI, *supra* note 21, at 222. See also generally, KENNEDY-DAY, *supra* note 23.

²⁶ M.A. Naser and W.H. Muhaisen, *supra* note 3.

²⁷ Khaled Fahmy, *The Anatomy of Justice: Forensic Medicine and Criminal Law in Nineteenth-Century Egypt*, 6(2) ISLAMIC L. AND SOC'Y 224, 243(1999).

²⁸ See for example, Trade Marks Act 1994 arts 92-96 (UK).