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An Islamic Vision of Intellectual Property

I ISLAMIC VISION AND THE GLOBAL INTELLECTUAL PROPERTY LANDSCAPE

Intellectual Property (IP) is a product of the Western normative environment. From the Venetian patent statute of 1474 and the Statute of Anne in 1710 to the Berne Convention and the TRIPS Agreement, IP developed to reflect the legislative agendas of a few European countries, and later the United States. The vision that animated the doctrinal development of comparative IP laws is one centered on creating property rights in ideas and expressions to reward creators for their investments, or in an attempt to maximize the aggregate sum of knowledge and cultural products. In this book, I try to locate the Islamic vision on governing intellectual production and inquire whether this vision is different from the mainstream doctrinal structures of IP. In particular, I answer why and how Islamic legal philosophy allocates property rights in the products of the human intellect.

The Islamic vision of IP developed in this book locates IP in a multi-dimensional framework of a broader theory on social justice. The primary feature of this vision is that IP is not seen as a well-deserved reward for the genius/lone creator, or a tool to maximize innovation to benefit the greatest number of people. Rather, IP in the Islamic vision is located within a complex web of deontological and consequentialist considerations that do not necessarily impose a blanket rejection of merit and utility-based justifications of IP, but contextualizes their normative importance in overarching principles of fairness. These principles assign rights and obligations in governing knowledge and culture to serve basic human needs so that people can live healthy and productive lives, nurture a set of intellectual capabilities, and enhance their moral powers to influence their world. The need to reward investors who create knowledge to increase its production must abide by the principle of fair

equality of opportunity. The exclusive right to control intellectual content must not transform into the ability to concentrate power to control such content at all times. Individuals interacting with protected intellectual content must not be deprived of equal opportunities to reshape their knowledge and cultural mediums simply because they cannot pay or obtain permissions from gatekeepers.

IP is everywhere. It intervenes to regulate the distribution of rights and obligations to access a diverse array of knowledge and cultural contents. Patents regulate access to essential knowledge underpinning inventions in medicine, food, and technologies that make our lives easier and more productive. Copyright governs access and use of educational materials of all levels and cultural artifacts including literature, art, and digital materials distributed on internet platforms. In this sense, IP has a visible impact on individuals' ability to live healthy lives and exercise their intellectual capabilities to recast texts, images, and inventions around them into new forms.

The global architecture of IP was largely designed through two essential milestones. First, an agreement among major European colonial powers including Belgium, France, Italy, Portugal, and the United Kingdom in the late nineteenth century CE led to the Berne and Paris conventions on the protection of copyright and patents. The rhetoric that dominated the discussion then was one centered on creators. The global IP regime sought to reward authors and inventors with property rights in knowledge and culture in the hope that this would create flourishing global markets. In relation to the 1886 Berne Convention for the Protection of Literary and Artistic Works, Sam Ricketson and Jane Ginsburg note that the drafters of the convention were essentially "concerned with the private interests of authors and with raising the level of protection that is accorded to them."[1] The second milestone came with the negotiation and conclusion of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement) in 1994. At that stage, the United States joined the old colonial club, as a powerful new player in the global IP landscape, for the purpose of defining the scope and strength of property rights in knowledge and culture. This time, the forum and the content of the negotiation agenda were fundamentally trade and commerce-oriented. IP issues were brought to a trade forum to be part of negotiating the framework of the World Trade Organization. Research on the Uruguay Round, which led up to the adoption of the TRIPS Agreement, shows that the distribution of rights and obligations in knowledge and culture was largely

[1] Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford University Press, 2006) vol. 2, 881.

discussed in economic terms. More and stronger property rights in inventions and various forms of cultural expressions were seen as the best way to induce more innovation and creativity to benefit the greatest number of citizens in the contracting states. Behind the scenes, large stakeholders in IP-intensive industries such as pharmaceuticals, computer software, entertainment, and biotechnology pushed exporting IP countries – mainly the United States – to create more rights, make them stronger, and ensure strong enforcement mechanisms to expand their markets in the developing world.[2] The TRIPS Agreement ended up setting minimum standards of IP protection that would favor right holders and make access to knowledge an exceptional departure from what should be the norm. In other words, the agreement reinforced a state of affairs where the right to exclude people from knowledge and culture is the norm and access is the exception.

By and large, the rest of the world in Asia, Africa, and South America came to live within the preformed global architecture of IP. In the pre-TRIPS era, IP rules were transplanted into the legal systems of developing countries via colonization.[3] In fact, four major countries that had signed the Berne Convention in 1886 (France, Germany, Spain, and the United Kingdom) took advantage of Article 19 of the Berne Act relating to the Berne Convention, which gave them the right to accede to the convention at any time on behalf of their colonies.[4] These included colonies around the world, with the consequence that most developing countries had their copyright laws tailored for them.[5] The TRIPS Agreement came to consolidate and expand the strength and scope of the IP rights created under the old regimes. Despite the fact that the developing countries of Asia, Africa, and South America were independent when the negotiations started in 1986, their influence in the norm-setting process for the agreement was extremely limited. Peter Drahos and John Braithwaite traced the negotiation history leading up to the TRIPS Agreement and noted that there was a significant imbalance in bargaining power between developed countries, led by the United States, and developing countries. Major developed countries knew exactly what they wanted. They came prepared with draft provisions tailored to protect the interests of their

[2] Gana Ruth, "Prospects for Developing Countries under the TRIPS Agreement" (1996) 29(4) *Vanderbilt Journal of Transnational Law* 735, 737.

[3] Peter K Yu, "International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia" (2007) *Michigan State Law Review* 5.

[4] Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (Kluwer, 1987) 791.

[5] Peter Drahos, "Developing Countries and International Intellectual Property Standard-Setting" (2002) 5 *The Journal of World Intellectual Property* 765, 767.

large taxpayers. Developing countries lacked adequate information and expertise on the likely effects of the TRIPS provisions in relation to access to medicine, educational materials, and indigenous innovation capabilities. Furthermore, the United States exerted a great deal of pressure on developing countries to accept the minimum standards for IP protection. In 1989, the US Trade Act section 301 entered into operation against the developing countries that resisted US views on what should and should not be included on the TRIPS Agreement. Brazil and India found themselves on the Priority Watch List, which indicates the countries that are most worthy of trade sanctions, while Argentina, Egypt, and Yugoslavia were placed on the Watch List. Developing countries were in no position to negotiate; either they accepted the minimum standards promoted by the United States and its partners, or faced sanctions that would certainly harm their economies in the short term.[6]

Here is a rough vision of what the life of a product of the intellect would look like under the dominant doctrinal constructs of the global IP architecture: If you compose a song, you can sing and distribute it for free, or sell it to others. But your best chance of making real money out of it would probably come if a large distributor, such as Universal Music Group (UMG), decided to purchase your copyright for a lump-sum payment. In this instance, copyright law not only gives UMG the right to resell copies of the song to the public, but also the right to control how, when, and where others can use the song. In principle, if someone else decided to use the song, or even part of it, to create a documentary or family video to post on the Internet, they would need to obtain permission from, and possibly pay fees to, UMG. UMG can also choose not to respond on time when permission is needed. When the song is sung in the public sphere, it becomes part of culture. Copyright law does not treat it that way, but merely as an intellectual product protected by various rules of legal liability.

It is true that there are several circumstances where the law would allow reuse for specific purposes related to education, free speech, and so on. It is also true that some countries provide a broad "fair use" right that would allow transformative uses of copyrighted content. However, as I will show in several places throughout this book, permissions to reuse are introduced as exceptions that must be interpreted narrowly. They are not seen as legal rights for the public that could be used to redistribute the power to challenge and remake

[6] Drahos and Braithwaite, *Information Feudalism*, 190 et seq.; Bello H. Judith, "Section 301: The United States' Response to Latin American Trade Barriers Involving Intellectual Property" (1989–1990) 21 *University of Miami Inter-American Law Review* 495, 502.

culture. Even in countries where a broad "fair use" exception exists, it is largely discussed in economic terms. It does not take into account who reuses copyright, whether they are rich, poor, or disadvantaged. "Fair use" essentially operates to permit use when there is no threat to *potential* licensing markets for the right holder, rather than as a mechanism to widely redistribute opportunities to express and earn by working through culture.

II IP THROUGH AN ISLAMIC LENS

IP in its modern forms, as manifested both in its global rules and in the laws of major developed countries, attracted widespread criticism. Developing countries and large bodies of comparative critical assessments of IP are skeptical of IP's ability to serve broader concerns related to the social good of the wider global population. At a foundational level, critics of modern IP systems question the soundness of justifying IP as reward for labor or as a utilitarian bargain to make the majority better off. First, labor justifications for IP assume that authors and inventors create out of the thin air. This vision fails to view innovation and creativity as an accumulative process where creative individuals recast existing knowledge and culture into new ideas and expressions. Also, these justifications do not account for situations where an IP holder enjoys substantial market leverage for something that did not require equivalent labor. Second, utilitarian justifications fail to establish that without property rights over ideas and expressions, innovation and creativity would decline. We simply do not know whether, for instance, if authors are not rewarded – or are rewarded with fewer exclusive rights – fewer books and songs would be produced. Furthermore, utilitarian justifications of IP are inherently blind to distributive concerns. They direct IP to maximize the aggregate welfare for the majority and assume that the happiness of the majority will somehow compensate for the mischief of the minority. At an operational level, critics of modern IP rules hotly debate the appropriate strength and scope of IP rights. Developing countries and a great number of IP scholars are concerned that expansive exclusive rights and limited permissions to reuse knowledge and cultural resources are in effect benefiting a few well-established corporations in rich countries while harming the economies of developing countries and cash-strapped users of knowledge and culture in developed countries.

My task is to bring the Islamic vision of the social good to the global debate surrounding the appropriate justifications, scope, and limits of property rights in knowledge and culture. While Islamic civilization did not develop an indigenous counterpart to IP as we think of it today, Islamic sources contain

diverse and rich notions of the social good. I locate these notions in the normative language of the Quran, the teaching of the Prophet Muhammad, and the large body of classic and modern Islamic jurisprudence. I will show that these notions can inform discussions on the appropriate institutional framework to govern knowledge and culture in a fair society. At their core, Islamic notions of the social good share the main concerns of developing countries and comparative scholarship critical of modern IP doctrines. In the Islamic vision, IP cannot only be seen as mere reward for creative individuals or a tool to maximize creative outputs. These singular visions could turn IP into a tool with which to lock up knowledge and culture for the benefit of minorities of well-established stakeholders.

The Islamic vision on the social good starts from a human flourishing perspective. At an abstract level, the rules on distributing the benefits and burdens of social cooperation must be designed to make everyone better off. To achieve this, the social good must have an overarching deontological framework to ensure a continuing normative duty to fulfill basic social needs, including promoting life, health, intellectual capabilities, autonomy, and opportunities to pursue one's life plans. These basic needs must be distributed fairly to everyone regardless of the ability to pay, work, or potential impact on aggregate utility. Once these basic social needs have been met, distribution of sources of happiness such as income, wealth, and power can be based on merit or promotion of economic efficiency through maximizing goods and resources. However, since distribution based on merit and promotion of economic efficiency can lead to economic and social inequalities, the public system of rules must ensure that inequalities are not transformed into an ability to concentrate power in the hands of a few in society, in turn undermining equal opportunities for others.

It is important to keep in mind that the task of encapsulating an Islamic theory of justice in a formula accessible to comparative moral philosophy is a challenging one. Even more challenging is trying to talk about an Islamic vision of IP based on such a theory. By and large, Islamic jurisprudence has deeply rooted positivist conceptions of the social good. Right and wrong, good and evil, fair and unfair are determined through various interpretations of the Quran and the traditions of the Prophet of Islam. As I discuss below, a unified theory of social justice – at least in a sense comparable to major social contract theories – is not a visible feature of Islamic jurisprudence. Hence, I offer a preliminary foray into various textual sources and a large body of Islamic jurisprudence to assemble scattered notions of fairness and the social good into one normative framework to inform the justification and design of IP laws. Within this framework, the governance and the distribution of rights,

obligations, privileges, and burdens regarding knowledge and cultural resources are informed by two overarching considerations:

First, in an Islamic vision of a fair society, governing knowledge and cultural resources through private property rights will not enjoy normative priority. The original position on governing resources is common ownership. In the Islamic worldview, tangible and intangible resources are presented as part of trusteeship arrangements between the Creator and humankind. I will call these trusteeship arrangements "the Pact of *Istikhlaf*." *Istikhlaf* (trusteeship/stewardship), according to Islamic belief, means that God created the earth and all resources and entrusted them to humans as His most intelligent creations. In their original position, all resources remain equally open for everyone to benefit from. God's ownership of resources is manifested in common ownership for people, dedicated to making everyone better off. There is no general assumption in Islamic theology that keeping resources open to everyone would lead to depletion. A generalized fear of a tragedy of the commons in the form that Garrett Hardin warned against is not part of the Islamic vision on governing resources.[7] However, there is no blanket rejection of notions of private ownership of tangible and intangible resources. Humankind will not be denied fair individual rights of ownership to reward labor, satisfy their intrinsic personal needs for possession, or to maximize resources to efficient levels. A good case must be made to show that property rights are needed to reward labor, satisfy personal needs, or maximize efficiency. This initial normative view towards property rights could prove useful when debating the need to protect various forms of ideas and expressions such as business methods, methods of medical treatment, or databases.

Second, if we decide to create IP rights, they must operate within a broad framework of distributive justice. Society must create mechanisms capable of constantly adjusting individual IP rights so that a proportionate response to concerns of fair reward and economic efficiency can be found. This means that when an IP right transforms into a substantial ability to concentrate power over large markets or restrict potential opportunities to recast knowledge and culture into novel forms, it must be rearranged to restore a balance. For instance, if a corporation created an essential drug to cure a terrible illness by investing hundreds of millions of dollars and relying on publicly funded research, we should be cautious about accepting arguments that such a corporation can rely on patent law to exercise broad control powers. We should question the extent to which it can exercise its monopoly to set

[7] Garrett Hardin, "The Tragedy of the Commons" (December 13, 1968) 162(3859) *Science, New Series* 1243–48.

prices, prevent others from reverse-engineering the drug, or prevent others from producing generic versions of the drug for deprived populations in poor countries. Furthermore, an IP right must recognize that its existence can affect the fair distribution of a broad set of intellectual freedoms and capabilities. While the right to exclude under IP may empower rights holders to sell, reproduce, and distribute intellectual content, it must not prevent others from reading, imitating, transforming, contextualizing, and challenging IP-protected culture and knowledge. Distribution of these capabilities should not depend on the ability to pay.

III WHY AN ISLAMIC VISION OF IP MATTERS

We have a global IP system that influences people across the ideological and ethical spectrum around the world. This system defines rights and obligations in relation to knowledge and culture. As such, the system is important to people's life plans, just as knowledge and culture themselves are important. IP can affect the accessibility of medicine or food, the ability to protect traditional knowledge and cultural expressions, and participation in the processes of innovation and creativity. We want this system to be fair, efficient, and to leave everyone better off. No particular normative environment should dominate shaping the metes and bounds of such an important global regime where there are wide varieties of worldviews with different ideas about justice and the social good. Accordingly, the global normative analysis of IP should be mindful of pluralism and the rich platforms of comparative views on justice and the social good.

An Islamic vision of justice and the social good is part of this pluralistic reality. Muslims represent a significant element in the fabric of pluralism throughout the world. One in five individuals in the world is Muslim, and they live almost everywhere. There are more than 50 countries with majority Muslim populations and Muslims are minorities in many other countries across Asia, Africa, Europe and North America. There is good reason to believe that introducing the Islamic vision on social justice and the social good as a benchmark for assessing and developing IP would be a good addition to the global efforts to make IP regimes more just for everyone. In this context, John Rawls theorized that a fair and stable society must be mindful of the fact that societies are complex entities. Different people will have different views on social justice and social good. If we are to create a just and stable society, our moral standards and normative rules for social cooperation must converge on a focal point of justice. The diverse and sometimes conflicting doctrines of peoples sharing time and space must engage in dialogues to find common

grounds so that they can achieve what Rawls calls an "overlapping consensus" on the social good despite being different.[8] In a sense, this book engages in the search for an overlapping consensus on shared commitments to social justice that could influence the remaking of a fairer global IP regimes. This could happen along two lines.

At a broad philosophical level, the Islamic vision on social justice and the social good coincides with global comparative efforts to define justice beyond merit and economic efficiency. I will show that the vision introduced in this book significantly overlaps with comparative and influential theoretical frameworks on justice and human flourishing within the liberal philosophical sphere. In several places I show that the Islamic vision subscribes to a pluralist conception of the social good with striking similarities to dominant comparative theories on social justice. For instance, John Rawls's theory of *Justice as Fairness*, Amartya Sen's *Human Development Paradigm*, and Martha Nussbaum's *Central Capabilities Approach* all share with the Islamic vision broad and fundamental views on justice. As in the Islamic vision, they theorize that justice can be achieved when the public system of rules promotes a set of essential social needs and recognizes the intrinsic worth of human life, intellect, dignity, and freedom. They also agree with the Islamic vision in emphasizing that justice is not necessarily achieved by pursuing choices that maximize the good consequences for the majority. Justice must also be concerned with minorities when they are dropped out of aggregate calculations – particularly when the systems that are supposed to serve the majority end up skewing power and wealth under the control of a few while marginalizing large segments of society, including those who are least well off.[9] This comparative, broad vision on social justice would likely affect IP in a variety of ways. It could significantly contribute to the debates on IP and its development. The Islamic conception of social justice would support the developing world's agendas on IP, which seek to achieve more access to knowledge and culture not only to promote economic growth but also to serve fundamental human needs such as access to essential drugs, food, and educational material. Such an agenda has long been in conflict with that of powerful stakeholders in the developed world, which seeks to lock up content to achieve more economic gains.

At a doctrinal level, this book will end up locating various normative signals that would contribute to holding IP doctrines accountable to the Islamic

[8] John Rawls, *Political Liberalism* (Columbia University Press, 1993).

[9] John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001); Amartya Sen, *Development as Freedom* (Anchor Books, 2000); Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press, 2011).

vision of justice. In different chapters of this book, I outline the basic features of these principles. First, a fair system of governing knowledge and culture does not necessarily presuppose that property rights have priority over common ownership. It is open to the possibility that, in many situations, keeping knowledge and culture outside property systems is conducive to the collective social good. Second, fair property rights in knowledge and culture must not create an enabling environment for a few rights holders in society to concentrate power to control access to knowledge and culture, while leaving large groups of users without access to essential goods or unable to fully participate in the knowledge and cultural mediums to which they aspire. Large bodies of comparative IP scholarship offer a wealth of proposals that would contribute to fairer distribution of rights and obligations in knowledge and culture. As far as the Islamic vision on social justice and IP is concerned, this body of scholarship is extremely critical of IP's expansion and its focus on construing efficiency-based concerns to the benefit of a small set of well-established rights holders. I will show that discourses around recognizing the public domain and expanding the rights and capabilities of users of knowledge and culture could go a long way in realizing the Islamic vision of fair and efficient systems to govern knowledge and culture. Here as well, the Islamic normative vision on IP overlaps with critical IP studies.

IV TOWARDS AN ISLAMIC VISION OF A FAIR IP LANDSCAPE

Chapter 2 offers a quick and informative tour of the main sources of Islamic law and standards of morality – namely, the Quran, the recorded traditions of the Prophet, and various versions of Islamic jurisprudence. Particular focus will be given to explaining how notions of social good and social justice as understood in mainstream Islamic legal theory. Muslims do not disagree that their comprehensive doctrine of life (known as *Islamic Sharia)* is fundamentally oriented towards promoting justice and the public interest. Islamic scholar Ibn Qayyim al-Jawziyya (d. 1350 CE) famously wrote: "Sharia is founded on wisdom and social good of the people … all of its rules are dedicated to justice and welfare … matters in which justice is replaced with oppression … [or] in which good is replaced with evil are not part of Sharia."[10] But how do Muslims define justice and social good? A clear answer to this challenging question is significant. Once something is proclaimed as good or fair, Islamic law must promote it. I show that Muslims start from the Quran, and the recorded traditions of the Prophet known as the Sunnah, to make

[10] Ibn Qayyim al-Jawziyya, *I'lām al-Muwaqqi'īn* (Dar al-Kutub al-'Ilmiyah, 1991) vol. 3, 12.