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THE JUSTIFICATION OF INTELLECTUAL PROPERTY RIGHTS IN ISLAMIC LAW

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ABSTRACT: *I expended my efforts on all this, and gathered in my book general rules from fiqh arranged in an analytical form and a structured presentation. It is something that will please the leaders in the field and be acceptable to the scholars.*

ABŪ BAKR AL-KĀSĀNĪ
Badā'i' al-Sanā'i' fi Tartib al-Sharā'i'[2]

In this article, we shall try to do exactly what the great jurist Abū Bakr al-Kāsāni tried to do in his book. We shall first summarize all those rules. After identifying the rules, we will present the arguments of those who have attempted to declare intellectual property rights to be valid from the Islamic perspective. Although there are many people who have issued such a ruling, we will focus mainly on two sources as detailed arguments and reasoning have been provided in such sources. The first is a 1983 case decided by the Federal Shariat Court of Pakistan.[3] *The second is the comprehensive work of Justice Muhammad Taqi al-'Uthmani in his book referred to in the previous chapters.*[4] *Due to the significance of these two sources, we have included them in the appendices in full so that the reader does not have any difficulty in understanding their complete arguments. Further, this will help us avoid constant quotations from the sources. After presenting the arguments from these two major sources, we will identify the main arguments and analyse them objectively. The methodology adopted here will, we hope, have the following benefits:*

- *It will help us identify the stronger arguments that support the validity of intellectual property and the associated rights from the Islamic perspective.*
- *It will highlight those arguments that are either weak or do not help in affirming such validation and should not be repeated again and again.*
- *The methodology will help us identify those points that are very important, but have not been covered by the arguments of the scholars or the courts. These are areas that need to be addressed in all future legal reasoning in support of intellectual property rights.*

KEYWORDS: *Choses in action, Choses in possession, ayn, urf, mal.*

INTRODUCTION

The law regards all kinds of property as a right. One classification of property was that into choses (things) in possession and choses in action. Choses in possession are physical objects that we call '*ayn* in Islamic law. By their nature such property is capable of being physically possessed. The owner is able to exert physical control in different ways. *Choses in action* are "all personal rights of property which can only be claimed or enforced by action, and not by taking physical

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[2] See Introduction to al-Kāsāni, *Adab al-Qadi* trans. Imran Ahsan Khan Nyazee, Book LIII (2007).
[3] *In re: Trade Marks Act (V of 1940) and 22 Other Acts*, PLD 1983 FSC 125.
[4] See Muhammad Taqi Usmani, *Bay' al-Ḥuqūq al-Mujarradah*, vol. 1, 72–125.

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possession." The law makes no attempt to consider them the same as or similar to, choses in possession. Their nature depends on the type of legal action to be taken. Thus, they are merely actionable rights. Intellectual property is classified as choses in action. It is of no consequence for the law that intellectual property does not resemble choses in possession or tangible property. It is merely an action to be taken in case the right is infringed.

Copyright law protects only *the form of expression of ideas, not the ideas themselves.* 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? Should copyright and patents be analysed together? In other things, it is either a mark, name, geographical name and so on. Each requires separate analysis from the Islamic perspective.

Copyright consists of a bundle of rights. Some of these rights are passed on to the buyer, while others are retained. Moral rights remain with the original author, in the case of copyright, even when he has transferred his economic rights to another. This amounts to some kind of conditional sale. Can this be permitted under Islamic law? Copyright and patents are rights of limited duration. These rights can be inherited, but the life of the right remains the same. In Pakistan, copyright has 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 *shariah*? The life of a patent varies depending on the model under which protection is granted. A trade name or mark may be renewed forever it appears (for a fee), but what is its real life? If the fee is not paid it expires.Patents and other rights are being extended to food and genetic material. What do the scholars have to say about such rights? The Rights are granted for the protection of musical compositions, performances, choreography and so on. What position do the scholars take on such issues? A distinction has to be made between copyright sold to another, and a book sold to a buyer. Do the scholars make such a distinction? The owner of the copyright can sell the product again and again. In other words, the product has repeat value**.** It is the expression protected by copyright that is being sold again and again. What kind of right is involved here? Can one thing be sold again and again under Islamic law?

Rules from the Analysis of Property in Islamic Law

Here we will list the points emphasized by scholars like Justice Taqi al-Usmani, as they consider them important for the analysis of intellectual property.

- The first point is about the assigning of commercial value to rights or things so that they are considered *māl*. The basis for assigning such value is the practice of the people, that is, what they consider valuable is to be acknowledged by the law. It is like the law merchant and its practices. Nevertheless, al-Sarakhs┘ has clearly stated that any *'urf* that is to be acknowledged must not oppose a text. In our view, that should include its implication too where such implication is in the form of general principles derived from the texts.
- Allamah Taqi Usmani has stated time and again that *qiyās* (analogy) is to be given up when it is faced with *'urf* customary practice. We would like to agree that yes there are certain rights that are against analogy and these have been established by a text of the Qur'ān or the *Sunnah*. In such cases analogy has been ignored by the texts. An example is *shuf'ah* (pre-emption). From this

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it should not be concluded that *'urf* has to be accepted without analysis and analogy is to be given up outright. The example we quote here is from Imām al-Sarakhs┘'s statement reproduced several times in this study. He says that selling the right of *shirb* (access to water) opposes the texts that prohibit *gharar*. Now, this right has not been mentioned specifically in the texts of *gharar*, then how is Imām al-Sarkhs┘ saying that it is opposed to *gharar*? It is obvious that he means the *qiyās* or legal reasoning arising from the texts of *gharar* oppose the sale of such a right. We, therefore, find it difficult to accept Justice Usmani's position on this issue.

- Another point is that all rights that have been called ┌*uqūq* (or mere rights) by the *fuqahā'* are attached to an *'ayn* or corporeal property (land in this case) in a manner that they are treated as additional attributes that do not really affect the nature of the property itself. Here we may quote al-Sarakhs┘, who says: "The basis of the issue in sales is that the opinion in our view maintains that the price is in lieu of the primary property and not the additional attributes. Thus, the loss of the additional attribute (*wasf*) in the hands of the seller, without intervention of anyone, does not extinguish any part of the price."[5] Now, the earlier jurists did not permit the separate existence and sale of such rights. Yes, some Hanbali jurists may have done so, but is their legal analysis sound and acceptable to the established schools. We will discuss this in the following section.
- When an inventor sells his invention to a financier, or when the copyright to a book is being sold to a publisher, what is the value of such an invention or literary work? At the time of sale no one knows what its value will be in the future. How much is it worth then and what value should be paid. This is called the problem of valuation in the law. *Gharar* is, therefore, inherent in such rights.

It is to be noted that the law does not bother about this problem of valuation. The *WIPO Handbook* says: "It will be protected whether it be considered, according to taste, a good or a bad literary or musical work—and even of the purpose for which it is intended, because the use to which a work may be put has nothing to do with its protection."[6]

Rules from the Analysis of Rights in Islamic Law

Some important points are identified here for analysis:

- In the general discussion about rights, whether it is the discussion by the jurists, or by Justice Taqi Usmani, it is the discussion of pure rights (*Huqūq mujarradah*) that is most relevant to our study about intellectual property rights.
- Such pure rights are usually attached to property, like the right of way and access to water. Matters like relinquishing office and *'arbūn* may be the exceptions. Under pressure from modern needs, matters like *'arbūn* are already being considered legal. Now, the validity of the sale or relinquishment of these pure rights of the latter type that are not attached to property is based entirely on the writings of later writers. In most cases detailed legal reasoning is lacking. Even when there is some legal reasoning, it sounds highly unconvincing and is based on shaky ideas of *darar* (injury). Should such opinions and such reasoning be made a basis of declaring things legal? In our view, such opinions should only be accepted after proper legal reasoning and justification.
- The idea of relinquishing or extinguishing such rights through *isqāṭ* does not really help us. We are interested in the unhindered disposal of such rights and transactions in them. We know

[5]Al-Sarakhsi, *al-Mabsūṭ*, vol. 14, 135.

[6]*WIPO Handbook*, 52. (Emphasis added).

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that copyrights, patents and other things are freely transferable. *Isqāṭ* (relinquishment) is not going to provide valid justification.

- The problem of valuation discussed in the previous section applies here again in the context of commercial value that depends upon the assignment of such value by the people. This, according to some scholars, is a matter of the practice of the people. The issue is: are the people assigning a value to pure rights that is free of *gharar*? Apparently not. Here the point made by Imām al-Sarakhsi above about additional attributes being without value is relevant.
- Further, attaching value to things on the basis of the practice of the people, even though it is based upon custom or customary practice, cannot be accepted without question; it has to go through the repugnancy test in the light of the *shar┘ ʻah*. Such legal analysis must be based upon sound legal reasoning rather than on mere assertions like injury and *darar*.

We are sure that many other points can be raised when we go into the details of new forms of intellectual property that are being recognised almost on a daily basis, genetic information being a case in point. Nevertheless, this list will suffice for the purposes of our study. We may now try to identify the scholars who have tried to participate in this important debate.

Scholars Who Have Supported or Opposed the Validity of Intellectual Property Rights

Our study will not be complete if we do not identify some of the important scholars who have taken part in the discussions about intellectual property and have either opposed or uphold their legal validity and valuation.Justice Taqi Usmani has provided a list of those scholars who upheld the validity of intellectual property rights, even though they discussed individual categories like trade names, trademarks or copyright. Most of the scholars he lists belong to the Indian Sub-Continent. The most notable among them are: Mawlānā al-Shaykh Fath Muḥammad al-Lakhnawi (God bless him) (the student of Imām ʻAbd al-Ḥayy al-Lakhnawi God bless him); ʻAllāmah Shaykh al-Mufti Muhammad Kifāyat Allāh; ʻAllāmah Shaykh Nizām al-Din, Mufti of the Dar al-ʻUlum at Deoband; and al-Shaykh Mufti ʻAbd al-Rahmān al-Lājpuri. The Federal Shariat Court refers to the work of Yūsuf Mūsā, *al-Amwāl wa Nazariyyat al-ʻAqd*[7] quoting him as an authority who upheld the validity of intellectual property rights. The Court also refers to Yūsuf al-Qaradāwi[8] There are others too. In fact, a number of *fatwā* have been issued declaring intellectual property rights to be lawful and their infringement a theft. Some of these can be located on the Internet. The main problem with such rulings is that they lack legal reasoning, sometimes completely.

Among those who opposed the validity of such rights is the illustrious father of Mawlana Taqi Usmani, the late Mufti Shafi. Justice Usmani, however, maintains that his father on reading the research of his son was inclined to review his opinion.[9] The Court mentions ʻAbd al-Raḥmān al-Sābūni in his book *al-Madkhal li-Dirāsat al-Tashriʻ al-Islāmi* and considers his opinion to be too rigid.[10]

[7]At page 162, quoted in PLD 1983 FSC 125, 132.
[8]PLD 1983 FSC 125, 134.
[9]See Muhammad Taqi Usmani, *Bayʻ al-Huqūq al-Mujarradah*, vol. 1, 125.
[10]PLD 1983 FSC 125, 134.

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The Arguments Advanced by the Federal Shariat Court for Justifying Intellectual Property Rights

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.[11] The issue, with respect to the Tade Mark Act, was: Whether a trade mark, a copyright or patent is property that is assignable and tranferable.[12]

Tracing Earlier Concepts of Property

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 *shariah*. 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.[13] 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.[14] 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.[15] 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.[16] The reasons for such a classification were identified by the Court through a number of definition.

Widening of the Definition to Include Intellectual Property

According to the Court, it was John Salmond, who for the first time widened the definition of property to include intellectual property rights. Sir John Salmond said:

> All property is, as we have already seen, either corporeal or incorporeal. Corporeal property is the right of ownership in material things; incorporeal property is any other proprietary *right in rem*. Incorporeal property is itself of two kinds: (1) *jura in re aliena* or encumbrances, whether over material or immaterial things (for example leases, mortgages and servitudes), and (2) *jura in re propria* over immaterial things (for example, patents, copyrights and trade-marks).[17]

The Court considers this "a vast improvement upon the law of property,"[18] 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

[11]Ibid., 127.
[12]Ibid., 127.
[13]Ibid.
[14]Ibid.
[15]Ibid., 128.
[16]Ibid.
[17]John Salmond, *Jurisprudence*, 12th ed., 110 quoted in PLD 1983 FSC 125, 129.
[18]Ibid., 129.

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to confuse."[19] After this Paton raises another objection, which in our view should be 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.**[20]

Thereafter, the Court makes the following observation to identify the latest meaning property current in the West, especially in the U.S.A.:

The present day definition is much wider and consists of an aggregate of rights which are guaranteed and protected. It has been held by the Courts in U.S.A to be all embracing so as to include within its definition every physical object, tangible benefit and prerogative susceptible of ownership possession or disposition though it's meaning may be restricted by the context of a particular statute. In this broad and complex sense property also signifies any valuable right or interest which is considered as a source of element of wealth. The line is no longer drawn between the wealth consisting of tangible property or incorporeal or intangible property only to the extent of primarily some interest in land. It also includes the fruits of ones brain whether it is in the field of invention or science. Thus, it includes goodwill of a business earned by a particular person or firm or body whether corporate or not; thus extending its scope to trade mark, trade name patents and designs, copy right as well as good will.[21]

The Supreme Court of India has acknowledged this wider meaning, while discussing the concept of property in terms of Article 31 of the Indian Constitution.[22]

Meaning of Property in Islamic Law According to the Court

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." 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."[23]

The Court then notes the distinction drawn by the Ḥanafi 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-Shāfiʿias 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

[19]Paton, *Jurisprudence*, 458 quoted in PLD 1983 FSC 125, 129.
[20]Paton, *Jurisprudence*, 458 as quoted in PLD 1983 FSC 125, 129–30 (emphasis added).
[21]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.
[22]AIR 1951 SC 41.
[23]Ibid., 131.

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among people. This according to his opinion also corresponds to contemporary law."[24] The Court adds further that according to Yūsuf Mūsā. "Everything from which benefit can be derived is property provided that the acquisition of benefit there from is not prohibited in Shariah."[25]

The Court, after describing what is perfect and imperfect ownership according to the Ahanaf, moves on to the views of 'Abd al-Rahmān Sābūni. "Sabuni 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."[26] 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."[27] The Court then implies that trade-marks, trade-names, patents and copyrights can all be included in this definition.[28] In support the Court refers to Yūsuf al-Qardāwi, who appears to agree with this view. The Court also refers to Mawlāna Ashraf Ali Thanwi, to Mufti Kifayatullah, and also to the adverse comments in Fatawa Rashidia and the work of Mufti Shafi.[29] 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-Hajji Kurdi. The detailed views of the writer are reproduced and then the views are rejected by the Court. These details may be seen in Appendix B. What is of interest for us here is that this analysis is quite similar to the analysis presented by Justice Taqi Usmani.

Conclusion by the Court

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.[30]

Comments on the Analysis by the Court

The main points relied upon by the Court, for its conclusion, are the following:

- 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.
- 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."[31]

[24]The reference is to the work of Yūsuf Mūsā, *al-Amwāl wa Na ⊾ariyyat al-'Aqd*, 162, quoted in PLD 1983 FSC 125, 132.
[25]Ibid.
[26]Ibid., 134.
[27]Ibid.
[28]Ibid.
[29]Ibid., 135.
[30]Ibid., 137–38.
[31]Ibid., 137. For this the Court relies on the comments of Sābūn⌋ .

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- That property is considered as such when people assign it such a value according to their usage and custom.
- The definition of *māl* given by Imām al-Shāfiʿi 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. Nevertheless, we would like to make the following observations.

1. It cannot be denied that concepts should change over time to take stock of the new realities. This, however, does not mean that concepts be expanded blindly. All new concepts must be analysed and assessed in the light of the principles of Islamic law before they are declared valid. It is obvious that the Qur'ān and Sunnah do not mention things like copyrights, trade-marks, trade-names, patents and so on. These new concepts have to be subjected to analysis before they are taken into the fold of Islamic law. As far as analysis goes, the detailed list we have given above is not reflected at all in the analysis of the Court, except perhaps tangentially where sale of copyright to a publisher is considered. If we start accepting concepts without proper analysis, the entire structure of Islamic law can be destroyed. Here the words of Paton quoted above may be reproduced: *Once we speak of ownership of things which are not corporeal, where are we to stop***?**
2. We find it difficult to agree with the statement of the Court that the jurists have come up with the definition of property "according to their own lights." without referring to the Qur'ān and the Sunnah. In fact, the Court has not tried to analyse why the Ḥanafi do not consider *manfaʿah* to be *māl* or why the majority of the jurists do. We may mention just one tradition here that does play a role in these definitions: "Do not sell what you do not have."
3. The statement that property is something to which the people assign value is true, but it has to be qualified. Such assignment of value must not oppose the texts or their implications, which means the acknowledged principles of Islamic law as well. For this purpose, the discussion of *ʿurf* and its acceptance above may be seen.
4. We feel that the definition given by the Shāfiʿs has been unduly stretched. Yes, the Shāfiʿis do accept *manfaʿah* as *māl*, but they do not consider pure rights to be *māl*.

The Arguments Advanced by the Justice Muhammad Taqi Usmani for Justifying Intellectual Property Rights

It may be stated at the outset that most of 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 1983 and discussed above. This is not to imply that the material is identical or the arguments are exactly the same. Justice Usmani has presented the arguments with greater sophistication based upon his superior knowledge of Islamic law.

Analysis of Trade Name and Trademark

Justice Usmani, after discussing rights and their relinquishment in detail, takes up the discussion of trade name and trademark first.[32] He tries to show first that even though trade names and

[32]Muhammad Taqi Usmani, *Bayʿ al-ḥuqūq al-Mujarradah*, vol. 1, 116.

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trademarks are not tangible property, yet they have been accepted by traders as having value in the mercantile practice.[33] The main idea behind this argument is that, in his view, a thing acquires value if it is assigned value through *'urf*.[34] He relies on the statement of Mawlānā Ashraf Ali Thanwi, who draws and analogy upon the right of office, to strengthen his argument.[35] The reason why protection of such names and marks was needed is explained in his words below:

> When it appeared that some people started using the names of manufacturers who were well known among consumers, due to the acceptance of their goods under such a name, and it was feared that confusion would be created for the people in general, laws were made by governments for the registration of trade names and trademarks with the government. Traders were prevented from using trade names and trademarks that had been registered by others.

Mawlana Thanwi, however, restricts the permission to relinquishment and concludes that "compensation be given for it in lieu of relinquishment, but not sale, because it is an established right, or a benefit (*manfa'ah*) that has accrued from an existing tangible property."[36]
To allow the sale of such names and marks, Justice Usmani advances the second argument. He considers it to be a strong argument. The argument is that after registration this value is affirmed and in fact the certificates of protection in the hand of the bearer make them quite similar to tangible property. He says:

> 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 honorable Justice Usmani, we find it difficult to accept these arguments. First of all certificates are not tangible property, they are choses in action as has been elaborated above. Yes, 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. 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? 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 may also mention here that he argues on the basis of custom and how it has dealt with electric power and gas, things that were not once accepted as wealth, but are now a source of tremendous

[33]Ibid. 117.
[34]This point has been discussed several times above.
[35]Ibid., 18
[36]Ibid., 117.

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wealth. This again is a weak analogy. The two things are distinguished. Electric power and gas, whatever their nature, are tangible property for they can be felt and stored.
His conclusion is: "It, therefore, appears that there is no *shar'i* obstacle for their being treated as wealth whose sale and purchase is permissible."[37]

Legal Validity of Commercial Licenses

One would have thought that Justice Usmani would be discussing "trademark licensing"[38] and "franchising"[39] of businesses under this heading. He, however, chose to discuss import and export licenses. His solution for such licenses is simple: "What we have said about the rule (*Hukm*) of the trade name and trademark, as to the permissibility of taking compensation for them, is true of the commercial license as well."[40] To justify the legality of such licenses, he uses an argument quite similar to the one above:

> The bearer is granted a legal attribute that resembles written certificates, and the traders, by virtue of it, are granted facilities that are bestowed by the government on the bearer. This license has become, in mercantile practice, something with immense value that is treated like property. Accordingly, there is no harm if it is linked to tangible property for the permissibility of its sale and purchase.[41]

He does add that such transfer is to be allowed "if there is a governmental regulation that permits the transfer of this license to another person."[42] Our response to these arguments is exactly the same as the one above. At the end we may add that obtaining import and export licenses in Pakistan was once a big problem. It is no longer a problem and the permits are freely available to any trader.

Justifying the Right to Invention and Publication

Under this heading, Justice Taqi Usmani, while addressing the fundamental point in the issue whether the right to an invention or the right to publish is a right acknowledged by the *shari'ah*, gives the following arguments.

- Whoever first invents a new thing, whether it is a material thing or immaterial, possesses a prior right as compared to another. The basis is what has been recorded by Abū Dāwūd from Asmar ibn Mudris (God be pleased with him), who said: "Whoever has first access to a thing not accessed by another, has a right to own it." The tradition, it is claimed, applies not only to revival of barren lands (*ihyā' al-mawāt*), but includes all tangible property, wells and minerals. Thus, whoever

[37]Ibid., 119.
[38]The WIPO Handbook says: "It is common practice for trademark owners to license third parties to use their trademarks locally in the country where they exercise their own business. However, the main importance of the possibility of licensing the use of trademarks lies in its usefulness in international business relations. Licensing is indeed the principal means whereby the trademarks of foreign companies are used by local businesses." WIPO, *WIPO Handbook*, 94.
[39]"Even if the term 'franchising' is unfamiliar to most consumers, they are familiar with the results of franchising. The most widely known results of franchising appear to be fast-food restaurants, hotels or cosmetic retail shops. Franchising extends, however, to industries as diverse as the hiring of formal wear, car tuning, the preparation of taxation statements or returns, lawn care, day-care schools and dentistry. In short, it may apply to any economic activity for which a system can be developed for the manufacture, processing and/or distribution of goods or the rendering of services. It is this "system" that is the subject matter of franchising. Ibid., 97.
[40]Muhammad Taqi Usmani, *Bay' al-huqūq al-Mujarradah*, vol. 1, 120.
[41]Ibid.
[42]Ibid.

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acquires them first has a right to own them.[43] This argument presumes that the right to invention and copyrights are property. Not only this, the argument is taken to be proof of ownership in the *shariah*.[44]

- The relinquishment of the right to a seat in the mosque is taken to mean that "it is permitted to relinquish the right to an invention or the right to publication in favour of another in return for money acquired by the person relinquishing."[45]
- When this right is acquired by registration with the government for which the inventor spends in terms of effort, wealth and time, "then there can be no doubt that this registered right is linked to tangible property and wealth due to the verdict of this prevalent practice."[46]
- Commercial value, according to Ibn 'Ābidin, is attained through assignment of such value by the people. This right, after registration, is taken into possession like tangible property, and is stored for the time of need like other tangible property. In the consideration of this *'urf*, there is no opposition to any *shar'i* text of the Qur'ān or the *Sunnah*. The maximum that can be said is that it is opposed to analogy when *qiyās* is given up in the face of *'urf*, as has been established during its discussion."[47]

Following these arguments, Justice Usmani takes up some weak arguments of those scholars who do not permit the sale of such rights. He responds to them in a manner that is adequate for the layman, but there is no legal content in them, therefore, the arguments do not merit consideration here.

Comments on the Analysis by Justice Taqi Usmani

The comments for this section are more or less similar to what was said for the analysis by the Federal Shariat Court of Pakistan. We give our observations below in the form of a list. Matters that have not been examined are listed first followed by analytical comments on those that have been considered.

- No distinction has been made with respect to copyright with reference to the fact that copyright law protects only *the form of expression of ideas, not the ideas themselves.* Islamic law must give a ruling on what it is protecting.
- Likewise, in patents and industrial designs, *it is the underlying idea that is protected*, but there is no indication of the awareness of this fact nor is there an indication of what exactly is being protected. Both patents and copyright have been analysed together. This appears to be inappropriate methodology as the two are quite different in nature.
- Many other things that fall under intellectual property rights have not been included in the analysis.
- As indicated earlier, copyright consists of a bundle of rights. Some of these rights are passed on to the buyer, while others are retained. Moral rights remain with the original author, in the case of copyright, even when he has transferred his economic rights to another. Retaining such rights prevents the buyer from altering the contents of the work at his discretion. There is no discussion of such a distinction in the above analysis.

[43]Ibid., 122-22.
[44]Ibid., 122.
[45]Ibid., 122
[46]Ibid.
[47]Ibid.

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- There is also no discussion about the limited duration for which copyrights and patents are protected. Does Islamic law admit of such a concept? There is no discussion in the analysis above. Nor is there any discussion about the renewal every year of a trade name or mark for a fee. What kind of right would this be under Islamic law?
- The extension of patents and other rights to food and genetic material has not been taken into account.
- There is also no discussion about the granting of protection to musical compositions, performances, choreography and so on. These rights fall under copyright.
- In the analysis no distinction has been made between copyright sold to another, and a book sold to a buyer. The latter issue alone has been discussed. The owner of the copyright can sell the product again and again. This **repeat value** of the product has not been taken into account.
- The arguments advanced in the analysis are not really legal arguments. There is no indication of why the jurists do not acknowledge pure rights for unhindered sale. After all, there must be some substantial reason. We have already indicated this in the discussion above.
- Unhindered *'urf* has been taken into account for assigning value to new types of rights. This is not so in Islamic law, as discussed above, and each *'urf* must tally with the general principles of Islamic law that have arisen from the texts.
- Registration by the government of such rights has been taken to be the main argument and is deemed sufficient to be considered a mere right as tangible property. This does not appear to be a legal argument, and in our view is mere insistence upon the granting of legal recognition to a right.

CONCLUSION

A large number of *faatawā* (legal rulings) are to be found on the Internet as well as in other sources. In most of these rulings there is just an acknowledgment that it is not proper to violate intellectual property rights. Some of the rulings even declare such violations to be theft. We have not included these rulings in this study as it will unnecessarily at to the length of the study without contributing much to the content. The main reason is that these rulings lack legal reasoning underlying the verdict. Consequently, they are not of much help to us. We have, therefore, considered the two main analyses discussed above to be sufficient.

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