CONCEPT OF MĀL IN ISLAMIC LAW AND INTELLECTUAL PROPERTY RIGHTS

(Prepared as a partial requirement of LL.M Shari'ah and Law)

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DEDICATION

This thesis is dedicated to my precious asset my parents who taught me to persevere and prepared me to face challenge with faith and humility. Thank you for all the love, guidance, and strength and support that you have always given me, helping me to succeed and instilling in me the confidence due to which I am capable of doing every thing in the world. Thank you again for every thing.

Contents: **page no.**

Chapter 2: Intellectual Property And Islamic Law

ACKNOWLEDGEMENT

First of all I am very thankful to Allāh with the blessing of whom it became possible for me to complete this difficult task. After that I am grateful to my parents who encouraged and supported me to accomplish this work. Without their support I am not able to complete it. I also wish to express my special gratitude to Dr. A.B. Mahroof my Current supervisor who gave his precious time to guide me and Dr. Ida Madieha of International Islamic University, Malaysia who provided me some basic material on the topic and also to my previous supervisor Mr. Aziz-ur-Rehman and all my teachers who helped me in writing this thesis.

Preface:

In current era due to technological and philosophical revolution there arose phenomena and problems which were not present in the past decades. One of them is Intellectual property rights.

These are intangible rights granted by the legislature to the author or inventor for a limited time period to prevent others from using ideas or information for their own commercial advantages. These are very important rights which have links to all fields of life. These rights are used by people as valuable property and they traded them like other tangible property.

As Muslims have their own complete legal system which is different from positive law system. So, it is their duty to discover the answer for new problems with in their own legal system and make possible for the general public easy to understand the rules and principles of sharī'ah present to solve these problems. It will help Muslims to legislate rules and regulations with in the limits of their own legal system.

For This research work the relevant material is collected from the Islamic books of history, Islamic Law, Literature and tried to present it in a way which will make it easy to understand.

Thesis Outline:

I divided this thesis in three chapters. First chapter discuss the concept of Intellectual property. This chapter discusses the concept of property and Intellectual property and then justification for granting intellectual property and then history of intellectual property.

Chapter 2 discusses the concept of *māl* in Islam and the justification of Intellectual property. First I discuss the basis for intellectual property in the light of Qurān, Ḥadith and history of Islamic law which are also called moral rights of author. Before discussing the concept of *māl* in Islamic law, the concept of right and *milkiyyah* is discussed. It helps the reader to understand the concept of *māl* in the context of Intellectual property. After this the concept of property (*māl*) in different schools of jurisprudence is discussed. And after this I discussed the justification of proprietary rights of the owner of the property in it which are mostly used in transactions these days.

Chapter 3 discusses the theories of Intellectual property in the light of Islamic rules. After that this chapter discusses the Situation of Intellectual property rights in Pakistan. Then come conclusion and bibliography.

Abbreviations:

BSA: Business Software Alliance

EMR: Exclusive Marketing Rights

EU: European Union

FIA: Federal Investigation Agency

GSP: Generalized System Of Preferences

IFPI: International Federation Of The Phonographic Industry

IIPA: International Intellectual Property Alliance

INTA: International Trademark Association

IPO: Intellectual Property Organization

IPR: Intellectual Property Rights

OUP: Oxford University Press

RIIA: Recording Industry Association

TRIPS: Trade Related Aspects of Intellectual property Rights

USTR: United State Trade Representative

WIPO: World Intellectual Property Organization

WTO: World Trade Organization

Introduction:

Intellectual property rights are very important part of western jurisprudence. These are legal rights which accrue from intellectual activity in the industrial, scientific, literary and artistic field and include patent and other rights in inventions, rights in trade marks, and industrial designs, musical, artistic and cinematographic works etc.

These are rights to prevent others from using ideas or information for their own commercial advantages. These intangible rights, granted by the legislature to the author or inventor for a limited time period, today become increasingly value able in the fight to secure and retain shares of a market in free market economy.

These different rights which are gathered under the umbrella of intellectual property are not present in this form at the time of our forefathers. It is an outcome of the current era. This does not mean that Islamic law had no concept of these rights. These rights exist in Islamic law from the very beginning and also our forefathers had the knowledge about this phenomenon. Islam has principles and rules to protect these rights which are deeply embedded in teachings of Islam although these principles and rules are not discussed as separate subject in detail in Islamic law. A strongest example of it is that false attribution of a Quranic verse towards man or attribution of a man made verse towards Allāh S.W.T and the false attribution of a statement towards Prophet P.B.U.H is prohibited and is considered as a sin. Islam also prohibits concealment of truth which leads towards all the Offences.

Principles and rules were also present in the beginning of Islam. Scholars and artisans follow these ethics and norms for transmission of Knowledge and for protection of the accuracy of the work transmitted..

Intellectual property has two aspects one is its commercial aspect that it is valuable property and used for commercial gain and the other is its educational aspect that it is knowledge by using which one created a new thing.

In Islam these two things wealth and knowledge both is valuable thing and these are included in five basic purposes. The whole Islamic system revolves around these five purposes. So to understand the basis of Intellectual property in Sharī'ah understanding of concept of knowledge and wealth is necessary.

Some Muslim scholars denied these rights by arguing that the concept of ownership in Islamic law is confined only to the tangible property and intellectual property rights are intangible rights that means which have no corpus. The traditional Islamic law does not treat intangible property like these rights as māl. The reason behind this is that there is no direct provision mentioned in the original resources of Islamic law regarding the ownership of intangible property rights. But along with this, there is no express provision which restrict the concept of māl and ownership only to tangible property.

Some people are of view that the concept of "Intellectual property rights leads to monopoly of some individuals over the technology which can never be accepted in Islamic law. But we have no concern with this view at this stage. The point which is going to be discussed and found is wether the person who uses his mental labour to invent some thing has the right to own and to prevent others from using the fruit of his labour without his permission or not.

We are Muslims and have our own complete legal system which is different from positive law system. So, it is our duty to discover the concept of intangible property with in our own legal system and try to legislate with in the limits of our own system.

Hypothesis:

Islam a religion which laid down a complete code of life and claims that it laid down solution for the problems of each and every era must have the norms and principles for IPRs.

The major questions which are included in this research work are:

Is it a totally new phenomenon for Islam or they have some rules and regulations for these?

Is there any instance in which any Intangible right used as mal in Islamic law or there is not a single instance?

Is there any direct provision regarding permission or prohibition of these rights in Islamic law?

Is there any specific criteria given by shari'ah for considering a thing as an māl in Qurān and Sunnah?

Is Intangible Object subject matter of property in Islamic law or not?

Is intangible object subject matter of ownership Islamic law or not?

Is rights subject matter of ownership Islamic law or not?

Is Islamic law completely agreed with the concept of Intellectual property presented by the west or partially agreed or completely disagree with that concept?

Is Islamic law also having same reason for justification of intellectual property rights as given by the west or has partially similar reasons or has totally different reasons?

To whom preference is given in case of conflicts between the right of individual and society In Islamic law?

Literary review:

Collection of material on this topic was not an easy task for me but by the guidance and support of Allāh I completed this task.

WIPO Intellectual Property Hand Book: Policy, Law and Use book helps in understanding the concept of intellectual property. It described the different rights gathered under the term of intellectual property in an easy way.
The history of intellectual property is discussed in detail by the Peter drahos in his work "The Universality of Intellectual Property Rights: Origin And Development". This work contains complete history of intellectual property. Kamil Idris's book also gives detailed historical background of Intellectual property.

Justine Hughes discussed two theories (Moral Desert and Personality theory) of justifications of intellectual property in detail. It will help in understanding the basics. William Fisher and Peter S. Manell also discussed these theories but the work of Hughes is easy and to the point.

Ali Khan's "Islam as Intellectual Property "My Lord! Increase me in knowledge" is also a good and detailed work which discussed many rules and principles which are deeply embedded in the Islamic teaching to protect knowledge from piracy, alteration by others and false attribution of work. This work helps a lot in comparison of western theories of justification of IP with Islamic concept of Knowledge.

The work of Ida Madieha is also of great importance. This is the starting point from where I started. After reading her work I started my research in Islamic law.

She discussed ethics laid down in Qurān and Sunnah for transmission of Sunnah and which were used by the companions of prophet (P.B.U.H) and after them by Muslim scholars. She compares these ethics and norms used in Islamic law for transmission of knowledge with the ethics used in jurisdiction of U.S.A and U.K.

Research is done by both the Western and Muslim scholars on this topic. The Western scholars like, Adam D. more and William fisher discuss the issue in detail according to positive law philosophy. They never consider the philosophy and principles of Islamic law on this issue.

She also discussed the concept of Māl in Islamic law and the basis for justification in Islamic law briefly.

A book Ḥaqq al-Ibtikār by al-Duraynī discusses in detail the concept of ownership and concept of māl in different schools of Jurisprudence in detail in relation to Intellectual property rights. Justice Taqī Uthmānī' discussed in his work the concept of right in Islamic law for justification of Intellectual property. These two are the books or work available in Pakistan regarding the justification of these rights in Islam.

For comparison of the three theories with the Islamic concept of knowledge and maqāṣid I found some hints in the work of Ida Madieha only but these are not sufficient. All the books and articles I mentioned have such comparison. I tried my self in the light of general rules and principles to make such comparison.

For describing situation of protection of Intellectual property I mostly used the annual reports of IIPA which discussed the whole situation of every country every year.

For translation of Quranic verses I used the translation of Marmaduke Picktha

Chapter1: Intellectual Property

1. Introduction Of Intellectual property

1. 1. Definition Of Property:

The term property in general means one's own thing'. [1] In legal terms it is defined as: "an aggregate of rights which are guaranteed and protected by the government". These rights include right to possess, to use, to exclude every one from interfering with it, to dispose of.[2] So this means every right and interest which a man has in a thing which he owns. It is a relationship of man with object.

The term property is not used in a single sense. In its widest sense all things which are the subject matter of ownership are property. Ownership means the collection of rights and these are 1) ***jusutendi***: right to use, 2) ***juspossidendi***: right to possess, 3) ***jusabuntendi***: right to consume or destroy 4) ***jusdespndendiveltransfered***: right to transfer.[3] It is a dominion or right over a thing real or personal, corporeal or incorporeal[4], which the owner can enjoy and do with it as he pleases, either to

spoil or destroy. Any thing in possession of a person whether he is using and enjoying or which is the cause of his satisfaction and pleasure are the subject matter of ownership and also of property. All those things which are cause of satisfaction and pleasure for a man are valuable for him; due to this some people

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1 The word property is derived from Latin word proprius. see International Encyclopedia Of The Social Sciences, Vol: 11,editor David L. Sills, The Macmillan company and the free press, New York , Collier Macmillan company, London , Reprinted edition 1972, S. v. "property" , P: 590.

2 *Black's Law Dictionary*, Publisher St. Paul. Minn, 5th edition, S. v. "property" , P:1095 .

3 Ibid, s. v. "ownership" P: 997 .

4 Things are divided into personal and real, and into corporeal and incorporeal. Personal means moveable like goods, money and chattels and real things are immoveable things which are permanent or fixed or attached which cannot be carried out of their place like lands, tenements and hereditaments. corporeal means things which have physical form or are capable of being touched or seen and incorporeal means things which have no physical form like goodwill, bonds, stocks, copyright, trademarks, patents. Ibid, s. v. "property." ; Glanville William, *salmond on jurisprudence* , (printed in Great Britain by The Eastern Press L.t.d. of London and Reading,1957), 11th edition P: 461.

say that all valuable things are property.[5] Things are of two kinds corporeal and incorporeal. Corporeal things are those which exist physically e.g., land and incorporeal are those which have no physical appearance e.g., legal rights like right of liberty, right of reputation and all these are as valuable as corporeal things like land for man. In this sense according to Salmond it includes all corporeal and incorporeal things.

So according to this statement one owns his life and limbs and these are also valuable for a person. As Hobbes says: "of things held in propriety, those that are dearest to a man are his own life and limbs; and in the next degree in most men, those that concern conjugal affection; and after them riches and means of living."[6] John Locke says about man's right to preserve "his property, that is, his life, liberty, and estate".[7]

In a narrower sense, it includes all proprietary rights of a person and excludes his personal rights. In this sense his life, liberty, and reputation are not property. On the other hand a man's land, chattels, shares, and the debts are his property due to him.

In a third sense it includes all proprietary rights in *rem* only according to this sense it excludes debts or benefits of contract and include land, or patent or copyright.

And in its narrowest sense, it includes only the corporeal things, that means ownership in material objects which is perceptible by the senses and exclude intangibles or incorporeal or immaterial objects are not perceptible by the senses.

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5 Lysander Spooner, *"The law of intellectual property ; or an essay on the right of authors and inventors to a perpetual property in their ideas"*, published by Bela Marsh, vol:1, P: 6-19, http://lysanderspooner.org /intellect/contents.htm last visited on 2nd November 2005.

6 Glanville William, *Salmond on Jurisprudence*, P: 451-452,.

7 Ibid;

In this sense it includes land and other physical objects and excludes copy rights, patents, and other intangible objects.[8]

The above mentioned things in these four senses, all are property in some sense but different laws deals with them. The substantive civil law is further divided into three 1) the law of property 2) the law of obligations 3) the law of status.[9] The law of property deals with property rights in *rem* and all these rights are of economic value and the law of obligation deals with proprietary rights in *personam* and the law of status with personal rights of a person.

The intellectual property rights are property rights in *rem* and there are separate laws for protection of this intangible property. This generic term "intellectual property" came into regular use during twentieth century which is used to refer to a group of legal regimes which confers rights of ownership in a particular subject matter. Copy right, patent, trade marks, and unfair competition are the areas covered by this term.

Property and rights to own property is recognized in every socio-political and economic system. In Pakistan property includes property of every description, moveable or immoveable, corporeal or incorporeal, commercial and industrial undertaking, and any right or interest in any such property and any means and instrument of production.[10] Article 23 and24 of the constitution of Pakistan also guaranties that subject to any restriction imposed by law, every citizen shall have right to acquire, hold, dispose of property and no property shall be compulsorily acquired or taken possession and save by authority of law.

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8 Ibid;

9 Ibid;

10 Rafi Butt, *The Constitution Of Pakistan, 1973*,(Mansoor Book house, Lahore, Revised Edition). Article 260.

1.2. Intellectual Property:

The term Intellectual Property refers to creations of the mind: inventions, literary and artistic works, and symbols, names, and images used in commerce[11].

"Traditionally intellectual property it has been divided into two categories:

I. Copyright and rights related to copyright

Copyright includes literary works such as novels, poems and plays, film's, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms, and those of broadcasters in their radio and television programs.

II. Industrial property

Industrial Property includes patents, trademarks, industrial designs and geographical indications. It is divided into two main areas:

- One includes the distinctive signs and unfair competition. Distinctive signs cover trade marks, trade names, service marks, geographical indications and unfair competition means "any act of competition contrary to honest practices in industrial and commercial matters".[12]
- Second includes inventions, industrial designs, and trade secretes."[13]

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11 WIPO, *WIPO Intellectual Property Hand Book: Policy Law And Use*, WIPO publication No. 489E, 2nd edition, 2004, Ch:1, P: 3, http://www.wipo.int/about-ip/en/iprm/index.htm. last time visited on 6th January 2006. ; http://www.wto.org/english/tratop_e/trips_e/in and also see http://dictionary.lp.findlaw.com/scripts/search.pl?s =Intellectual+property. last time visited on 15th November 2005.

12 Paris Convention For The Protection Of Industrial Property (Stockholm Act of 1967), Article 10 bis (2). http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html

13 See Article 2(viii) of the convention establishing world Intellectual Property Organization (WIPO) concluded in Stockholm on July 14, 1967; http://www.wipoint/clea/docs/en/wo/wo029en.htm. last time visited on 17th November 2005.

a. **Patent:** is an exclusive right granted by state to an inventor for an invention in all fields of technology for a certain period of time in return for disclosure of his invention. "Invention" means a product or a process that provides a new way of doing something, or offers a new technical solution to a problem.[14] General criteria for granting patent are that an invention must be of practical use; it must show an element of novelty (some new characteristic, not known in the body of existing knowledge in its technical field). The invention must show an inventive step that could not be deduced by a person with average knowledge of the technical field.[15]Pharmaceutical sector is one of the important sectors in patent.

b. **Trademark:** is any distinctive sign which distinguishes the goods or services of an enterprise from the goods or services of its competitors.[16] It may be one word or a combination of words, letters, and numerals. It may consist of drawings, symbols, three-dimensional signs such as the shape and packaging of goods, audible signs such as music or vocal sounds, fragrances, or colors used as distinguishing features.[17] The owner of a registered trade mark has an exclusive right to prevent all third parties not having his consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which trade mark registration has been granted.

   Trademarks help consumers distinguish a product or service from one source from those produced by another source. A mark provides protection to its owner by preventing confusion as to source in connection with the distribution of goods or services.

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14 WIPO, WIPO Intellectual Property Hand Book: Policy, Law and Use, P: 17.

15 Trips Agreement, Article 27.1- 27.3, http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm

16 Ibid, Article 15(1)

17 Ibid,

Geographical indication is also a sign used on goods that have a specific geographical origin and possess qualities or a reputation that are due to that place of origin. Mostly it consists of the name of the place of origin of the goods. [18]Geographical indications mostly used for agricultural products to highlight specific qualities derive from their place of production and are influenced by specific local geographical factors, such as climate and soil e.g., "Tuscany" for olive oil produced in a specific area of Italy or also for highlighting specific qualities of a product which are due to human factors that can be found in the place of origin of the products e.g.," Switzerland" or "Swiss" which is perceived as a geographical indication in many countries for products that are made in Switzerland and, in particular, for watches.

Trademark protection also hinders the efforts of unfair competitors, such as counterfeiters, to use similar distinctive signs to market inferior or different products or services. The system enables people with skill and enterprise to produce and market goods and services in the fairest possible conditions, thereby facilitating international trade.

c. **Copy Right:** It deals with particular forms of creativity, concerned primarily with all forms and methods of public communication, not only printed publications but also such matters as sound and television broadcasting, film's for public exhibition in cinemas, etc. and even computerized systems for the storage and retrieval of information. Copyright law, however, protects only the form of expression of ideas, not the ideas themselves. The creativity protected by copyright law is creativity in the choice and arrangement of words, musical notes, colors, shapes and so on. Copyright law protects the owner of rights in artistic works against

18 Ibid, Article 22 (1)

those who "copy", that is to say those who take and use the form in which the original work was expressed by the author.

The work generally protected under copy right includes:[19]

- *Literary Works:* novels, short stories, poems, dramatic works and any other writings, irrespective of their content (fiction or non-fiction), length, purpose (amusement, education, information, advertisement, etc.), form (handwritten, typed, printed; book, pamphlet, newspaper, magazine); whether published or unpublished; in most countries "oral works," that is, works not reduced to writing, are also protected by the copyright law;[20]
- *Musical Works:* whether serious or light; songs, choruses, operas, musicals, operettas; if for instructions, whether for one instrument, a few instruments (, or many (bands, orchestras) ;
- *Artistic Works:* whether two-dimensional (drawings, paintings, etchings, etc.) or three-dimensional (sculptures, architectural works), irrespective of content and destination;
- *Maps And Technical Drawings;*
- *Photographic Works:* irrespective of the subject matter (portraits, landscapes, current events, etc.) and the purpose for which they are made;
- *Motion Pictures ("cinematographic works"):* whether silent or with a soundtrack, and irrespective of their purpose (theatrical exhibition, television broadcasting, etc.), their genre (film, dramas, documentaries, etc.), length, method employed, or technical process used.
- *Computer Programs* (either as a literary work or independently).

19 Berne Convention, Article 2, http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

20 In many countries such as Belgium, Germany France, Brazil and Italy a work is eligible for copyright protection as long as it is in a form that others can perceive it regardless of whether it is fixed in a tangible medium of expression. See ICTSD-UNTAD, *Resource Book on Intellectual Property and Development*, see in part 2: Substantial Obligation topic of copy right explanation of article 9 of trips agreement on P:141.

Many copyright laws protect also "works of applied art" (artistic jewelry, lamps, wallpaper, furniture, etc.) and choreographic works.

a. **Industrial Designs:** The subject matter of the legal protection of industrial designs is not articles or products, but rather the design which is applied to or embodied in such articles or products. Design means features of shape, configuration, pattern, color, ornament, or combination of all these in an article.[21] The owner of a registered design has an exclusive right to prevent others from copying their design but this only applies to such articles or products as embody or reproduce the protected design.

2. History Of Intellectual Property

Intellectual property is an old concept. As long as 3,000 years ago, Indian craftsmen used to engrave their signatures on their artistic creations before sending them to Iran. Manufacturers from China sold goods bearing their marks in the Mediterranean area over 2,000 years ago and at one time about a thousand different Roman pottery marks were in use, including the FORTIS brand, which became so famous that it was copied and counterfeited.[22]

The different subject areas of it originated in different places and at different times. The first patent on an invention was granted in Florence in 1421 to an architect and engineer that gave him a monopoly on the invention for three years but it was not institutional agreement.[23] However, the Venetian Law of 1474 is often referred to as the first systematic approach to protecting inventions by a form of patent and their model spread to other European states.[24] Sixteenth-century

21 Copy Right and Designs and Patents Act 1988(section 213(2)) of U.K cited in WIPO Intellectual Property Handbook: Policy, Law and Use, P: 114.

22 WIPO, *WIPO Intellectual Property Handbook: Policy, Law And Use*, P : 67

23 Mahfuz Ullah, "*Intellectual Property Right And Bangladesh*" , published by BELA and CFSD, P: 7.

24 Kamil Adris, *Intellectual Property- A Power Tool For Economic Growth*, P: 13, http://www.wipo.int/aboutwipo/en/dgo /wipo _pub_888/index_wipo _pub888.html . (last time visited on 6th January 2006); Peter Drahos, " *The Universality Of Intellectual Property Rights: Origin And Development*" , P

Tudor England already had a patent system, and the Statute of Monopolies in 1624 was the first written law which provided for the grant of a monopoly for an invention for a limited period of time.[25]

In the case of copyright, it was the spread of the printing press that provoked the need for a copyright law. In the first millennium copying of a manuscript was a painstakingly slow process done mainly by monks. It was limited to copying religious works for orders and the royal courts of Europe. The majority of people were illiterate; only privileged members of society had access to these manuscripts.[26] The invention of moveable type and printing press made printing books easy and cheap. It was available every where in Western Europe by the second half of the 15th century, the Roman Catholic Church began to ban books written by reformers, and monopolies of the press emerged in England and France. In the 16th century, monopolies by printers continued in order to protect publishers' profits and to permit control over printing.[27] Modern copyright law began in England with the 1709 statute of Anne.[28]

In 1791, France recognized the right of inventors and in the context of this law it provide a right of representation to authors based on the principle that "the most sacred, the most unassailable and the most personal of possessions is the fruit of a writer's thought."[29]

:3 http://www.wipo.int/tk/en/hr/paneldiscussion/papers/word/drahos.doc last visited on 6th December 2005. (hereafter referred to as Peter Drahos "The Universality of Intellectual Property Rights")

25 Kamil Adris, *Intellectual Property- A Power Tool For Economic Growth*, p: 13; Peter Drahos, " *The Universality Of Intellectual Property Rights: Origin And Development*" , P :3; W.R.Cornish, *Intellectual Property: Patents, Copy Right, Trade Marks And Allied Rights*, (3rd edition, first Indian reprint 2001, published by Universal Law publishing co Pvt. Ltd), P: 93. (hereafter referred as W.R.Cornish, Intellectual Property)

26 Kamil Adris, *Intellectual Property- A Power Tool For Economic Growth*, P: 14. ; W.R.Cornish, *Intellectual Property*, P:297-298.

27 Ibid,

28 Ibid,

29 B. Zorina Khan, *"Intellectual Property And Economic Development: Lessons From American And European History"*, P:14,27 . http://216.239.59.104/search?q=cache:Q7gTF9L1HL0J:www.iprcommission.org/papers/word/study_papers/sp1a_khan_study.doc++development+of+intellectual+property+in+history&hl=en (last visited on 10th December 2005).

The Copyright and patent clause of the U.S. constitution, drafted in 1787, further codified intellectual property rights by giving Congress the power to "promote progress in science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries". In 1790 U.S. enacted a patent law and a federal statute to protect the product of authors was approved on May 31, 1790, "for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned."[30]

In the case of trade mark English courts before statutory trade mark laws developed protection through the action of passing off which proved unsatisfactory for many reasons. Statutory system of trade mark registration began in England in1862 and 1875 and in U.S.A. in 1870 and 1876. [31]

In 19th century anti-patent movement started but strong waves of nationalism plays an important role in supporting the introduction and maintenance of modern industrial property laws [32]

This period is dominated by the principle of territoriality. According to this principle intellectual property rights do not extend beyond the territory of the sovereign which has granted the rights in the first place. This meant that an intellectual property law passed by country 'A' did not apply in country 'B'. Owners of intellectual property rights faced problem due to the free copying of their creations in other countries which led states to the international protection.[33]

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30 Ibid, P: 17,18,31

31 Peter Drahos, " *The Universality Of Intellectual Property Rights*" P:4

32Kamil Adris, *Intellectual property- A Power Tool For Economic Growth*, P: 15.

33 Peter Drahos, " *The Universality Of Intellectual Property Rights*" P: 5.

2.1. International Period

In the half of the 19th century development of national Intellectual Property systems and international trade raised the awareness of the need for international protection.

In response to free copying problem, U.K passed the 1838 and 1844 Acts that protected works first published outside of the U.K In these acts principle of reciprocity[34] was introduced. The 1844 Act saw a considerable number of bilateral agreements concluded between the U.K and other European states. [35]

Other branches of industrial property also became the subject of bilateral agreements. By 1883 there were 69 international agreements mostly dealing with trade marks and they were operated on the national treatment principle.[36]

Following an international exhibition of inventions held in Vienna, Austria in 1873 which foreign exhibitor refused to attend due to fear that their ideas would be stolen and exploited commercially in other countries and this incident resulted in birth of Paris convention 1883 for the protection of industrial property. [37]

Berne convention adopted in 1886 for the protection of literary and artistic work was also the result of meetings of international literary association organized by influential authors of that period.[38]

These were the first international agreements on Intellectual Property and over the year they have gone through a series of amendments to keep up with technological

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34 This principle is that foreign work would only gain protection in the U.K if the relevant state agreed to protect U.K works.

35 Peter Drahos, " *The Universality Of Intellectual Property Rights*" , P: 6

36 Ibid, Principle of national treatment means that the intellectual property protection offered by a state to its national is equally offered to a foreigner with in the state jurisdiction.

37 Peter Drahos, " *The Universality Of Intellectual Property Rights*" , P: 6; Kamil Adris, *Intellectual Property- A Power Tool For Economic Growth*, P: 15.

38 Ibid,

advancement. After the Second World War more developing countries joined these two conventions.

Many other international agreements were adopted in other areas of Intellectual property so to administer them properly WIPO was established by a convention of 1967.

2.2. Global Period

Up to this time, despite the existence of international agreements administered by WIPO, there was still a lot of free riding or copying that was tolerated. The only enforcement mechanism under the various intellectual property treaties were appeals to the International Court of Justice and most states took reservations on such clauses.[39]

Developing countries wanted an international system that catered to their stage of economic development. The lack of effective enforcement machinery for Intellectual Property Rights under WIPO was detrimental to key industries of U.S.A economy.[40] U.S pharmaceutical companies wanted to locate their products any where in the world safe in knowledge that their property would be protected. For them Intellectual Property was an investment issue. With strong lobbying they succeeded in linking Intellectual Property to trade. There were two immediate advantages of this first: if Intellectual property standard made part of a multilateral trade agreement it would give those standards global coverage. Second: Intellectual property would fall under the mechanism that states had developed for settling trade disputes.

39Peter Drahos, " *The Universality Of Intellectual Property Rights: Origin And Development*" P:8

40 Ibid, P:9

In 1984 U.S amended its 1974 Trade Act and includes Intellectual Property in the "Section 301" trade process, that if countries failed to act on Intellectual Property they would face sanction from the U.S.A.[41]

Upon the initiative of U.S.A and its supporter countries intellectual property was included as a negotiating issue at the Ministerial Meeting at Punta del Este in September of 1986.[42]

The Uruguay Round concluded on 15 April 1994 with the signing of the Final Act embodying the results of the Multilateral Trade Negotiations. This Final Act contained a number of agreements including the agreement establishing the World Trade Organization (WTO) and the TRIPS (Trade Related Intellectual Property Rights) Agreement.[43] TRIPS Agreement was made binding on all members of the WTO. There was no way to avoid TRIPS Agreement for a state that wished to become or remain a member of the multilateral trading regime. TRIPS came into force in 1995. It is the most comprehensive multilateral agreement that sets out detailed minimum standards for the protection and enforcement of Intellectual Property. It gives its member transitional periods, which differ according to their stages, to bring themselves into compliance with its rules.[44]

Under WTO mechanism First Ministerial Meeting was held in Singapore in December 1996. It was agreed in this meeting that least developing countries and many developed countries under the new trading system have been further marginalized. It was also decided in this meeting that WTO would improve the availability of technical assistance to developing countries. Following Singapore

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41 Ibid, P:10

42 Ibid,

43Trips agreement set out standards of protection for different categories of IPR. These categories are: copy rights and related rights, trademarks, geographical indications, industrial design, patent, lay out designs of integrated circuits protection of undisclosed information, and control of anti competitive practices in contractual licenses. see text of agreement on trade-related aspects of Intellectual Property Rights on http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm

44 Mahfuz Ullah, "*Intellectual Property Right And Bangladesh*", P: 16,

Declaration, a high level meeting on the Integrated Initiatives for least developing countries was held in the WTO Geneva in 1997 in which an Integrated Frame work for Trade-Related Technical Assistance was endorsed.[45]

The fourth meeting was held in Doha in 2001. In this meeting a short but separate declaration was adopted on the TRIPS agreement which would allow the countries to ignore patents on pharmaceutical products to produce cheaper version of generic drugs in the interest of public health. The Declaration also acknowledged that countries without the capacity to produce drugs find it difficult to make effective use of compulsory licensing and instructed the TRIPS council to find an expeditious solution to this problem.[46]

3. Philosophy Of Intellectual Property:

There are mainly two types of philosophies for justification of intellectual property rights: Natural right philosophy and utilitarian philosophy. Civil law countries system based on natural right philosophy and common law system countries like U.S.A on utilitarian philosophy. The three most famous theories which are used are Moral Desert theory, Personality theory, and utilitarian theory. The first two based on natural right philosophy.

3.1. Moral Desert Theory:

This first approach springs from the propositions that "a person who labors upon resources that are held in "common" has a natural property right to the fruits of his or her labor and it is the duty of the state to respect and enforce that natural right. John Locke"[47] used this preposition in his famous work "Second Treatise on Civil

45 Ibid,

46 Ibid,

47 John Locke is a 17th century philosopher who had a profound impact on the enlightenment and the development of political philosophy. Locke's ideas were fundamental in the development of representative government, the separation of Church and State, personal property and free enterprise. Our current property system emerges from locks theory of labor which he described in Second Treatise on Civil Government.

Government" for justification of property rights which remains a central pillar of property theory today. The ideas originated in writings are widely thought to be especially applicable to the field of intellectual property.

Locke's theory of property begins with a state of nature in which goods are held in common.[48] It is up to the individual to convert these goods to private property and thereby appropriate them by exerting labor upon them. Because there are enough unclaimed goods, at least in a primitive state, everyone can appropriate the goods upon which their labor is exerted without impinging on goods that others have appropriated.[49]

According to Locke, allowing appropriation of things with which people have mixed their labor "increases the common stock of mankind." Locke protects interest of people other than the laborer with his two provisos. The first, referred to as the sufficiency proviso which requires that "enough and as good" be left in the commons from which others can draw. The second, referred to as the spoilage proviso which places the condition that things appropriated not go to waste.[50]

The idea presented by him in labor theory was originally for real property but many philosophers and scholars extended it to include intellectual property. According to them relevant raw material i.e., the "field" of all possible ideas prior to the formation of property rights is in intellectual property, with which laborer mixes his labor, is similar to Lockeon common and the intellectual labor like labor in Locks theory importantly contributed to add value in the finished product. In

48 According to Lock "The common" is a grant from God to humanity, and is drawn upon to convert things from their natural state, in which they cannot be enjoyed, to a different state where they can be enjoyed by human beings. see John Locke, *Second Treaties Of Government*, ch: 5,Section:26, P:20 in Two Treatises Of Government, http://www.marxists.org/reference/subject/politics/locke/ last time visited on 23rd November 2005.

49 Ibid, section 27, P: 21

50 Ibid., section: 46-47., P:32-33

reward of painful act of labor which added value to the society property rights are granted to the inventor, writer, or artist.[51]

According to Justine Hughes the sufficiency proviso "enough and as good" of Lockeon theory is satisfied in case of intellectual property better than tangible property.[52] For this purpose common needs to be practically inexhaustible and not infinite. In case of tangible goods the inexhaustibility needs huge supply but in case of intangible property each idea can be used by an unlimited number of individual. Complete exclusion of idea is not possible so ideas will be available to people in their own thoughts even though these ideas already have become someone else's property. So this availability of idea in the mind once known may leads to a set of new accessible ideas. For example Computer languages one contribution to the society in this case makes other contributions possible. When a new language is created than it further stimulate programming in a way that is not possible with other language. This new language further leads to new ideas to write these programs. It is an addition to the "common" which gives many people new ability to create even more property and expand the common even further.

By the spoilage proviso Locke means prevention of wasteful possession of property appropriated. In intellectual property if knowledge is held in exclusive control of pioneer as a part of appropriation than it will not reach to its full use. For example some pioneer patent may even have used some of the characteristics of the laws of nature in that they can form the basis for many other types of inventions, and it would be impossible for the patent holder to explore all the possible areas of application that the patent might have. With its unique nature,

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51 Adam D.Moore, "*Intellectual Property: Theory, Privilege And Pragmatism*", 16 CAN J.L& Jurisprudence 191, 209 (2003) P: 191-216. ; William Fisher, "*Theories Of Intellectual Property*", P: 21-23, http://www.law.harvard.edu/faculty/tfisher/iptheory.html. last time visited on 5th June 2007; Justin Hughes, "*The Philosophy Of Intellectual property*", 77 Geo. L.J. 287, 300 (1988) P: 297-327. www.law.harvard.edu/Academic_Affairs/coursepages /tfisher/music/Hughes1988.html135k-. (last time visited on 25th November 2005).

52 Justin Hughes, "*The Philosophy Of Intellectual property*", P: 313-323.

opposite to the tangible property, it fulfills the spoilage proviso of the Lockeon theory.[53]

Locke's theory play an important role in development of intellectual property rights but there are some difficulties in its application because the original subject of this theory is real property which is different in nature from intellectual property which is intangible.

3.2. Personality Theory:

The second philosophy of intellectual property drives loosely from the writings of the Hegel and Kant. According to Jane Radin the premise underlying the personhood perspective is "to achieve proper development - to be a person - an individual needs some control over resources in the external environment."[54] The necessary assurances of control take the form of property rights. According to Kant work communicates the creator's personality because his words or vision continually express his inner self and Hegel writes that through work creator expresses his will which is the core of individual's existence. So in this way work expresses personality of its creator and seen as an integral part of the self.[55]

According to Hegel to institute property over a thing, such an object must be possessed, used, and alienated. First, Hegel's possession element would be circumscribed by anything in which one ensconces his will, and identifies as "mine. Second, Hegel's "use" element is realized when a possessor fulfils a need

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53 In case of tangible property exclusion of others from the property is necessary to reach to its full use whereas in intangible property complete exclusion of others is not possible due to its intangibility and an information that cannot be used to bring forth other ideas and inventions is not being put to its full use. Ibid, P: 331-333.

54Margaret Jane Radin, "*Property And Personhood*", Stanford Law Review, Vol: 34, No. 5 (May, 1982) ,P: 957; Peter S. Menell, "Intellectual Property: General Theories", P: 158, http://users.ugent.be/~gdegeest/1600book.pdf

55 Justin Hughes, "*The Philosophy Of Intellectual property*", P: 331-350 ; *"Hegel's Philosophy of right*", section 41-71, http://www.marxists.org /reference/archive/hegel/works/pr/prconten.htm

by altering the thing to his satisfaction. Finally, the third element, alienations, occurs through abandonment, or yielding to another's will.[56]

For intellectual property he writes "while mental aptitudes, erudition, artistic skill... and so forth" are "owned by the free mind and are something internal and not external to it, ... by expressing them it may embody them in something external and alienate them, and in this way they are put into the category of "things."[57]

In this way creator's work is an act of self expression or self realization, and thus is an extension of his person. As such it belongs to creator not as possession but as a part of the self. So basic human freedom demands that creator be able to control what they created.

3.3. Utilitarian Theory:

It is not a single theory but rather a cluster of theory advocated by economist such as Bentham and Mill. According to utilitarian approach Government should choose laws and policies that maximize wealth" or "utility." [58]Property rights in intellectual property system are given to creator as an incentive for the social value added by him in the form of value able creation.

Anglo-American systems of intellectual property are based on utilitarian ground. The constitution of united state granted power to congress to create intellectual property rights "[T]o promote the progress of science and useful arts."[59] By assigning property rights an incentive is placed for people to bear expenses and

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56 Ibid;

57 Ibid, P: 337

58 Adam D. Moore, *"Intellectual Property, Innovation, And Social Progress: The Case Against Incentive Argument"*, 26 Hamline L. Rev, 612, (2003), P:606-613. http://faculty.washington.edu/moore2/mooreIP.pdf last visited on 1st December 2005 ; William Fisher, "Theories Of Intellectual Property, P:13-20 ; Tom G..Palmer, *"Are Patents And Copy Rights Morally Justified? The Philosophy Of Property Right And Ideal Objects"* , Harvard Journal Of Law And Public Policy, vol: 13 Number: 3 (Summer 1990) , P: 849-851 .

59 U.S. CONST. art. I, § 8, clause. 8

spending time to invent a new product or to develop new ideas. As president Lincoln remarked, "The inventor had no special advantage from his invention [under English law prior to 1624]. The patent system changed this . . . [I]t added the fuel of interest to the fire of genius in discovery and production of new and useful things."[60]

Basically this theory is based on three premises: first, society ought to adopt a system or institution if and only if it leads to or, given our best estimates, is expected to lead to the maximization of overall social utility. Second, a system of institution that confers limited rights on authors and inventors over what they produce is expected to serve as incentive for the production of intellectual work. Third, the promoting of the creation and dissemination of intellectual work produce an optimal amount of social progress. Therefore, a system of intellectual property protection should be adopted.[61]

60 Quoted by Justin Hughes in "*The Philosophy Of Intellectual Property*", P:305.

61 Adam D. Moore, "*Intellectual Property, Innovation, And Social Progress: The Case Against Incentive Argument*", P : 612.

Chapter2: Intellectual Property And Islam

1. Basis Of Intellectual Property In Islam

Concept of intellectual property has two aspects one is related to wealth and the other is related to the knowledge. In shari'ah wealth and knowledge both are included in the five maqāṣid for the protection of which whole system of Islamic Law is developed. To find out roots of IP understanding of the concept of knowledge *('ilm)* and its importance and the place of a knowledgeable person in Islam and the concept of māl is necessary.

In the Islamic theory of knowledge, the term used for knowledge in Arabic is *"'ilm"* which is an all-embracing term covering theory, action and education[62]. It has many connotations science, learning, knowledge, lore and information.[63] In its broad sense this word is used to denote both religious and scientific knowledge by the Muslim scholars.

1.1. Islamic Theory Of *'ilm*:

According to the Islamic theory of *'ilm* all the knowledge, whether it is known or unknown, rational or mystical, revealed or hidden, scientific or religious, belongs to Allāh (S.W.T) and He discloses from His knowledge what He wants and no one has power to encompass His knowledge.

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62 Dr. Sayyid Wahid Akhtar, "*The Islamic Concept of Knowledge*" in Al-Tawhid A Quarterly Journal of Islamic thought, Vol: 12 No. 3, published by the Foundation of Islamic Thought, P: 1, http://www.al-islam.org/al-tawhid/islam-know-conc.htm. .(Last time visited on 25 November 2006).

63 Aḥmmad bin Muḥammad bin Alī al-fiyūmī, "*Miṣbaḥ al-Munīr Fī Gharā'ib Al-sharḥ Al-kabīr*", (Maktabah al-'Ilmiyah), S.v. 'ilm, P:427.

Allāh (S.W.T) said in the Qurān: (**...HE knoweth that which is in front of them and that which is behind them while they encompass nothing of His knowledge save what He will...**).[64]

Out of His vast knowledge, God has imparted a little to human beings, some through divine revelation and some through human reason.

(And of knowledge ye have been vouchsafed but little.)[65]

A portion of this knowledge Allāh S.W.T reveals on mankind in the form of Qurān. Qurān contains principles and guidelines for each and every aspect of life. It contains knowledge about religion, way of living, various transactions between human beings, numerous aspects of communal life, ranging from the law of war and peace to the freedom of religion and also scientific knowledge like birth of human being, birth of universe [66]and many other things.

The Sunnah[67] of Prophet Muhammad (P.B.U.H.) which is after Qurān the second major source of knowledge is the practical explanation of the Qurān. All this knowledge is gift of God[68] for all mankind and is applicable for all era[69] and Allāh (S.W.T) himself took the responsibility of its protection.[70]

These two are protected knowledge based assets of Islam which for the protection of their integrity and dignity have been placed in a Trust (*Al-Amānah*) The Trust is universal, timeless and irrevocable and established for the benefit of all, as every human being, Muslim or non-Muslim, is free to benefit from the protected

64 Q: 2:255; 6:59 which say (.... Not a leaf falleth but He knoweth it...).

65 Q: 17:85

66 Q: 86:6-7, 76: 2; 85:1; 78:6-7.

67 The Sunnah consists of the words, deeds, approvals, and disapprovals of Prophet Muhammad (peace be upon him). Ṣaḥīḥ Al-Bukharī and Ṣaḥīḥ Muslim are the two well-known compilations of authentic traditions of the Sunnah.

68 Q:36 :5, (A revelation of the mighty, the merciful); 39:1

69 Q: 81: 27, ("This naught else than reminder unto creation");25: 1; 38: 87.

70 Q:15: 9 ("Lo we even we, reveal the reminder, and lo! We verily are its Guardian")

knowledge. All Muslims are trustees of the protected knowledge, because their faith is inseparable from it. As a trustee they are obliged to preserve this knowledge from the irreverence of misinformed critics, from the assault of misguided assailants, and from the mockery of fools. As trustees, it is also their duty to transfer these assets to the next generation of Muslims without changing the nature of the Trust and without depreciating the value of its assets.[71] Islamic law considers any amendment in the text of Qurān and ḥadith offensive and also prohibits false attribution in both the cases.

But this doesn't means that the knowledge of Qurān is rigid. Allāh (S.W.T) laid down in Qurān some general and flexible principles and also some specific or firm rules[72] and allows Muslims to decide their problems in the light of them with consultation by using their intellect.

This concept of common heritage of Moral Desert theory is somehow similar to the Islamic concept of knowledge. Some opponents of the intellectual property rights denied allocation of any form of property rights in the knowledge. According to them it restricts the availability of knowledge which is common heritage of all mankind and not the property of individual. If one analyzes the meaning of above given verses it has been found that these verses only tell us about the origin of all knowledge (which is Allāh S.W.T) and that no one is able to know or understand any thing without His will and does not mention any thing about the compulsory sharing of knowledge or information.[73]

Secondly capability of understanding and absorption of information of every person varies according to the person's background, preparation, state of mind, intention, and the quality and quantity of knowledge he already possesses. "As he

71 Ali Khan, "*Islam as Intellectual Property "My Lord! Increase me in knowledge.*", Cumberland Law Review; 2001.P:631-684.

72 For example, the Quran prescribes fixed shares of inheritance for a decedent's children, parents, and spouse. Q 4:11-12.

73 There are ḥadīths which tells us that the sharing of religious knowledge is compulsory. We will discuss them in detail in next heading.

reaches higher stations, new doors are open to him through which he looks upon new and subtle meanings."[74] The grasp of knowledge, therefore, varies from person to person and stage to stage. It also varies from age to age, as the knowledge contains secrets that maybe disclosed to one generation, but not another.[75]

> As Allāh S.W.T said in Qurān: **(Are those who know equal with those who know not?)**[76]

Similarly a hadiths tells us that the Ḥażrat Khiżar (P.B.U.H) was more knowledgeable than Ḥażrat Mūsā (P.B.U.H).[77] In another hadiths prophet said: **"advise each other in *'ilm*..."**[78]

If all persons have equal capability of understanding and absorption of information then there is no need to advise and to teach each other.

1.2. Islam's Trend Towards *'ilm* (knowledge):

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74 The quotation is taken from Ibn-ʿArabī(d.1240), a Muslim jurist born in Undulusiyyah, Spain. See P: 659 supra foot note :138 of Ali Khan, Islam as Intellectual Property "My Lord! Increase me in knowledge"

75 Q: 51:47. As the Qurān explains "(We have built the heaven with might, and We it is Who make the vast extent (thereof)")The gradual expansion of the universe is an important discovery unavailable to previous generations of Muslims to fully appreciate the meaning of the Qurān. Describing human reproduction, the Qurān states: (He created you in the wombs of your mothers, creation after creation in three folds of gloom" Q:39:6. The three veils of darkness have been identified as (1) abdominal wall (2) Uterine wall, and (3) amino-chorionic membrane (a sac filled with fluid in which the fetus floats). Maurice Bucaille, *"The Bible, the Qurān and Science 205"* (North American Trust 1979). Ibid Supra foot note 139.

76 Q: 39: 9; 35 :28

77 Narrated Ibn ʿAbbās: That he differed with Hur bin Qais bin Hisn Al-Fazari regarding the companion of (the Prophet) Moses. Ibn ʿAbbās said that he was Khadir. Meanwhile, Ubai bin Kaab passed by them and Ibn Abbas called him, saying "My friend (Hur) and I have differed regarding Moses companion whom Moses, asked the way to meet. Have you heard the Prophet mentioning something about him? He said, "Yes. I heard Allāh's Apostle saying, "While Moses was sitting in the company of some Israelites, a man came and asked him. "Do you know anyone who is more learned than you? Moses replied: "No. " So Allāh sent the Divine Inspiration to Moses: Yes, Our slave Khadir (is more learned than you.)' Moses asked (Allāh) how to meet him (Khadir)....." See Abū Abdullah Muḥammad Bin Ismail al- Bukhārī, Translator Muḥammad Moḥsin Khan,"*Ṣaḥīḥ Bukhārī (English translation)* ", Vol: 1, (Qāżi publications,4th revised edition) Book: 3, Ḥadith no. 74. (hereafter referred as al-Bukharī, Ṣaḥīḥ Bukharī).

78 'Abdul 'Azīm ibn 'Abdul Qawī al-Manzarī, "*Al-Targhīb Wa al-Tarhīb min al-Ḥadīth al-Sharif*", Vol: 1,(Dārul Fikr), p: 123,.

Islam encourages knowledge and also knowledgeable person and remembers them as *Ulul Albāb* and *Ulul 'ilm*.[79] The word *al-'ilm* or its derivatives and associated words are used in 704 verses. The first teaching class for Ādam started soon after his creation and Ādam was taught all the names by Allāh S.W.T[80] and the first revelation of Qurān started with the word "*iqrā'i*"[81] which means read or recite. From this the importance of '*ilm* in Islam is evident a religion in which first revelation ordered messenger of Allāh S.W.T and his believers to read.

Islam always discourages concealment of '*ilm* and encourages dissemination of knowledge whether it is in the form of knowledge (religious or non-religious) or action. The reason behind this is that concealment of '*ilm* leads to falsehood, injustice and many other serious offences[82] prohibited in Islam whereas the dissemination of knowledge leads to truth, justice and save people from committing sins.

Allāh (S.W.T) said: **("confound not truth with falsehood, nor knowingly conceal the truth")[83]**

Allāh (S.W.T) prohibited from attributing any Quranic verse to human being and also attribution of any man made verse to Allāh and consider it a sin.

Allāh (S.W.T) said: **("who doth greater wrong than he who inventeth a lie concerning Allāh? Such will be brought before their Lord, and ...Now the curse of Allāh is upon wrong-doers")[84]**

And in another verse Allāh S.W.T said:

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79 Q: 2:197 and 31:12

80 Q: 2: 31.

81 Q: 96: 1.

82 Offences like fraud, theft, false testimony, dishonesty, fake documents, fake currency and many other offences.

83 Q:2:42 , 140,146, 174

84 Q:11: 18

("And lo! There is a party of them who distort the Scripture with their tongues, that ye may think that what they say is from the scripture, when it is not from the scripture. And they say: It is from Allāh, when it is not from Allāh; and they speak a lie concerning Allāh knowingly")[85]

Similarly false attribution of ḥadīth is also prohibited in Islam.

Prophet P.B.U.H said in a ḥadīth narrated by Ali: **The Prophet said, "Do not tell a lie against me for whoever tells a lie against me (intentionally) then he will surely enter the Hell-fire"[86]**

In another ḥadīth reported by Abū Hurayrah Prophet P.B.U.H prohibit concealment of knowledge. Prophet P.B.U.H said:

"Whoever is asked about '*ilm* which he learns and conceal, will be lashed with the bridle of fire from the hell"[87]

In another hadith reported by Abi Sa'id Al-khużrī prophet specified the religious knowledge Prophet P.B.U.H said:

"Whoever conceals '*ilm* that would benefit others in religious matters will be lashed with the bridle of fire from the hell on the day of judgment" [88]

The opponents of these intellectual property rights oppose on the basis of this ḥadīth and contend that these laws restrict the access to knowledge which is against the Islamic ethics. But deep analysis of the ḥadīth it has been found that the "'*illah*" given in this hadith is concealment of knowledge and not the transaction involving knowledge. There is nothing in this hadith and not any other

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85 Q: 3:78

86 Al- Bukhārī, "*Ṣaḥīḥ Bukhārī (English translation)*" ,Vol:1, Book: 3, Ḥadīth no.106 , 107, 108, 109, 110

87 Al-Munzarī, "*Al-Targhīb Wa al-Tarhīb min al- Ḥadīth al-Sharif*", Vol: 1, P:121.

88 Ibid, P:121.

ḥadīth which prohibits transactions involving knowledge. On the other hand there is *aḥādīth* which allow transactions involving knowledge.[89]

The concept of intellectual property right does not contradict the concept of '*ilm* in Islam rather it supports Islamic concept which is dissemination and easy access. The purpose of intellectual property is dissemination of knowledge for the benefit of people and it does not result in exclusivity of its resources[90]. It only results in the control of the access, content and use of the information which is also permitted in Islam.

In a Ḥadīth, reported by Ibn 'Abbās Prophet P.B.U.H said:

"Advise each other in knowledge. Indeed the betrayal of one of you in knowledge is worse than his betrayal in the property. Allāh will judge your responsibility"[91]

And in another hadith reported by Samrah ibn Jundab Prophet P.B.U.H said:

"There is no other form of ṣadaqah that equals knowledge which is being disseminated."[92]

Some Muslim scholars differentiate between the religious and non religious knowledge. In general the term '*ilm* is used to denote all forms of '*ilm* in Islamic scholarship whether it is religious or non religious.[93] Spreading of religious knowledge is obligatory for every Muslim. As Prophet P.B.U.H said in a ḥadīth narrated by 'Abdullah Ibn Mas'ūd:

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89 Al-Bukhārī, "*Ṣaḥīḥ Bukhārī (English translation)*" , vol: 3, Book: 36, Ḥadīth no. 476;Vol: 7, Book: 62, Ḥadīth no.24

90 Ida Madieha Abdul Ghani Azmi, "*Authorship and Islam in Malaysia: Issue in perspective*", IIC international review of industrial property and copy right law, P:653

91 Al-Manzarī, "*Al-Targhīb Wa al-Tarhīb min al-Ḥadīth al-Sharīf*", Vol: 1, P:123

92 Ibid, P:119

93 According to my view it is not possible to make separation between the religious knowledge and knowledge of other sciences because they are interlinked with each other. Even Qurān which is knowledge given by Allāh is a combination of both religious and knowledge of other sciences.

The Prophet said, "Do not wish to be like anyone except in two cases. (The first is) A person, whom Allāh has given wealth and he spends it righteously; (the second is) the one whom Allāh has given wisdom (the Holy Qurān) and he acts according to it and teaches it to others. "[94]

Despite this fact that the dissemination of the religious knowledge is obligatory Islam gave certain rights to the person over his knowledge to protect it from the unwarranted inaccuracies and false hood which include right to choose proper person and proper time. In a ḥadith, reported by Anas ibn. Mālik tells us about the right to choose the recipient of '*ilm*.

Prophet said: **"Seeking knowledge is obligatory for all Muslims. The one who gives knowledge to those who do not deserve it is like the one who puts fake jewels and gems on a pig's neck" [95]**

Another ḥadīth narrated by Anas bin Mālik tells about the right to chose proper time of dissemination of such knowledge.

"Once Mu'adh was along with Allāh's Apostle as a companion rider. Allāh's Apostle said, "O Mu'adh bin Jabal."Mu'adh replied, "Labbaik and Saadaik. O Allāh's Apostle!" Again the Prophet said, "O Mu'adh!" Mu'adh said thrice, "Labbaik and Saadaik, O Allāh's Apostle!" Allāh's Apostle said, "There is none who testifies sincerely that none has the right to be worshipped but Allāh and Muhammad is his Apostle, except that Allāh will save him from the Hell-fire." Mu'adh said, "O Allāh's Apostle! Should I not inform the people about it so that they may have glad tidings? "He replied, "When the people hear about it, they will solely depend on it." Then Mu'adh

94 Al- Bukhārī, "*Ṣaḥīḥ Bukhārī (English translation)*" , Vol:1, Book: 3, Ḥadīth no. 73

95 Al-Manzarī, "Al-Targhīb Wa al-Tarhīb min al-Ḥadīth al-Sharīf", vol: 1, P :96.

narrated the above-mentioned Hadith just before his death, being afraid of committing sin (by not telling the knowledge).[96]

In an *āthār* it is reported that Harir ibn Salmān ibn Samīr said:

Do not narrate false hood to al-hukama', do not narrate wisdom to al- sufaha' for they will tell a lie against you, do not conceal knowledge to those who deserve it for you will commit a sin, do not narrate it to those who do not deserve it, for you will become ignorant. Indeed you are obliged to observe the right in your knowledge as you are obliged to observe right in your property.[97]

These ḥadīths primarily talk about the control of access of knowledge in a sense of revealed knowledge. There is nothing in these ḥadīth which suggest that the sharing of knowledge, even in the sphere of religious knowledge, would provide a more suitable environment for the exchange of information.[98]

Islam gives the concept of dissemination and easy access of knowledge with certain checks and balances. The only need is to create a balance between the duty of dissemination, protection and rights of the receiver of knowledge.

Every person is responsible for his thoughts and the knowledge and the statement which he said and transmitted to others. As Allāh S.W.T reward and punish on the basis of good and bad deeds. As Allāh said in Qurān: **((O man), follow not that whereof thou hast no knowledge. Lo! The hearing and the sight and the heart-of each of these it will be asked.)**[99]

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96 Al- Bukhārī, "*Ṣaḥīḥ Bukhārī (English translation)*", Vol: 1, □adīth no.130.

97 Abū Muḥammad 'Abdullah ibn 'Abd al-Raḥmān, Sunan Al-Daraymī, Vol: 1 P 105 mentioned by Ida Madieha Abdul Ghani Azmi, "*Authorship and Islam in Malaysia: Issue in perspective*", II C international review of industrial property and copy right law, P:676.

98 Ida Madieha, "*Authorship and Islam in Malaysia: Issue in perspective*", P:676.

99 Q:17: 36.

In this verse Allāh forbids from speaking without knowledge only on the basis of suspicion which is mere imagination and illusion. Every person will be asked about the words he speaks, hear by his ears, seen by his eyes and thought in his heart on the Day of Judgment.[100]

Allāh said on another place:

(When the two receivers receive (him), seated on the right hand and on the left, He uttereth no word but there is with him an observer ready.)[101]

And also said in Surah al-Infiṭār:

(Lo! There are above you guardians, Generous and recording, Who know (all) that ye do)[102]

the above two verses mentioned that each and every word spoken by a man and each and every movement by him is written and recorded by the two recorders in their name and on the basis of this record reward or punishment will be decided on the last day.[103]

As Allāh said in Qurān:

(This Our book pronounceth against you with truth. Lo! We have caused (all) that ye did to be recorded) [104]

And also said on another place:

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100 Ibn Kathīr, "*Tafsīr ibn Kathīr (abriged by the group of scholars under the supervision of Shaykh Sayfur-Rahmān Al-Mubārik Purī)*", vol: 5, (Dār-ul-salām, Lahore, Riyāżh, Huston), P: 621-623.

101 Q: 50: 17-18.

102 Q: 82: 10-12.

103 Ibn Kathīr, "*Tafsīr ibn Kathīr*", vol: 9, P: 227-229; vol: 10, P:389-393.

104 Q: 45: 29

(And every man's augury have We fastened to his own neck, and We shall bring forth for him on the day of resurrection a book which he will find wide open. (And it will be said unto him): Read thy book. Thy soul sufficeth as reckoner against thee this day.) [105]

These two verses mentioned that each and every human deed is recorded and written whether small or big, whether he did it in the day light or he did it in the darkness of night. Every one will be punished according to the record and nothing has been recorded against a man only what he has been done and no one is treated unjustly. Every one is responsible only for his deeds and words he speaks. [106]

Prophet P.B.U.H said:

"A slave (of Allāh) may utter a word which pleases Allāh without giving it much importance and because of that Allāh will raise him to degrees (of reward); a slave (of Allāh) may utter a word (carelessly) which displeases Allāh without thinking of its gravity and because of that he will be thrown into the Hell fire." And with words: **"A slave (of Allāh) may utter a word without thinking whether it is right or wrong, he may slip down in the fire as far away a distance equal to that between the east..."**[107]

This ḥadīth shows that there is a relation between man and the word spoken by him and he is responsible to for its result whether it is good or bad and it also tells us that he does not speak these words after thinking and considering.[108] If a person speaks and proves words after thinking and consideration for a long time then he is more responsible for them.

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105 Q: 17: 13-14.

106 Ibn Kathīr, "*Tafsīr ibn Kathīr*", vol:9, P: 34-36, vol: 5, P: 587-590.

107 Al- Bukharī, "*Ṣaḥīḥ Bukharī (English translation)*", Vol: 8 Book 76, ḥadīth no.485

108 Shaḥab-ul-Dīn Aḥmad bin Ali ibn Muḥammad Ḥajar al-'Asqilānī, "*Fatḥul Bārī*", vol: 24, (Maktabatul Kuliyyāt al-Azhar, Al-Azhar, new edition 1398 hijrah/ 1978), P: 99.

In another ḥadīth prophet P.B.U.H said: **"he who called (people) towards righteousness he would be rewarded like those who followed him diminishing nothing in any respect to their rewards and he who called (people) to error, he shall carry the (burden) of his sin like those who committed it, without diminishing any thing with respect to their sin"**[109]

According to al-Nawawī this ḥadīth include education of knowledge, prayers...etc;[110] so every person is responsible for what he speaks, what he writes, what he made what he invent on the Day of Judgment so there is a strong relationship between the person and his words deeds.

1.3. Historical Perspective:

Islamic history tells us that Muslims had the awareness of the phenomena in early era and its stigmatization[111] was deeply embedded in Islamic scholarship though not used for the purpose of economical gain as used today by the man made laws.

Let us start first with the collection of hadiths[112] to preserve them in written form. All the texts were preceded by a series of references who accepted the responsibility for their quotations. It was the duty of the reference to quote the name of authority in order to shift the burden and provide necessary confidence in the audience. The quote without quoting authority would be ignored. There are many statements about its importance and place in Islam as Abdullah bin Mubarik said: "*Asnād* is from religion, if there is no *asnād* than every one say what he

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109 Al-Nīsābūrī, Imām Abī al-Ḥusaīn Muslim Bin al-Ḥujāj al-Qashīrī, "*Ṣaḥīḥ Muslim (corrected and revised by Dr. Ḥasan and reprinted into English by 'Abdul Ḥamīd Ṣadiqī)*", vol: 4B, (Ashraf Islamī Publishers, Lahore, 1990), P: 226. (hereafter referred as Imām Muslim, Ṣaḥīḥ Muslim (English translation)).

110 Imām al-Nawawī, "*Ṣaḥīḥ Muslim bī Sharḥ al-Nawawī*", vol: 16, (Dārul Kutub Al-'Ilmīyyah, Beirut), P:227.

111 In Qurān Allāh S.W.T stigmatizes the people who ascribe their words as words of Allāh and also Prophet P.B.U.H prohibit and stigmatize those who ascribed their words as words of prophet. It was not only for the protected knowledge. A scholar Abu- 'Ubaīdah al-Qāsim in his book "The classes of prominent poets" discusses the adulteration of poetry. And also a renowned scholar in history and sociology wrote about the practice and some tactics of ascribing work of earlier authors to one self in his famous book "Al-muqadammah". Ida Madieha, "*Authorship and Islam in Malaysia: Issue in perspective*", P:673

112 Ḥadīth (the quote of Prophet P.B.U.H) was written 8th century.

wants."[113] On another place he said that "in between me and my nation is *asnād.*"[114] And Al-Thurī said: "*Asnād* are weapons of believers"[115]

This system of *Isnād* (chains of transmission) is clear evidence of honesty in transmission of text. This concern of Islam with *Asnād* were not limited only to the religious knowledge but covered other fields like history, literature, news and interpretation and crafts like textiles, pottery and bookbinding.

Another method used by the Muslim scholars for extraction of a text from the work of other scholars was attribution of the statement towards the person who says it and mentioning of the references relied upon. Yūsuf Qarżāwī said in his book *Al-Rasūl wal 'Ilm*: "to attribute the statement to the person who says it and the thought to its thinker is honety of knowledge. Do not seek benefit from the works of others and attribute the fruits to yourself because it is a kind of theft, deceit and piracy."[116] al-Qarṭabī, Al-suyūtī, Al-Mardāwī and many other scholars said that "it is the prosperity of the statement to attribute it to a person who said it." [117] al-Nawawī said: "change in the statement of others is not allowed if the meaning of the statement of others change during Quoting or there is any doubt about it than mention it in the marginal or foot note of the work"[118]

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113 Al-Qāżī Ghayāż Bin Mūsā al-yaḥṣabī, "*Al-ilmā' Ilā Ma'rafatu Uṣūl al-Riwāyah Wa Taqyīd al-Samaā*'", (Dār Aḥyā'u al-Turāth al-Qāhirah and Maktabah al-'Atīqah, Tyūnas, 1st Edition, 1389 Hijrah/ 1970), P: 194 (hereafter referred as Al-Qāżī Ghayāż, Al-ilmā' Ilā Ma'rafatu); Imām Abī al-Ḥūsaīn Muslim Bin al-Ḥujāj al-Qashīrī Al-Nīsābūrī, "*Ṣaḥīḥ Muslim (Arabic)*", vol: 1, (Dārul Aḥyā'u al-Turāth al-'Arabī), P: 11 (hereafter referred as Ṣaḥīḥ Muslim Imām Muslim (Arabic)); Al-Muḥadīth Abī Bakar Aḥmmad Bin Alī Khaṭib Baghdādī, "*Tārīkh-e-Baghdād*", vol: 6,(Dārul kutub Al-'Ilmiyyah Beirut), P:144; Dr. Maḥmūd al-ṭaḥān, "*Taysīr Muṣṭaliḥ al-Ḥadīth*", (Maktabah al-Rushd, 5th edition, 1403 hijrah/ 1983), P :180.

114 Imām Muslim, "*Ṣaḥīḥ Muslim (Arabic)*", P: 11vol: 1.

115 Maḥmūd al-ṭaḥān, *"Taysīr Muṣṭaliḥ al-Ḥadīth"*, P: 180.

116 Yūsuf Qarżāwī, "*Al-Rasūl wa al-'Ilm*", (Maktabah Wahbah Zuḥaylī, al-Qāhirah, 2nd edition 1428 hijrah/2006), P:63.

117 Abī 'Abdullah al-Qarṭabī, "*Al-Jāma' Lī Aḥkāmul Qurān*", vol: 1, (Dārul fikr), page no, 3; 'Alā'u al-Dīn Abī al-Ḥasan Alī bin Sulmān al-Mardāwī, "*Al-Inṣāf*", vol: 1, (Dār Aḥya'u Al-Turāth, Beirut 2nd edition, 1400 hijrah/ 1980), P:16 (hereafter referred as al-Mardāwī, Al- Inṣāf) ; Jalāl al-Dīn 'Abd al-Rahmān Al-Suyūtī, "*Al-Mazhar Fī 'Alūm al-Lughah Wa Anw'ahā*", vol: 2, (Al-Maktabah al-'Aṣariyah, Beirut), P:319; Muhammad Jamāl al-Dīn al-Qāsimī, "*Qawa'id-ul-Taḥdīs*", Dārul Kutub al-'Ilmiyah, (Beirut, 1st edition, 1399 hijrah/1979), P:40.

118 Imām al-Nawawī, "*Ṣaḥīḥ Muslim bi Sharḥ al-Nawawī*", vol: 1, P: 36-37; Al-Qāżī Ghayāż, "*Al-ilmā' Ilay Ma'rafatu*", P:185-186.

In case of craft on most works normally name of craftsman, date and place of manufacture was mentioned.

The third method is method for transmission of work which was adopted by muslim scholars. In this method scholars give different types of certificate to transmit their works to their students and there are specific names for each type. The names of some of these are: *Ijāzah, Manāwalah, Mukātbah, Waṣiyyah, Al-A'lām and Wajādah.*[119]

The method adopted in tenth 10th century for checking the accuracy of work transmitted in the published form further threw light on practice of Muslims in this regard. Publication of book was not allowed for every one. The person who wanted to publish a book needs a certificate of audition (*Ijāzah Sam'ī*)which certify that the person studied the book personally under the supervision of author or another scholar[120] authorized to teach the book and had been given the license to publish the work.[121] One of the examples of such *Ijāzah* is given at the end of the *Al-Risālah* by Al-Shāf'ī in which he allowed his student Sulmān Bin Rabī' to copy his book *Al-Risālah.* It was against the practice of that time because usually scholars allowed to or narrate about them and the permission of a copying was a [122]unique thing.

If the books written in this period and after this has been examined such as 1050 AD by Ibn Sayyadah "*al-Mukasas*" and "*al- Durar al-Kamina*" written by Ibn

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119Abī 'Abdullah Muḥammad Bin 'Abdullah al-Ḥāfiẓ al-Nīsābūrī, "*Ma'arafatul 'Alūmul Ḥadīth*", P: 256, Maktabah al-Halāl, Beirut, 1st edition 1409 hijrah/ 1989; Al-Qāżī Ghayāż, "*Al-ilmā' Ilā Ma'rafatu*", P:68-121; Jalāl al-Dīn 'Abd al-Raḥmān Al-Suyūtī, "*Tadrīb-ul-Rāwī fī Sharḥ al-Taqrīb al-Nawawī*", P: 8-13 vol: 2, Dārul Kutub al-'Ilmiyah, Beirut, 2nd Edition, 1399/1979; Maḥmūd al-ṭaḥān, "*Taysīr Muṣṭaliḥ al-Ḥadīth*", P:159-164.

120 In such case he cited his authority going back directly to the author or through one or more authorized scholars intervening between the author and himself.

121 Only the original author of the work has the right to give license and that shows the relationship of author with his knowledge. See Makdissi, "*Rise of Colleges*", P: 140-141, Edinburgh university press, 1981

122 See Muḥammad Bin Idrīs al-Shāfi'ī, "*Al-Risālah (interpreted and examined by Ahmmad Shākir)*", (Dārul Kutub al-'Ilmiyah, Beirut), P: 17 and for the text of Ijāzah see P:601; Dr. Bakr Bin 'Abdullah Abū Zayd, "*Milkiyyatul al-Tā'ilīf Tārīkhān wa ḥukmān*", al -'Adad:2 , (Mujallatul Majma' al-Fiqh al-Islamī, , year and publication details not available), P:222.

Hajar Al-'Asqalānī in 1450AD it reveals that author quote their references together with their sources in their introduction. They quote the name of the original author who was normally a master the name of student who had transmitted the work, and who had edited and analyzed the work.[123]

2. Concept Of MĀL In Sharī'ah And Intellectual Property

There are many terms in Arabic used by Muslim scholars for intellectual property rights. Some of These are: *Ḥaqq al-Intāj al-Dhahnī, Ḥaqq al-Ibtikār, Milkiyyah al-Ma'nawiyah, Ḥaqq al-Ma'nawiyah, Ḥaqūq al-Wāridah Alā Amwāl ghayr 'Adiyah, al-Ḥaqūq al-Muta'aliqah Bil 'Umālah, Ḥaqūq al-Fikriyah, Ḥaqq al-Ibda', Ḥaqūq al-Intāj al-'Ilmī* The legal position of intellectual property had been considered in the Islamic Law by the jurists first in 11th hijrah by Ibn Hazam in his book "Al-Muhallā". In this book he considered the validity of transactions which involves books. According to him the transactions of books are valid irrespective of the fact that the subject matter (knowledge) of such transaction has no monetary value because what is being traded in a sale of book is mere paper and ink. The *'ilm* contained in the book does not have separate distinct existence.[124]

Later it was discussed in detail by al-Qarāfī in his book *al-Furūq*. He objected to the concept of ideas as property rights that can be owned and transacted separately. According to him intellect which is the source of idea can not be inherited by any other person likewise following the legal position of source (intellect) ideas can not be separated. He recognizes the existence of author's rights in his ideas. But these are merely personal rights which according to his

123 The language used by the original authors was difficult and usually the meaning of the text was transmitted orally which complement the written work. Hence, only those who are well acquainted with the oral transmission could explain the meaning of technical vocabulary (al-'Iṣṭalāḥāt). So student often propagated the work of their master by writing commentaries based on oral teaching. Ibid, Rise of Colleges, P: 140-141.

124 Alī Ibn Aḥmmad Ibn Ḥazam, "*Al-Muḥallā*", Vol: 9,(Dārul-Fikr), P: 44 -47.

view ended with the death of author, who is the owner of the intellect from which ideas originate.[125]

Many contemporary scholars however are reluctant to accept intellectual property rights as a *māl* due to the view of Ḥanafī jurists. According to their view only the things with a corpus can qualify as *māl* and they do not consider *manfa'ah* and rights as *māl*.

In order to understand the legal position of intellectual property rights in Islamic law understanding of the concept of *milkiyyah* (ownership), *ḥaqq* (right) and the concept of *māl* (property) in all schools of jurisprudence, and the relation of these three terms with each other is necessary.

2.1. Concept of Right:

2.1.1. Linguistic and juristic Meaning of rights:

The word used for the term right in Islamic law is "*Ḥaqq*" which in Arabic language means "prove", "surety", and "necessity"[126]. It means according to the *Qāmūs al-muhīṭ* "something that can be justly claimed or the interests and claims that people may have by law."[127] The jurists also used this word in the same meaning. Some jurist defines it as: "legitimate interest (*maṣlaḥāh*)" and some others as "capability to do or perform certain acts to attain interests protected by the law." [128]

125 Cited in Al- Fatḥī al-duraynī, "*Ḥaqq al-Ibtikār*", (Bayrūt: Mū'asisah al-Risālah, 4th edition), P:55-80.

126 'Alāmah Abī al-Faẓal Jamāl-ul-Dīn Muhammad Bin Mukaramah Ibn-i-Manẓūr, "*Lissān al-'Arab*",vol:10, (Dār al-Ṣādir, Beirut), S.v. "Ḥaqq",P:51

127 Allāmah al- Laghwī Majd-ul-Dīn Muḥammad Bin Fīrūz Ābādī, "*Alqāmūs al-Muḥīt*", (Mū'asisah al-Risālah,Beirut,2nd edition, 1987/1407 hijrah). S.v. "Ḥaqq", P: 1129.

128 Maṣlaḥāh means benefits which Allāh S.W.T. laid down for the benefit of human and to avert the evil .

Zarqā'i define it in his book *Madkhal* as: "right is an authority determined by Shari'ah in the form of power and obligation"[129] and Wahbah Zuḥaylī defines it as: "what the law recognizes for an individual to enable him to exercise a certain authority or bind others to perform something in relation to him."[130]

Ḥaqq and *manfa'ah* [131] are two important terms used in this chapter. For understanding the concept it is necessary that the relationship between the two terms should be known.

According to Alī khafīf, *ḥaqq* is a general term which comprehends all the *manfa'ah* (benefits) and interest to which individuals are entitled by law and thus they are owner of these interests. All *manfa'ah* are subject matter of rights but not all rights are subject matter of *manfa'ah.* In other words it means that term right is general and *manfa'ah* is specific. Both these terms equally apply to those things which are utilized for the benefits like residing in a house and riding a car and share with each other the scope and extent of *manfa'ah.* But vary from each other when the term *ḥaqq* applies to the interests which are not result of beneficial use of thing like right of custody right of guardianship etc. some jurist use it as a synonym of *manfa'ah.* But the terms are not same; there exists a difference between them. When the term *ḥaqq* is used attention goes towards the person who is entitled to it by law while in case of *manfa'ah* attention goes towards subject matter from which a person receives benefits. For example riding in a car is benefit which attaches to the car while the capability to ride a car is a right which is conferred on the person who is entitled to it. So this means that *manfa'ah* is the

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129 Muṣṭafā Aḥmmad Zarqā'i, "*Madkhal al-Fiqhī al-'aām*", vol: 3,(Dārul Fikr, 1st edition), page no 10 (hereafter referred as Zarqā'i, Madkhal al-Fiqhī al-'aām).

130 Aḥmmad Raysūnī, Wahbah Zuḥaylī and 'Uthmān Shabīr, "*Ḥaqūq al-Insān Maḥwar Maqāṣid al-Shar'iyyah*", (Silsilah Kitāb al-'Ummah) , P: 49.

131 Manfa'ah literally means benefit and advantage or the means used in achieving such benefits and advantages. According to this meaning manfa'ah includes in general all benefits taken out of a thing either thing is a physical structure or in the form of substance for example the milk and calf of the cow, the fruits of a tree, the rent of a house.

attribute of the subject matter from which such benefit emanates and the right to such benefit is an attribute of the person.[132]

Basically Islam gives five basic rights in the form of maqāṣid *al-Shari'ah* and whole Islamic legal system is developed for the protection of these five purposes of law. These are protection of religion (*ḥifẓ al-din*), protection of life (*ḥifẓ al-nafs*), protection of progeny (*ḥifẓ al-nasl*), protection of intellect (*ḥifẓ al-'aql*), and protection of wealth (*ḥifẓ al-māl*).[133]

Under these basic headings there are many rights for the protection of these rights.

2.1.2. Classification Of Rights:

Jurists classify these rights further to understand the concepts clearly.

I Classification With Respect To Owner Of Rights:

Some jurists classify rights into three kinds on the basis of possessor or owner of the rights:

a. **Rights of Allāh (*Ḥaqūq Allāh*):** These are also called rights of society (*Ḥaqūq al-mujtam'a*) because of benefit of these rights for the whole society for example different prayers and punishment of hudood is rights of Allāh. These rights cannot be waived by pardon and compromise.
b. **Rights Of People (*Ḥaqūq al-'ibād*):** These are the rights given by shari'ah to human being for his "*maṣlaḥah*" to protect his property, life which is the right of whole mankind and also to protect specific right of a person like right of owner in his property. These rights can be waived by pardon and compromise.

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132 Muḥammad Woḥidul Islam, "*Al-Māl: the concept of property in Islamic legal thought*",(Arab Law Quarterly 1999), P: 366-367.

133 Imran Ahsan khan Nyazee, "*Theories Of Islamic Law*", (Islamic research Institute press Islamabad), P: 220-260; Aḥmmad Raysūnī, Wahbah Zuhaylī and 'Uthmān Shabīr, "*Ḥaqūq al-Insān Maḥwar Maqāsid al-Shar'iyyah*", page 49-70

c. ***Ḥaqq* al-*Mushtarik*:** In this *ḥaqūq al-'ibād* and *ḥaqūq Allāh* both are present some time *ḥaqq Allāh* is stronger and it prevails over the right of people and some time *ḥaqq al-'ibad* is stronger and it prevails over the right of Allāh. For example *'idat al-muṭlaqah* right of Allāh in this is to protect parentage from mixing and the right of person in it is to protect parentage of his child. The right of Allāh will prevail in it because protection of parentage is beneficial for whole society. In *qiṣāṣ* right of Allāh is to protect the society from the crime of murder and the right of person in it is to cure his anger by killing the murderer. Right of person prevails over the right of Allāh in this case.[134]

II **Classification On The Basis Of Subject Of Right:** Some classify them on the basis of subject matter of rights into two:

a. ***Ḥaqūq Ghayr al-Māli:*** rights other than property rights like right of *qiṣāṣ*.

b. ***Ḥaqūq Mālī:*** rights related to property. *Ḥaqūq mālī* further subdivides into two categories:

- ***Ḥaqq shakhṣī* (right in *personam*):** *Ḥaqq shakhṣī* is a legal relation between the two humans and according to these rights a person is prohibited to do any thing which is against the other party. For example purchasers right to receive the purchased object and sellers right to receive the payment and the right of wife to receive *nafaqah*.
- ***Ḥaqq 'Aynī* (right in *rem*).**[135] *Ḥaqq 'aynī* is a right given by shari'ah to a person upon a specific thing means a legal relationship between a person and a thing by power of which

134 Wahbah al-Zuḥaylī, "*Al-Fiqh al-Islāmī wa Adillatuhu*", vol. 4, Dārul Fikr Damascus, 2nd edition, P: 369-371.

135 Zarqā'i, "*Madkhal al-Fiqhī al-'aām*", vol: 3, page no 14.

person can dispose off it according to his will like ownership right (*ḥaqq al-milkiyyah*) and other rights related to ownership are *ḥaqūq mālī* (right related to property) the related means rights of benefit (*ḥaqq al-intafā'*) and the right of easement (*ḥaqq al-irtafāq*)[136].

III **Classification With Respect To Source Of Origin:** Some jurist divided them on the basis of origin of these rights into two:

a. ***Ḥaqūq Shar'ī:*** *Ḥaqūq shar'ī* are those rights which originated as a result of *naṣ* (text). *Ḥaqūq shar'ī* further divided into two:

- ***Ḥaqūq Aṣliyyah* (quantifiable rights):** Whereas *ḥaqūq aṣliyyah* or quantifiable rights are rights which are directly granted by shari'ah to the owner not to avert any harm from him for example right of *qiṣāṣ* and right of inheritance. In this case it is not allowed for owner of the right to receive consideration for these rights as sale but he has right to receive consideration in case of compromise. For example in *qiṣāṣ* the owner of the right of *qiṣāṣ* can leave the killer without using his right after receiving money in case of compromise. The money in this case is payment for not using the right which the murderer pays to save his life.[137]
- ***Ḥaqūq* Żarūriyah (absolute rights):** *Ḥaqūq* żarūriyah (absolute rights) are given to the owner of right to avert harm from him for example right of shuf'ah. This right is granted to the neighbor of a land to avert any harm if the owner of that

136 These are rights in adjacent land for example right of way for humans and animals (ḥaqq al-Marūr), the right of water for pasturing and irrigation (ḥaqq al-shurb), the right of way for bringing water (ḥaqq al-majrūr), the right of owners of upper and lower story in a house(ḥaqq al-ta'alā), rights of neighbors (ḥaqq al-jawār). See Wahbah al-Zuḥaylī, *"Al-Fiqh al-Islāmī wa Adillatuhu"*, P:496, vol: 5.

137 Justice Muḥammad Taqī 'Uthmānī, *"Maghrabī Mamālik kay Chand Jadīd Fiqhī Massā'il"*, P:162-165. Mayman publishers. Karāchī.

land sells it. As these are not directly given rights so it is not allowed to take consideration for these rights neither in case of sale nor in the case of compromise.

b. **Customary Rights (*Ḥaqūq 'Urfī*):** Whereas *ḥaqūq 'urfī* are those which originate as a result of customary practice and there is no text in favor and no text against these rights and shari'ah accepted them. Some *ḥaqūq 'urfī* which shari'ah accepted are:
    i. Right to use benefits of tangible property for example right of residence in a house and easement rights (*ḥaqq irtafāq*).
    ii. First acquisition right (*ḥaqq istabqīt*).
    iii. Right of agreement (*ḥaqq 'aqd*).[138]

In case of first type of customary rights (right to use benefits of property) if the use of benefit is for some specific time period than it is allowed for owner that he can take consideration for this as *ijārah* for example leasing of a house to someone for residence. But if the owner transfers this benefit of residence to another person forever then it is the sale of benefit upon which the opinions of scholars are different some allowed it and some disallowed. These are pure rights (*ḥaqūq al-mujaradah*). All easement rights are also pure rights and according to the opinion of Ḥanafī School sale of pure rights (*ḥaqūq al-mujaradah*) is not allowed because according to them only tangible things are *māl* and rights and *manfa'ah* are not *māl*.[139]

But on the other hand they allow the sale of right of way and gave reason that this right belongs to *'ayn* so it is also considered as *'ayn*.[140] So it is clear that all rights which related to are considered as *māl* and sale of these rights are allowed if there

138 Ibid: P:166-168.

139 Ibid: page no .182 Ḥaṣkafī define māl as: "māl means tangible thing which can be used and for which desire and greed can be found among people."

140 Imām Kamāl al-Dīn Muḥammad bin 'Abdul Waḥīd Ibn al-Humām, "*Fatḥ Al-Qadīr*", vol: 6, P:429-430, Dār al-Fikr.

is no risk, ignorance and fraud. Those rights which do not related with *'ayn* these are not considered as *māl* and sale of these are not allowed like right of upper environment of a house or land (*ḥaqq al-ta'alā*) but as a compromise owner can take payment for not using his rights.[141]

Shāfi'ī, Ḥanbalī and Mālikī schools allow the sale of most of these rights because these schools did not consider corpus (*'ayniyyah*) as necessary condition for *māl* and they also consider the permanent benefits (*munāfa'*) as *māl*.[142]

The second type (*ḥaqq iktisāb*) right of first acquisition of all the permitted things which are not owned by any one. For example barren land which is not owned and used by any one if a person converts this waste land into use full land than he becomes owner of that land. If he only marks a boundary line by stones around a waste land he does not become owner of that land but he is more entitled than any one else to convert this land into useful land. This right to convert that land into useful land (before becoming owner) is not allowed to sell according to Ḥanbalī and Shāfi'ī.[143] But in case of compromise owner can leave his right after taking money.[144]

The third type (*ḥaqq 'aqd*) means right to do agreement with others and right to continue agreement with any one for example right of making agreement of lease with owner of a house or land similarly right of work on a post in "*uwqāf*" and right of earnest money in case of leasing of shops and houses. According to Ḥanafī, Shāfi'ī and Ḥanbalī sale of right of work on a post in "*uwqāf*" is not

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141 Taqī 'Uthmānī, *"Maghrabī Mamālik kay Chand Jadīd Fiqhī Massā'il"*, P:188-189.

142 Ibid: P: 169-181. Detail definitions of māl according to different schools of thought come in next topic.

143 Ḥanafī and Mālikī scholars' discussed this right in their books but no one discussed about the sale of these rights. See Zayn al-Dīn Bin Ibrāhīm Ibn Najaym, *"al-Baḥar al-Rā'iq sharḥu kinz al-Daqāīq"*, vol: 8,(Dārul kutub al-Islāmī, 2nd edition), P: 240; Mālik Bin Anas Bin Mālik al-'Aṣbḥī, *"Al-Mudawinah al-Kubrā"*, vol: 4,(Dārul kutub al-'Ilmiyyah,1st edition.1415 hijrah/1995), P:473; For Shāfi'ī and Ḥanbalī schools see Muḥammad Bin Shahāb al-Dīn al-Ramlī, *"Nihayat-ul-Muḥtāj 'Ilā Sharḥ al-Minhāj"*, vol: 5, P:340 Dārul Fikr, Last edition, 1404 hijrah/1984. Ibn Qudāmah, *"Al-Mughnī"*, vol: 5, P: 332.Dār Aḥyā'i al-Turāth 1st edition, 1405 hijrah/1985; Al-Mardāwī, *"Al- Inṣāf"*, vol: 2, P:373-374.

144 Manṣūr Ibn Yūnus Bin Idrīs al-Buhutī, *"Sharḥ al-Muntahī al-Irādāt"*, vol: 6, P: 368. Dārul Kutub, 1982/11402 hijrah.

allowed but as a compromise owner can take money for leaving his right in favor of others.[145]

Earnest money or "*khulū*": when the owner of a house or shop rent out his property he takes some amount of money from lessee as an earnest money. The lessee by paying this amount owns the right to continue lease agreement for the period specified in the agreement. Sometimes the lessee transfers his right to another person and takes payment from him. If the owner of the property wanted to take back his property from the lessee then he has to pay money as agreed both to the lessee. This is the modern form used in cities.

This form is different from the one discussed by Muslim jurists in the books as "*khulū*". According to Mālikī jurists the manager of the *waqf* rent out the property of *waqf* which is not in use to a person who use this property and construct a shop on it and that shop then rent out to him on the specific amount. The rent of that shop equally divided between the waqf and the lessee who construct the shop. In this way both become partner in the benefit of shop. The right of manfa'ah which the lessee own in that property by spending money is "*khulū.*" But it is necessary for this type that the construction is not possible by the property of *waqf.* Another situation mentioned is that some shops are waqf for a mosque. Manager of *waqf* needs money for new construction in the building of mosque or for completion of the building. The rent of the shops is the only source of income and there is no other source for construction of mosque. Each shop is if rent out for 30 dirham. He takes specific amount of money from the lessees and decreases the monthly rents of shops to 15 dirham. So in this way both the lessee and *waqf* becomes partner in the benefit of the shop. [146] So the "*khulū*" is different from the earnest money which the owner of the property took now. Some Mālikī jurists also allow this

145 See Ibid; Shaykh Muḥammad Amīn 'Umar Bin 'Abd-ul-Raḥīm Ibn 'Abidīn, "*Rad-ul-Mukhtār Sharḥ al-Dur al-Mukhtār*", vol: 4, (Dārul Kutub al-'ilmiyyah, 1992/ 1412), P:518-520 (hereafter referred as Ibn 'Abidīn, Rad-ul-Mukhtār)

146 See 'Adwī, "*Ḥāshiyyat-ul-'Adwī 'Ala al-khārshī*", vol. no. 7 P: 79 mentioned by justice Taqī 'Uthmānī , *"Maghrabī Mamālik kay Chand Jadīd Fiqhī Massā'il"*, P:210-211.

right of "*khulū*" in property other than *waqf* on the condition that the lessee makes some construction in it. Mālikī and Ḥanafī jurists allow the transfer of these rights to other for money as a compromise.[147]

Intellectual Property rights are also customary rights which will be discussed in detail in next headings and try to find out whether these rights are according to the teachings and objectives of shari'ah or not.

Another important division of rights with respect to this topic was made by Ibn Rajab. He divided right into five categories: [148]

1) Right of ownership (*ḥaqq Milk*) for example right of master in the property of slave.

2) Right to own a permitted (*mubāḥ*) thing (*ḥaqq al-tamaluk*) for example right of "*mużārib*" in profit after gaining and before distribution. [149]

3) Right to use benefits (*ḥaqq intafā'*) for example right of lessee to enjoy benefit of residence in a house in case of lease agreement.

4) Right of "*ikhtaṣāṣ*" for example a person who sits in a mosque on a place first he is more entitled to sit on that place. By first capturing that place he makes it specific for himself but by doing so he does not become owner of that place.

5) Right to own a thing with respect to satisfaction of claim of any other right for example right of mortgagee with mortgage.

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147 Taqī 'Uthmānī , "*Maghrabī Mamālik kay Chand Jadīd Fiqhī Massā'il*", P: 208-216

148 'Abd-ul-Rahmān Bin Aḥmad Ibn Rajab, "*Qawāid fī al-Fiqh al-Islāmī*", (Dārul Kutub al-'Ilmiyyah), P: 188. (hereafter referred as Ibn Rajab, Qawāīd fī al-Fiqh al-Islāmī)

149 'Abd al-Razāq al-Sanhūrī mentioned in his book Maṣādir al-Ḥaqq that there is a middle stage in between the ḥaqq al-milk and ḥaqq al-tamaluk which only Islamic law differentiates. Western law does not discuss this middle stage. According to him ḥaqq al-tamaluk is Ibāḥah and milk is right if a person sees a house and he is interested to purchase it. Before the acceptance of seller he has only right to own (ḥaqq al-tamaluk) which is general. After the acceptance of seller he has right of ownership in it which is specific. This means right to own is general and right of ownership is specific. See 'Abd al-Razāq al-Sanhūrī, "*Maṣādir al-Ḥaqq*", vol:1, (Al-Majma' al-'Ilmī al-'Arabī al-Islāmī), P: 9-12

2.2. Concept of Ownership

2.2.1. Linguistic and juristic meaning of ownership:

The word use in Islamic law for ownership is "*Milkiyyah" or "Milk"*. The root word is *"Mulk"* which means "possessing things, and the ability to operate it by the owner"[150]. In *Qamūs al-Muhīt* this term is defined as: "ownership means to obtain control or power over a thing to operate it according to his will."[151]

In other words it is the name of relationship between things and human beings.

Islamic law defines ownership in different ways. Ibn Subkī defines it as: it is a legal relationship between corpus (*'ayn*) or benefit (*manfa'ah*) of a thing and human that gives human being to whom it belong power or authority to get benefit from it and right of disposal over it"[152]

Qarāfī defined it as: "it is a legal relationship between corpus (*'ayn*) or benefit (*manfa'ah* of a thing and human that gives human being to whom it belong power or authority to seek benefit from owned property and right of disposal over it."[153] From these definitions it has been found that "*milkiyyah*" is the name of the permission given by shari'ah to the owner of a thing or *manfa'ah for* obtaining benefit from that thing itself or "*manfa'ah*".

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150 Ibn-i-Manẓūr, "*Lissān al-'Arab*",vol:10, S.v. "Mulk", P:491.

151 Fīrūz Ābādī, "*Alqāmūs al-Muḥīt*", S.v. "Mulk",P:1232.

152 Jalāl al-Dīn 'Abd-ul-Rahmān al-Suyūṭī, "*Al-Ashbah wa al-Naẓa'ir*", (Dārul Kutub al-'Ilmiyyah, 1st edition, 1983/1403 hijrah), P:316. (hereafter referred as al-Suyūṭī, Al-Ashbah wa al-Naẓa'ir)

153 Aḥmmad bin Idrīs al-Qarāfī, "*Anwār al-Barūq Fī Anwā' al-Frūq*", vol: 3, ('Alām al-kutub, 5th edition), P:208. (hereafter referred as al-Qarāfī, Anwār al-Barūq Fī Anwā' al-Frūq)

Akmal-al-dīn Bābartī defined it as: "*Milk* is power given by shari'ah to operate" and Ibn Najaym added in this definition "except those prohibited".[154] The example of those prohibited is minor who is owner of his property but has no power to operate it and similarly the sold property which is transferable (*manqūl*) owned by the purchaser but he has no power to sell it further before getting the possession of it.

Muṣṭafā Aḥmad Zarqā'i define it by combining all the definitions as: "the legal relationship between humans and things that gives absolute control and right of disposal over it to the exclusion of others." [155]

In the subject matter of *milkiyyah* comes four things (1) *'ayn* which means a thing having corpus which in the opinion of all jurists can qualify for being called *māl* for example a house, a car etc., (2) *manfa'ah*[156] which means benefits that has been derived from things by using them and they have no existence independent of the thing from which they are originated for example living in a house a benefit which can be owned by the renter in case of *ijārah* (hire) which he can not use without taking possession of a house (3) things which have corpus but are not considered as *māl* due to some technical reason for example the slave (4) *Ḥaqūq aṣliyyah* (quantifiable rights) which do not have physical existence like right of inheritance .[157] So "*milk*" is general and "*māl*" is specific. All rights which a person can own and possess are subject matter of *milk* irrespective of the fact that it has commercial value or not, it includes both proprietary and nonproprietary rights for example right of guardianship, right of agency and marital rights. All

154 Zayn al-Dīn bin Ibrāhīm bin Najaym, "*Al-Ashbah wa al-Naẓa'ir*", vol: 2, P: 603.Dārul Kutub al-'Ilmiyyah, Beirut, 1st edition,1979/1399Hijrah

155 Zarqā'i, "*Madkhal al-Fiqhī al-'aām*", vol:1, P: 241

156 In case of land there are two types of munāfa' (benefits) one is which the possessor or owner itself derived from the thing by using its rights and the other is easement rights which are rights in the adjacent land. See Wahbah al-Zuḥaylī, "*Al-Fiqh al-Islāmī wa Adillatuhu*", P:492-494, vol: 5.

157 Ibid; Imran Ahsan Khan Nyazee, "*Out Line Of Islamic Jurisprudence*", P: 190.

these are nonproprietary rights which are subject matter of *milk*.[158] Ibn Abideen differentiates between *māl* and *milk* by excluding the *manfa'ah* from the category of *māl* because ḥanafī did not except *manfa'ah* as *māl*. He says: "*manfa'ah* is *milk* not *māl*. It is the attribute of ownership that one can operate a thing by possessing it whereas *māl* its attribute is that it can be capable of being stored for the time of necessity."[159] So *manfa'ah* are subject matter of ownership and people can own it and operate by possessing it but it is not *māl* because it can not be stored which is a necessary condition for *māl* according to Ḥanafī School.

The owner got the authority or power through ownership in the form of legal rights which are right of benefit (*ḥaqq al-intafā'*), use (*istaghlāl*) and disposal (*al-taṣaruf*).[160] But this right of benefit is different from the ownership of usufruct (milk *al-manfa'ah*). In case of ownership of usufruct the owner owns the right of benefit (*ḥaqq al-intafā'*) and the use (*istaghlāl*) of thing. The example of such is hire (*ijārah*), commodate loans (*i'ārah*), charitable trust (*waqf*), and bequest (*waṣiyyah*). The owner in this case possesses the thing (which has corpus) from which right to benefit originate but this does not mean that he becomes the owner of the thing. According to some jurists ownership of usufruct and right of benefit are the same thing but some others differentiate between them. The one who differentiate between the two says that right of benefit (*Ḥaqq al-Intafā'*) is lawful permission (*ibāḥah*) in which the owner of the right can not transfer this right to others for example in case of charitable trust the individual or the group of people has the right of benefit from trust property only by themselves and they have no right to transfer that right to any other person through conventional transactions, succession or production benefits. The ownership of usufruct (*milk al manfa'ah*) according to them is one in which owner of a *manfa'ah* is permitted to have the

158 This is the characteristic of Islamic law and these two terms are different from the western concept that uses the terms property as synonymous to ownership.

159 Ibn 'Abidīn, "*Rad-ul-Mukhtār*", vol: 4, P:502.

160 al-Qarāfī, "*Anwār al-Barūq Fī Anwā' al-Frūq*", vol: 3, P:208-235.

right to benefit from the object himself through conventional transactions such as leasing, ijārah or will and also has the right to transfer such rights to the other person through conventional transactions. For example in case of lease of a house for specific time periods the tenant has the right to sublet it for that time period to any other person.[161] For understanding this topic it is necessary to differentiate between "milk", "*manfa'ah*", "*ikhtaṣāṣ*" and "*ibaḥah*".

- **Difference Between "*Milk*" And "*Manfa'ah* :**

The relation between the two is on the basis of subject matter. Scholars divide *milk* on the basis of subject matter into two types: absolute ownership (*milk* tām) and incomplete ownership (*milk nāqiṣ*).

Absolute ownership means that the owner has all the rights and powers given by shari'ah in the thing he owned and he can use it according to his will. He can gift it to any one, he can dispose it off, and he can destroy it. In incomplete ownership owner owns only the corpus or benefit of a thing. If owner owns only the corpus of a thing and man*fa'ah* is owned by other person then he has limited powers to operate in the corpus. For example if a person through will allowed any other person to reside in his house or to use his agricultural land for a specific period. After the death of owner the ownership of that property goes to the legal heirs of the owner but the ownership of the *manfa'ah* of residence or use of agricultural land is for the devisee for a period specified in the will. On the death of devisee or if the specific period ended the ownership of the *manfa'ah* also belongs to the legal heirs of devisor.[162]

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161 Ibid; 'Abdul karīm Zaydān, "*Al-Madkhal Lī Drāsah al-Shar'iyyah al-Islāmiyyah*",(Maktabah al-Quds Mu'asisah al-Risālah, 6th edition). , P: 227-229. (hereafter referred as Zaydān, Al-Madkhal Lī Drāsah al-Shar'iyyah al-Islāmiyyah)

162 Wahbah al-Zuḥaylī, "*Al-Fiqh al-Islāmī wa Adillatuhu*", Vol: 4, P:415.

A person, if he owns only *manfa'ah* of a corpus than he has no right over the corpus. He has no right to sell or dispose off the corpus. He has these rights only with respect to *manfa'ah* of the corpus. For example as in "*ijārah*" or "*i'ārah*". [163]

- **Difference Between "*Milk*" And "*Ikhtāṣaṣ*":**

According to Mālikī school *ikhtaṣāṣ* is related to *manfa'ah* only.[164] Whereas Shāfi'ī differentiate between milk and *ikhtaṣāṣ* that *manfa'ah* and corpus are subject matter of *milk* whereas *ikhtaṣāṣ* corpus is not it subject matter only *manfa'ah* are its subject matter. It also includes *manfa'ah* of those things which are not subject matter of milk like dog, *nijāsāt*.[165]

If a person sit in a mosque in a front row first or any place than no one prohibit him from sitting there because he by sitting makes this place specific for himself. Similarly any person by first capturing a permitted (*mubāḥ*) thing makes it specific for himself and he has right of *ikhtaṣāṣ*.

By this first capturing it become specific to him but this does not means that he becomes the owner of that thing. He is only more entitled to get benefit from it.[166]

Ḥanafī used the word of *ḥaqq* for *ikhtaṣāṣ* and according to them this is a difference between the right and *milk*. Kāsānī said that if a person makes a boundary by placing stones around the infertile land which is owned by any one. He will not by doing so become owner of that land. He becomes owner if he converts it into fertile land. But by making boundary of it he becomes more entitled to convert it into fertile than anyone else.

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163 see Ibid; al-Qarāfī, "*Anwār al-Barūq Fī Anwā' al-Frūq*", vol: 1, P:187

164 'Allāmah Shams-ul-Dīn al-Shaykh Muḥammad al-Dusūqī, "*Ḥāshiyyat-ul-Dusūqī 'Alā al-sharḥ al-Kabīr*" , vol: 4, , (Dārul Aḥyā'i al-Kutub),P:66. (hereafter referred as al-Dusūqī, Ḥāshiyyat-ul-Dusūqī)

165 'Izu al-Dīn 'Abdul 'Azīz bin 'Abdul al-Salām, "*Qawā'id al-Aḥkām fī Maṣālaḥ al-An'ām*", vol: 2, (Dārul Kutub al-''Ilmiyyah), P:86. (hereafter referred as 'Abdul al-Salām, Qawā'id al-Aḥkām fī Maṣālaḥ al-An'ām)

166 Ibn Rajab, "*Qawāīd fī al-Fiqh al-Islāmī*", P:192.

Similarly if a traveler stays on a place first he is more entitled to stay on that place than others.[167]

- **"*Milk*" And "*Ibāḥah*":**

Wahbah zoḥaylī define it as: "*Ibāḥah* is a right of person which is proved as a result of permission to get benefit from a thing".[168]

> Some time this permission is given by lawgiver like in case of water in rivers and trees in forest. Some time this from the owner of a thing like some one allowed any person to reside in his house or to eat his meal or to use his car. *Ibāḥah* and right of benefit exist for permitted period and ends with the end of specific period (if specified between them) or if owner prohibited. So this means that *ibāḥah* or permission to use benefit does not mean that the person to whom permission is given becomes owner of benefits only right of *intafā'* is given to him.

2.2.2. Means Of Ownership:

Shari'ah has identified five major causes[169] for human ownership. They are:

a) Originality (*Munshī'i al-milk*): refers to any original action to lawfully obtain ownership from earth. Lawfully means no prior ownership of it and there is no prevention from Shari'ah to do so. This category includes hunting, wooding, mining, land revival (*Aḥyā'i*), and war plunders, including lands.

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167 Imām 'Alā'u al-Dīn Abī Bakar Mas'ūd al-Kāsānī, "*Bada'i' al-ṣanā'i' fi Tartīb al-Sharā'i'*", vol: 6,(H. M. Sa'īd company Karachi, 1st edition, 1328 hijrah/ 1910), P: 195. (hereafter referred as al-Kāsānī, Bada'i' al-ṣanā'i').

168 Wahbah al-Zuḥaylī, "*Al-Fiqh al-Islāmī wa Adillatuhu*", Vol: 4, P:417.

169 Aḥmad Ibrahīm Bik, "*Al-Mu'āmlāt al-Shar'iyyah al-Mālīyyah*", (Idārāt-ul-Qurān wa al-'Alūm al-Islāmiyyah, Karachi), P:24 (hereafter referred as Ibrahīm Bik, Al-Mu'āmlāt al-Shar'iyyah al-Mālīyyah); Aḥmad Muḥammad al-'Asāl and Fatḥī Aḥmad 'Abdul karīm, "*al-Niẓām al-Iqtaṣād fī al-Islām Mabādī'uhu Wa Aḥdāfuhu*", (Maktabah Wahbah), P: 48. (hereafter referred as al-'Asāl and 'Abdul karīm, al-Niẓām al-Iqtaṣād fī al-Islām).

b) Conventional Transactions (*Nāqil al-milkiyyah*): refer to the causes that are not originally a cause of ownership, but to the transaction of an already existing ownership from one person to another. An example of this is deals and transactions in general, such as selling and buying (*bay'*), gifts (*hibah*), will (*waṣiyyah*), charity (*zakah*), pre-emption (*shuf'ah*), endowment (*Waqf).*

c) Succession (*warāthat al-milk*): refers to the succession of the owner by another owner due to the first owner's death. Inheritance (*Irth*) is a clear example of this category, where Shari'ah has provided for the Sharing of inheritance among all family members. **d) Work (*Al-'amal*):** refers to all the work done by human being for price such as trade (*itjār*), craft (*iḥtrāf*), profession (*imtiḥān*), and manufacturing (*istaṣna'*). It includes all the benefits and services given by human being for price.

2.3. Concept Of *Māl*

2.3.1. Linguistic And Juristic Meaning Of Māl:

The Arabic term "*māl*"[170] linguistically means whatever a man can acquire and possess; whether it is corporeal (*'ayn*) or usufruct (*manfa'ah*); such as gold, silver, animal, plant and benefit gained out of things such as the residing in houses, the riding of vehicles and etc. On the other hand, whatever a man cannot possess cannot be regarded as *māl* linguistically. For instance, trees in the forest, birds in the sky, fish in the water, and mines in the depth of the earth are not considered *māl.*[171]

170 Māl has very important position in the life of human beings. It is subject matter of numerous legal transactions such as sale and purchase, rent and lease, partnership, bequest, gift, waqf, succession etc and the validity of transaction in Islam depends on the acceptability of the māl.

171 Wahbah al-Zuḥaylī, "*Al-Fiqh al-Islāmī wa Adillatuhu*", vol. 4, P: 398

Customarily *term māl* is applied to all things capable of being owned according to Lissān al-'Arab.[172]

Meaning Of *Māl* In Different Schools Of Jurisprudence:

Scholars of every school of jurisprudence try to define the term *māl* according to the technical meaning adopted in various schools. The most important definition is of Ḥanafī School according to whom only a thing with the corpus can qualify as *māl*.

- **Definition Of Ḥanafī School**

In Ḥanafī school jurists have laid down several definitions of *māl* by using different words implying approximately the same meaning and understanding. This variation is not due to the differences in understanding of the nature of *māl*; rather it is due to their various ways of expression.

Ibn 'Abidīn said: "*māl* is what human instinct inclines to, and which is capable of being stored for the time of necessity."[173]

Another jurist defines it as "*māl* is to which human nature inclines and to which the rule of expenditure and its prohibition applies."[174]

The *Mujallat al-Aḥkām al-'Adliyyah* defines *māl* as a thing which is naturally desired by man, and can be stored for the time of necessity. It includes moveable (*manqūl*) and immovable (*ghayr manqūl*).[175]

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172 Ibn-i-Manẓūr, "*Lissān al-'Arab*", vol. 11, p. 610.

173 Ibn 'Abidīn, "*Rad-ul-Mukhtār*", vol: 4, P:501.

174 Zarqā'i, "*Madkhal al-Fiqhī al-'aām*", vol: 3, P:114.

175 C.R.Tayser, "*The Mejelle (English translation)*", Article 126, P: 18 (Law Publishing Company, Lahore).

All these definitions are not comprehensive as they do not signify the nature of *māl*. There are, for example, some properties (*amwāl*) which, though not capable of being stored, remain beneficially useful, such as vegetables and fruits; but are not included in the definitions of *māl* according to these definitions. Similarly, there are certain things to which human instinct does not incline but rather dislikes and avoids, such as some medicines, which are not covered by these definitions.

The definition of author of al-Hāwī al-Qudsī seems to be accepted by other jurists as relatively more comprehensive and accurate, which is: "*māl* is the non-human things, created for the interest of human beings, capable of possession and transaction therein by free will."[176]

In all the above given definitions there is no definition which specify that only a thing with a corpus can qualify as *māl*. It is only mentioned in definition of Haskafi who define it as: "*māl* means tangible thing which can be used and for which desire and greed can be found among people."[177]

Some contemporary jurists have attempted to redefine *māl* in the light of the Ḥanafī perspective. Some of them, for example, define it as "every corporeal thing with material value amongst people"[178] while some others define it as "whatever is capable of being under possession, protection and customarily recognized to have beneficial use"[179]

According to the Ḥanafī jurists two elements are required in order to confer on a thing the status of *māl*:

(1) The thing should be corporeal that is susceptible of being possessed and protected. Therefore, if a thing does not comply with this requirement, it is

176Ibn 'Abidīn, "*Rad-ul-Mukhtār*", vol: 4, P:502; Zarqā'i, "*Madkhal al-Fiqhī al-'aām*", vol: 3, 115,

177 Taqī 'Uthmānī , "*Maghrabī Mamālik kay Chand Jadīd Fiqhī Massā'il*", quoted by him in his book P:182.

178 Zarqā'i," *Madkhal al-Fiqhī al-'aām*", vol: 3, 118.

179 Zaydān, "*Al-Madkhal Lī Drāsah al-Shar'iyyah al-Islāmiyyah*", P:216.

excluded from the definition of *māl*. As a result, the abstract human attributes, such as knowledge, health, dignity, intelligence; all usufructs, debts, mere rights such as the right to development, the right of pre-emption, the right to water, etc., are not considered as *māl*. Similarly, those things upon which human control is impossible are also excluded from the definition of *māl*, e.g. free air, heat of the sun and moonlight etc. It is clear that the Ḥanafī jurists do not stipulate that the thing, in order to be considered as *māl*, should actually be owned; rather it is sufficient in their view, in contrast to the literal meaning as discussed earlier, if the thing is capable of being owned. According to them the hunts in the desert and the birds in the sky are, therefore, *māl* on account of its capability of being owned.[180]

(2) The thing should be capable of beneficial use according to the prevailing customs. Therefore, the things which are not beneficial, such as poisonous or harmful food or carrion; or capable of beneficial use but not accorded by the customs of the people, such as a single wheat cereal, a drop of water, or a handful of soil, are not regarded as *māl* because they have no benefit in these small units. It is important to note that the beneficial use should be judged in view of the Shari'ah and it should be accorded by persistent custom in normal circumstances. For example wine and carrion are not considered *māl* according to shari'ah in normal circumstances. The beneficial use in circumstances of necessity, such as the consumption of carrion for survival in severe hunger, therefore, is exception and would not confer on the carrion the status of *māl*.[181]

- **Definition Of Shāfi'ī School:**

180 Ibid: P: 216-217; Wahbah al-Zuḥaylī, "*Al-Fiqh al-Islāmī wa Adillatuhu*", vol. 4, P: 399; Zarqā'i, "*Madkhal al-Fiqhī al-'aām*", vol: 3, P: 115.

181 Zaydān, "*Al-Madkhal Lī Drāsah al-Shar iyyah al-Islāmiyyah*", P: 216-217; Wahbah al-Zuhaylī, "*Al-Fiqh al-Islāmī wa Adillatuhu*", vol. 4, P: 399; Zarqā'i, "*Madkhal al-Fiqhī al-'aām*", vol: 3, P: 115.

Al-Zarkshī states that, "*māl* is what gives benefit, i.e. prepared to give benefit and it can be material objects or usufructs."[182]

Allama Suooti refers to Imam Al-Shāfi'ī as saying that, "the terminology *māl* should not be construed except as to what has value with which it is exchangeable; and the destructor of it would be made liable to pay compensation; and what the people would not usually throw away or disown, such as money, and the likes" [183]

According to Shāfi'ī the basis of *mālliyah* is custom (*'Urf*) so, whatever is evaluated as effectively giving rise to benefit is regarded as financially valuable property, and in contrast, whatever is incapable of showing the effect of giving rise to benefit is excluded from the status of financially valuable property.[184]

- **Definition Of Ḥanbalī School**

According to Ḥanbalī School *māl* is something in which there exists a lawfully permissible benefit in normal circumstances i.e., without resulting from pressing need or necessity. According to them the things in which there is no benefit in essence, such as insects, or where there might exist benefit but it is legally prohibited, such as wine, or there is a lawfully permissible benefit but only in the situation of pressing need, such as keeping a dog, or in the situation of necessity, such as the consumption of a carcass when in dire need of survival, are excluded from the status of *māl.*[185]So the basis of *mālliyah* in this school of thought is *manfa'ah.*

182 Al-Zarkshī, "*Qawā'id al-Zarkshī*", p. 323 mentioned in Al- Fatḥī al-Duraynī, "*Ḥaqq al-Ibtikār*", P:23.

183 al-Suyūṭī, "*Al-Ashbah wa al-Naẓa'ir*", P: 327

184 See Fatḥī al-Duraynī, "*Ḥaqq al-Ibtikār*",P:24.

185 Manṣūr Ibn Yūnus Bin Idrīs al-Buhutī, "*Kashāf al-Qanā' Matan al-Iqna'*", vol: 3, (Dārul Kutub, 1982/11402 hijrah), P: 152.

- **Definition Of Mālikī School**

According to the Mālikī jurist, al-Shaṭibī *māl* is the thing on which ownership is conferred and the owner when he assumes it excludes others from interference.[186] This definition affirms that *māl* is the subject matter of ownership[187]. It also explains that the basis of property rights is the relationship standing between the thing and the person.

2.3.3. Classification Of "*Māl*":[188]

"*Māl*" has been classified by the jurist in different ways:

- **Moveable And Immoveable Property:**

According to this classification property is classified into two classes: "'*aqār*" (immoveable) and "*manqūl*" (moveable). Immoveable property includes all lands and all permanent fixtures which cannot move from one place to another. Moveable property means things which may be carried from one place to another. Moveable property further divided into four things: 1) sold by measures of capacity (*Makīlāt*) 2) sold by measure of weight (*Mawzunāt*) 3) sold linear measurement (*Mażru'āt*) 4) sold by measure of count ('*Adadiyyat*)

- **Marketable And Non-Marketable:**

In this classification property is divided into "*Mutaqawwam*" (marketable) and "*Ghayr* Mutaqawwam" (non-marketable property). "Mutaqawwam" means those things that can be converted to private property and whose use has been permitted by shari'ah in normal circumstances. "*Ghayr Mutaqawwam*" means those things

186 Abū Isḥaq al-Shāṭibī, "*Al-Muwāfaqāt fī Uṣūl al-Shar'iyyah*", vol. 2, p. 17, Dārul M'arafah. (hereafter referred as al-Shāṭibī, Al-Muwāfaqāt).

187 All the subject matters of māl are subject matter of ownership but all the subject matter of ownership is not māl for example slaves.

188 Ibrahīm Bik, "*Al-Mu'āmlāt al-Shar'iyyah al-Mālīyyah*", P: 5-7.

that can not be converted in private property in normal circumstances for example bird in air, fish in the sea, wine and swine-flesh and so on.

- **Fungible And Non Fungible:**

In this classification property is divided into "*mithlī*" (fungible) and "*qīmī*" (non-fungible). Things substitute of which can be found by weight or measure and quality in the market are Fungible things. For example wheat and rice of certain quality and quantity will have a substitute in the market. Non-fungible things means things for which similar can not found in the market and these goods have their own value which is determined by valuation. For example a goat, a camel, a dress has no similar substitute in the market.

- **"*'Ayn*" (determinate) And "*Dayn*" (indeterminate):**

This classification of "*māl*" is connected with the classification of "*māl*" into fungible and non-fungible. If the owner of a property is entitled to recover his property borrowed by a person or a person took from him by use of force in the form of species than it is called "*'ayn*" or determinate property if not it is called "*dayn*" or indeterminate property.

2.3.4. Are Usufruct And Rights *Māl*:

As mentioned above, the Ḥanafī School recognizes property only in material things which have tangible substance or corpus. So according to there view Usufructs (*manfa'ah*) and rights (*ḥaqq*) are not *māl* because these by their nature are not capable of being possessed and even though if they come into existence for some time they do not have subsistence and continuity; rather they cease to exist gradually following their gradual consumption and enjoyment.

On the other hand according to non-Ḥanafī jurists usufructs and rights are also property, because by thing they mean the beneficial use and the benefit of it and not the thing itself. [189] This view is according to the customary usage of people and therefore accorded wide legal recognition.

The result of this conflicting interpretation of the Ḥanafī jurists leads to some practical differences in case of lease and inheritance, transgression of usufructuary rights. In case of transgression of usufructuary rights if someone wrongfully confiscated certain property and thereafter enjoys some benefit out of it for a certain period and then returns it to its true owner than according to non-ḥanafī majority jurists, he is obliged, to compensate for the benefits so enjoyed. However, according to the Ḥanafī jurists, the confiscator is not liable to pay compensation for the benefit enjoyed out of the confiscated property; rather mere restitution of the property to its true owner would suffice.

On the other hand, some Ḥanafī jurists have made certain exceptions to the above general rule. They maintain that if the wrongfully confiscated property is a trust (*waqf*) property or if it belongs to an orphan or are prepared for certain further development or utilization purposes or prepared for lease (e.g. hotels and restaurants etc.), then the confiscator is liable to pay compensation for the benefits in addition to restitution of the property. This exception is based on "*istiḥsān*"[190] and in this way they justified the transactions involving *manfa'ah.*[191]

With regard to the contract of lease, the Ḥanafī jurists are of the opinion that by the death of the lessee the contract would prematurely dissolve. According to them

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189 As 'Iz bin 'Abdul Islām say that the manfa'ah are the desired out come of all property. Cited in Al- Fatḥī al-Duraynī, "*Ḥaqq al-Ibtikār*", on P:189.

190 Istaḥsān is the principle according to which the law is based upon a general principle of the law in preference to a strict analogy pertaining to the issue .the principle is used by Ḥanafī's as well as Mālkī's this method of interpretation may be employed for various reasons including hardship. See, Imran Ahsan khan Nyazee, "*Theories of Islamic law: The methodology of ijtihād*", P:320; For detail see Dr. Ḥusayn Ḥāmid Ḥasān, "*uṣul al-Fiqh*", (1st edition, Dār al-Ṣidq, Islamabad), P:486.

191 Zarqā'i, "*Madkhal al-Fiqhī al-'aām*", vol: 3 P: 204 -209; Wahbah al-Zuḥaylī, "*Al-Fiqh al-Islāmī wa Adillatuhu*", vol:4, P: 401.

lease takes place in relation to benefits (*manfa'ah*) which lessee owns out of the leased object gradually with the passage of time so he cannot own the benefits accrued out of the lease after his death as it terminates all his ordinary legal claims. Furthermore, as the benefits are not *māl*, in their opinion, the legal heirs of the deceased lessee cannot inherit them. As a result, the lease contract does not continue after the death of the lessee.

Whereas the majority's view is that it would continue until the fixed period notwithstanding the death of the lessee. According to their view the benefits (*manfa'ah*) are considered to be present as a whole at the formation of the lease contract and the lessee owns it at once at the beginning by virtue of the contract legally concluded.

Furthermore, the lease contract does not dissolve on the death of the lessee like other sale contracts.[192]

Another contradiction in their view is that they accepted *dayn* as property which is intangible. When someone dies leaving debt according to them it is the duty of his heirs to release him from the liability by paying debt from the property he left behind. The shares of heirs should be distributed and assessed after paying the debt. If the property is not sufficient to pay the debt it is the duty of the heirs that they should pay it from their pocket. According to the Ḥanafī scholars its proprietary nature stems from its attachment to liability for payment of debts which is personal and relinquish only on the payment.[193]

Further more Ḥanafī jurists consider the *manfa'ah* of physical things as *māl*. *Manfa'ah* are of two types as discussed above right of use and enjoyment of the property which was allowed to transfer to other for money in the agreement of

192 Wahbah al-Zuḥaylī, "*Al-Fiqh al-Islāmī wa Adillatuhu*", P: 43 and 278

193 Zarqā'i, "*Madkhal al-Fiqhī al-'aām*", P: 168-173, vol: 3.

lease and hire. The second type is of easement rights which are rights in adjacent land. All these are intangible rights derived from the possession of tangible property. They have no independent existence but are considered as *māl*. Ḥanafī jurists accept them as *māl* on the basis that these rights are attached with the physical thing and are permanent rights of physical thing so they are considered as property.[194] For example right of way (*ḥaqq al-Marūr*), as Ibn al-Humām and Ibn ʻĀbidīn both said that right of way is attached with the land and land is a tangible property so a right attached with it can also be considered as tangible property.[195] These *manfaʻah* can be enjoyed by the lessee by physically possessing the property without the actual transfer of the property. For example in a hire of a house the lesser give the possession of a house to the lessee for the agreed time period and he reside and use it.

According to Al-duraynī a contemporary scholar by analogy considered the intellectual property rights as *manfaʻah* and said that *manfaʻah* should not be narrowly interpreted to include the *manfaʻah* of corporeal things only. According to him in most cases the intellectual property has physical medium in the form of book or other mediums in which these are expressed. Even though it is not like a traditional corporeal property. According to him the *manfaʻah* of intellectual property reside in a physical medium separate and independent from its origin and source.

It is not possible to use usufructuary rights of traditional tangible property without possessing the property. The usufruct in the case of intellectual property is like fruits of the traditional physical property which are utilized separately from their origin. For example *milk*, in case of animals, offspring's of animals and fruits of tree. Unlike the fruits of tangible property there is a link between the origin and intellectual property because the knowledge or idea which a person presented

194 Taqī ʻUthmānī , "*Maghrabī Mamālik kay Chand Jadīd Fiqhī Massāʼil*", P:191.

195 Cited by Taqī ʻUthmānī , "*Maghrabī Mamālik kay Chand Jadīd Fiqhī Massāʼil*", P:186.

reflects his personality and he is also liable for what he delivered in the form of intellectual property.[196]

According to the view of majority jurists' corporeality is not an essential element of *mālliyah* and it is the custom which decides the *mālliyah* of a thing and the essential element of *manfa'ah* of property is its utilization. As for as the physical possession is concerned it is possible through the medium to which this property is attached.

2.4. Justification For Intellectual Property Rights:

The major justification for recognition of intellectual property in Islam, in my view, is the first acquisition theory. This theory states that all the things in all forms and shapes belong to Allāh S.W.T.

As Allāh S.W.T says in Qurān:

> **"Unto Him belongeht whatsoever is in the heavens and whatsoever is in the earth and whatsoever is between them, and whatsoever is beneath the sod"[197]**

And also says on another place:

> **"Allāh's is the sovereignty of the heavens and the earth and all that is between them "[198]**

So Allāh S.W.T is the owner of all the things and property which he granted to human being as his trustee on the earth. He also told human being the ways to use

196 Al- Fatḥī al-Duraynī, "*Ḥaqq al-Ibtikār*",P: 11- 20; Article 41,43 and 45 of "*The Mejelle*"

197 Q:20:6

198 Q: 5:17

and own them within the limits inscribed by him in Qurān and Sunnah for the benefit of whole mankind.[199]

First of all, there is *ibaḥah* or permission for all mankind to use and seek benefit from them by possessing these materials. When someone exerts labor on a thing free in nature than by doing this he possesses it and becomes the owner of that property. For example in case of water all the natural sources of water like rivers and ponds are common property but when a person collect it in a pot by using his labor than he becomes the owner of that water. Similar is the case with other free things in the nature. The permanent committee for Academic research and *fatāwā* said in an answer of a question about *Bid'ah* that *Bid'ah* is of two types *Bid'ah Dīniyah* and *Bid'ah 'Ādiyah. 'Ādiyah* is like all those new products and inventions and rule for all these is permission except there is shar'i evidence for prohibition of it."[200] The reason behind this type of ownership is work and labor which he invested collecting it. In case of barren land when it is not owned and used by any one if a person exerted his labor on it and convert it into a useful land than that land is his. This is also supported by a hadith which allow the ownership for the labor invested by the individual in dead land to convert it into useful.

"He who cultivates land that does not belong to anybody is more rightful (to own it)."[201]

In another hadith prophet P.B.U.H said that the person, who preceded others in acquiring some thing which has never been acquired before, has the right of

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199 Q: 2: 20; 57:7

200 Aḥmad 'Abdul al-Razāq al-Dawaysh (Collected and arranged by him), "*Fatāwā al-Lajanah al-Dā'imah Lil Baḥūth Wa al-Ifta'i*", Vol: 2, (Dārul Mū'iīd, 5th edition, 1424 hijrah/ 2003), P: 463, Kitāb al-'Aqīdah. (hereafter referred as al-Dawaysh, Fatāwā al-Lajanah al-Dā'imah Lil Baḥūth Wa al-Ifta'i).

201 Al- Bukharī, "*Ṣaḥīḥ Bukharī (English translation)*", vol: 3, book no.39, P: 306.

priority over it.[202] Ownership is granted to individuals on the basis of labor invested by them in a natural resource.

Islam considered the labour as one of major and favorite source for earning of livelihood. In a hadith prophet P.BUH said:

"Nobody has ever eaten a better meal than that which one has earned by working with one's own hands."[203]

Islam dose not differentiate between the physical labour and the mental labour. There is not single evidence which shows that mental labour and physical labour are two different things. According to Islam both are considered in the same way. The person who invested the labour in knowledge he becomes the owner of that knowledge. I supported my view by the ḥadīth in which prophet P.B.U.H allowed to accept the remuneration for all types of services rendered with respect to Qurān whether it is for teaching of Qurān or interpreting it or writing it or reciting it.

Ibn Abbas said, reporting on the authority of the Prophet, peace and blessings of Allāh be on him: "The most worthy of things for which you take remuneration is the Book of Allāh."[204]

In another Ḥadīth, prophet p.b.u.h allowed for his companions to accept sheep which were given to them by a tribe for whom they recite the *surah al-Fātiḥah.*[205]

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202 Cited by Ida Madieha, "*Authorship and Islam in Malaysia: Issue in perspective*", P:664.

203 Al- Bukharī, "*Ṣaḥīḥ Bukharī (English translation)*" , vol: 3 P: 162.

204 Ibid, P: 263.

205 Narrated Abū Sa'īd: Some of the companions of the Prophet went on a journey till they reached some of the 'Arab tribes (at night). They asked the latter to treat them as their guests but they refused. The chief of that tribe was then bitten by a snake (or stung by a scorpion) and they tried their best to cure him but in vain. Some of them said (to the others), "Nothing has benefited him, will you go to the people who resided here at night, it may be that some of them might possess something (as treatment)," They went to the group of the companions (of the Prophet) and said, "Our chief has been bitten by a snake (or stung by a scorpion) and we have tried everything but he has not benefited. Have you got anything (useful)?" One of them replied, "Yes, by Allāh! I can recite a Ruqyah, but I will not recite the Ruqyah for you unless you fix for us some wages for it." They agreed to pay them a flock of sheep. One of them then went and recited (Sūrah Fātiḥah): chief became all right. They paid them what they agreed to pay. Some of them (i.e. the companions) then suggested to divide their earnings among themselves, but the one who performed the recitation said, "Do not divide them till we go to the Prophet and narrate the whole story to him, and wait for his order." So, they went to Allāh's Apostle and narrated the story. Allāh's Apostle asked, "How did you

The payments are allowed in two cases first for the property which you owned and second for the labor exerted on a property. In these two cases according to my view payment is made for the property which a person gained by exerting labour on a property, which is '*ilm* or knowledge, given in the form of Qurān. In another hadith prophet p.b.u.h accepts the '*ilm* or knowledge as a valid *mahar* in a marriage contract.[206] Only owned property[207] can be used as dowry so this means that a person who memorizes something from Qurān he owns it and ownership from original sources can be achieved only by exerting labour on it. In battle of "*Badar*" the prisoner who are not able to pay *Fidā'i*[208]and there is no one who pay for them prophet (P.B.U.H) decided that they teach Muslims for specific period[209]. In both these cases in "*mahar*" and "*Fidā'i*" property given as mahar or "*Fidā'i*" must be his own and must be of material value. So these two hadiths show that a knowledgeable person must have some property rights in his knowledge and it can be used as a valuable thing.

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come to know that (Sūrah Fātiḥah) was recited as Ruqyah?" Then he added, "You have done the right thing. Divide (what you have earned) and assign a share for me as well." Ibid: Book: 36 Ḥadīth no. 476.

206 Mahar is the property which is given by the groom to bride as a result of marriage contract between them. Narrated Sahal bin S'ad al-Sa'idi: A woman came to Allāh's Apostle and said Allāh, "O Allāh's Apostle! I have come to give you myself in marriage (without Mahr)." Allāh's Apostle looked at her. He looked at her carefully and fixed his glance on her and then lowered his head. When the lady saw that he did not say anything, she sat down. A man from his companions got up and said, "O Allāh's Apostle! If you are not in need of her, then marry her to me." The Prophet said, "Have you got anything to offer?" The man said, "No, by, O Allāh's Apostle!" The Prophet said (to him), "Go to your family and see if you have something." The man went and returned, saying, "No, by Allāh, I have not found anything." Allāh's Apostle said, "(Go again) and look for something, even if it is an iron ring." He went again and returned, saying, "No, by Allāh, O Allāh's Apostle! I could not find even an iron ring, hut this is my Izār (waist sheet)." He had no rida. He added, "I give half of it to her." Allāh's Apostle said, "What will she do with your Izar? If you wear it, she will be naked, and if she wears it, you will he naked." So that man sat down for a long while and then got up (to depart). When Allāh's Apostle saw him going, he ordered that he be called back. When he came, the Prophet said, "How much of the Qurān do you know?" He said, "I know such Sūrah and such Sūrah," counting them. The Prophet said, "Do you know them by heart?" He replied, "Yes". The Prophet said, "Go, I marry her to you for that much of the Qurān which you have." Ibid , Vol :3 P: 264.

207 Property here means tangihle property and its benefits having material value (Qīmah)

208 Fidā'i is paid by the prisoners of the war to the party in whose prison they are for their release from the prison. See Wazārāt al-Uwqāf Wa al-Sh'ūn al-Islāmiyyah, "*Mūsū'ah Fiqhiyyah*", vol: 32, (Dārul Ṣafwah, Kuwait,1st edition,1995/1415) S.v. "Fidā'i", P: 59.

209 Mullānā Waḥīd al-Dīn Khan, "*Dīn-i-Insāniyat Islām Kā Fikrī Aūr 'Amlī Aūr Tārīkhī Muṭāli'ah*", (Maṭba'a Ganj Shakr Dār al-Tazkīr, A'lā edition,2008), P:257.

The Muslim jurist accepts that the mental labour is not in any respect different from the physical labour[210] but they did not consider it as mode of acquisition of ownership.

For this purpose also consider the payment for educating Qurān, "*Imāmat*" and for "*Adhān*". For the dissemination of religion is not less important than education of Qurān. Payment for education is also allowed on the basis of *maṣlaḥah*.[211]

History shows that in all era's Muslim governments, to appreciate the work of great scholars, historians, and other knowledgeable persons and researchers, gave them gifts. It is a well established custom in Islamic history. This starts first in the when Prophet (p.b.u.h) gave his robe (*'abā'i*) as a gift to a person who read a poem about Him (p.b.u.h).[212]

Some scholars of ḥadīth did not allow receiving payment for narration of aḥādīth[213] but there are examples in our history in which some great scholars did not allow others to quote hadith narrated by him with out price. One of them is a narrator of hadith Yaqoob who did not allow others to quote hadiths narrated by him with out price and he took one *Dīnār* for quoting hadith "and this does not affect his credibility.[214] There are many statements about *Fuqhā* which tells us that they sold their books and also purchased the books of others. As written about 'Abdullah bin al-Mubārik al-'Abkarī that he sold his own and purchased "*Kitābul Fanūn" and "Kitābul Faṣūl"* by Ibn-e-'Aqīl and *waqf* them for Muslims". In *Anbā'u al-Ghamr* it is written that "these are the books of al-Qarṭabī and I bought

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210 al-'Asāl and 'Abdul karīm, "*al-Niẓām al-Iqtaṣād fi al-Islām*", P: 128.

211 Shaykh Muḥammad Amīn 'Umar Bin 'Abd-ul-Rahīm Ibn 'Aābidīn, "*Majmū'a Rasā'il Ibn 'Aābidīn*", vol: 1, (Suhayl Academy Lahore, 2nd edition.1400hijrah/1980), P:13-14.

212Abī Muḥammad 'Abdullah bin Muslim Ibn Qatībah, "*Al-Sh'ar Wa al-Shu'arā*", (Lidun).1902, P:56.

213 Those who prohibited are: Ḥasan Baṣrī, Ḥammad bin Salmā, Salmān bin Suhayl Sulmān bin Ḥarab, Aḥmmad bin Ḥanbal. See khaṭīb Baghdādī, "*al-Kifāyah fī 'ilm, al-Riwayah*", (Dārul Kutub al-'Arabī, 2nd edition. 1406 hijrah /1986), P:184 -186.

214 Some other big scholars who allowed quoting the ḥadith narrated by them after receiving money are: Abū Na'īm, 'Alī bin 'Abdul 'Azīz,Ṭā'uws and Mujāhid. Ibid: P: 187-188.

his books for forty thousand *Dīnārs.*[215] So Knowledge in the form of books or published work is *māl* and it is the property of its writer or creator and he can sell it, gift it or lend it.[216]

Second point is that custom is one of the sources of shari'ah and here it is the custom which decides the "*mālliyah*" of a thing and the essential element of "*manfa'ah*" of property is its utilization.[217]According to Ibn 'Abidīn "*mālliyyah*" or value of a thing established when people considered it as "*māl*".[218] For example gas and electricity was not considered as "*māl*" many years back because these are intangible and it was not possible for human being to control them. But now a day both becomes valuable property due to the *manfa'ah* and are used as "*māl*".

Custom is accepted only on the basis of *maṣlaḥah mursallah*[219] if no contradictory "*naṣ*" (text) found in Qurān and Sunnah on the specific topic. There are two types of maṣlahah involved here: one related to specific rights of the individual (author or inventor which is right of property) and second general rights which are rights of society to seek benefit from the knowledge and inventions of the authors and inventor which plays important role in life. If the right of authors and inventors has been deny than no one spent his labor, time and money on such projects. So for the positive social and economic benefits of intellectual property and contribution of the authors and inventors to the furtherance of the science, education and technology recognition of intellectual property is necessary. There is no "*naṣ*" (text) in Qurān and Sunnah which prohibits from recognizing it.

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215 Dr. Abū Zayd, "*Milkiyyatul al-Tā'iīf Tārīkhān wa Ḥukmān*", P:221,

216. Ibid, P:261

217 Cited in Al- Fatḥī al-Duraynī, "*Ḥaqq al-Ibtikār*", on P:189

218 Ibn 'Abidīn, "*Rad-ul-Mukhtār*", vol: 4, P:501.

219 "These are attributes which are suitable for the conduct of sharia and its purposes but there is no specific evidence of validation or invalidation regarding these in the text (naṣ), and by applying command to it get benefit or avert the harm from people". Al- Fatḥī al-Duraynī, "*Ḥaqq al-Ibtikār*", on P: 188-191.

Intellectual property rights are *Ḥaqūq 'Aynī Aṣlī*. These are not given to avert the harm like right of *shuf'ah*. These are the rights which are originally given to the owner like right of *qiṣāṣ* for *walī* and in this type of rights taking money against these is allowed so taking money against intellectual property right is also allowed.[220]

Many contemporary Muslim scholars justify the rights over intellectual property on the basis of doctrine of *maṣlaḥah mursallah*. Some of these are Dr. Muhammad Sa'īd Ramażān al-Byūtī[221], Fatḥī al-Duraynī[222], al-Zarqā'i[223], Wahbah Zoḥaylī[224], 'Abdul Ḥamīd ṬaḤmāz[225], Dr. 'Amād-ul-Dīn khalīl[226], Justice Taqī 'Uthmānī[227], Muftī Muḥammad Kifāyat-Ullāh[228], and Fataḥ Muḥammad Lakhnawī[229], Abdul 'Azīz ibn Bāz[230], Shaykh Muḥammad ibn Ṣaāliḥ al-'Uthmayn[231], Dr. Bakr Bin 'Abdullāh Abū Zayd[232]

Islamic Fiqh Academy in his resolution (*Qrār*) no.43 in his fifth session (*Duwrah*) in favor of Intellectual property said that these are shar'i rights and these rights have monetary value in the custom so its owner has right of disposal in it and infringement of these rights is not allowed.[233]

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220 'Abdul Ḥamīd al-Ṭaḥmāz, "*Ḥaq al-Tā'ilīf Wa Tūzī' Wa al-Nashar Wa al-Tarjamah*", p:179, printed with Al- Fatḥī al-Duraynī, "*Ḥaqq al-Ibtikār*"; Dr. Abū Zayd, "*Milkiyyatu al-Tā'ilīf Tārīkhān wa Ḥukmān*", P:263.

221 Muhammad Sa'īd Ramażan al-Byūṭī, "*Qażāyā Fiqhiyyah Mu'aṣirah*", (Damascus: Dār al-Fikr, 1994).

222 Al- Fatḥī al-Duraynī, "*Ḥaqq al-Ibtikār*",

223 Zarqā'i, "*Madkhal al-Fiqhī al-'aām*",vol:3

224Wahbah Al-Zuḥaylī, "*Ḥaqq al-Ta'ilīf Wa al-Nashar Wa al-Tūzī*" , P: 188-191.

225Ibid, P: 174-187.

226 Ibid, P:161-168.

227 Taqī 'Uthmānī , "*Maghrabī Mamālik kay Chand Jadīd Fiqhī Massā'il*", P: 225.

228 Ibid.,

229 Ibid.,

230 "*Using CDs copied from the operating system to set up and maintain computers*" http://islamqa.com/index.php?ref=72848&ln=eng&txt=copyright last visited on 2nd July 2007.

231Ibid.,

232 Dr. Abū Zayd, "*Milkiyyatu al-Tā'ilīf Tārīkhān wa Ḥukmān*", P:197.

233 Resolution no. 43 (5/5), Islamic Fiqh Academy, http://www.fiqhacademy.org/intro_qararat.html last time visited on 23rd July 2007.

There are some scholars who deny these rights. The first argument is that these are not "*Shar'i*" conditions and one is not obliged to adhere to them. But the mere fact that these are not given in shari'ah is not sufficient. To declare that these are illegitimate it is necessary to establish that these are against the teachings of Islam.

The second argument which they give against these rights is that it is a pure right (*ḥaqq Mujarad*) which is not '*ayn* and taking consideration for these rights is not allowed. This argument is given in the light of the definition of *māl* of Ḥanafī jurists. But, as also discussed before, Ḥanafī scholar allows sale of some pure rights attached to the tangible property like right of way. More over, they also allowed taking consideration for some pure rights as compensation for leaving these rights in favor of someone like right of "*Ta'alā*", right of first acquisition and right of ..... Even Allāh S.W.T allows taking consideration for quantifiable rights in Qurān. For example right of the beneficiaries of the victim of a murder and also the right of husband not to release his wife from the wedlock. [234]

The third argument is that when a person buy a book, disk or cassette, which contains an intellectual property, whether scientific or literary. He also has the right to read it and benefit from whatever information that may be in it. He has the right to dispose of it by copying, selling or donating it to someone. However, he is not allowed to ascribe the scientific subject to anyone other than the one who originated it, otherwise he would have made a lie and forgery both of which are prohibited by the Shari'ah. Thus, the right of respecting the intellectual property is an ethical right which is realized when the thought is ascribed to the one who originated it and not by preventing others from using it without his permission. This ethical right realizes a moral right and not a right of material value which the west recognizes.

234 Taqī 'Uthmānī , "*Maghrabī Mamālik kay Chand Jadīd Fiqhī Massā'il*", P: 166-167.

The answer for this argument is that the person who purchases the book becomes owner of only that copy of a book. He has all the rights of ownership regarding this copy of book. He has right to get benefit by reading, by selling that copy of book. He has right to gift that copy to any one or even destroy that copy but has no right to make a copy similar to that because he is not the owner of the material inside the copy. So as he has no right to alter the material similarly he has no right to sell or distribute the material of the book in any form without the permission of the owner. This has been understood from the example of coins given by Justice Taqī 'Uthmānī in the reply of this argument. The coins or the currency notes when some one buy he becomes the owner of them he has right to get benefit from them, right to gift them, right to destroy them but has no right to make a similar coins or currency notes on the basis that he owns them.

The fourth argument is that the word (*manṭūq*) of the ḥadith of *walā*[235] indicates that the condition which contradicts what is in the Book of Allāh and the *Sunnah* of His Messenger should not be adhered to.

This is correct that the above mentioned have the same meaning but there is no text of Qurān and Sunnah to which these rights are contradictory.

The fifth argument is that the conditions of protecting intellectual property make the use of the sold asset restricted to one sort of benefit to the exclusion of another, so they are invalid conditions and contrary to what is in the Book of Allāh (S.W.T) and the Sunnah of His Messenger (P.B.U.H). This is because it contradicts the requirement of the shar'ī contract of selling, which enables the purchaser to freely

235 Hazrat Aysha narrated: That Buraira came (to Hazrat 'Aysha) and said, "I have made a contract of emancipation with my masters for nine ounces (of gold) to be paid in yearly installments. Therefore, I seek your help." Hazrat Aysha said, "If your masters agree, I will pay them the sum at once and free you on condition that your Wala' (loyalty) will be for me." Buraira went to her masters, but they refused that offer. She (came back) and said, "I presented to them the offer but they refused, unless the Wala' (loyalty) was for them." Hazrat Aysha mentioned that to the Messenger of Allāh (saw) so he said, "Do (it)" so she did. The Prophet (SAW) then got up and gave a speech to people, where he glorified and praised Allāh, and said, "What about some people who impose conditions which are not present in the Book of Allāh? So, any condition which is not present in the Book of Allāh is invalid. Allāh 's ordinance is more deserving, and Allāh 's condition is more firm. Verily, the Wala is for the liberator." See Al-Bukharī, "*Ṣaḥīḥ Bukharī (translated into English by Muhammad Mohsin Khan)*", vol: 3 Book 50, Ḥadīth no.889.

dispose of and benefit from the asset in any legitimate manner such as selling, trade, gift etc.

The answer for this argument is that the owner is allowed to sell what he owns. In the case of intellectual property the purchaser only owns the copy of a book and not the material inside so he has the right to dispose of that copy but not the material in that book. This is similar to a house which some one hire. The tenant only purchased the right of residence of a house but it is not possible for him to use this right without the transfer of possession of a house but this does not means that he becomes the owner and had right to dispose of house. He has the right to dispose of only the right of residence of which he is owner. Similarly in this case the purchaser owns the copy which he purchases and has rights related to that copy.

The sixth argument is that by publishing or making similar thing does not cause loss to the inventor or author or a trademark owner. It only reduces the profit.

The answer for this argument is that although less benefit is not loss but it harms the right of the owner who spend time and labour and money to invent or to write a book. The author or inventor is more entitled to get all the benefits of his property than a person who spend a little amount of many and by making or publishing similar property becomes partner in the profit of the author or inventor.

The seventh and most important argument is that intellectual property rights restrict the access to knowledge which is against the Islamic ethics. The basis of this argument is a hadith.[236] They also argue that if printing and publishing is not restricted to some than it will help more in propagation of knowledge.

236 Prophet P.B.U.H said: "Whoever conceals ilm that would benefit others in religious matters will be lashed with the bridle of fire from the hell on the day of judgment".

The answer for this argument is that intellectual property rights only stop from gaining of profit by publishing or reprinting it without permission and not from reading and gaining knowledge. If publication or reprinting is allowed for every one than no author and inventor should take a risk of spending his time labour and money on projects of new research for little profit. So this is necessary for the propagation of education and research and for the benefit of society to grant them intellectual property rights.[237]

- **Whether These Rights Are Inheritable Or Not?**

Now after accepting these rights then question arises that whether these rights are inheritable or not?

There are two types of rights on the basis of inheritance: inheritable rights and non inheritable rights. This division is applicable only to rights of individuals because inheritance in rights of Allāh is not allowed on the basis of a general rule: "rights of Allāh and those in which right of Allāh is dominant can not be inherited."[238]

But this does not means that all rights of individual are inheritable but as mentioned above there are two types of rights of individuals and scholars differentiate between them and said that all those rights which are related to māl and which are necessary to avert harm from the inheritor all these are inheritable rights but all those rights which are related to his self as a person are not inheritable like personal attributes of intellect and desires.[239]

According to Imām Qarāfī these rights are not inheritable. According to his view the intellect is personal attribute and it ended when the person dies and no one is

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237 Taqī 'Uthmānī , "*Maghrabī Mamālik kay Chand Jadīd Fiqhī Massā'il*", P: 225-227 and also see "*Is Copying Software Developed by US Companies Permissible*?" http://www.understandingislam. com/related/text.asp ?type=question&qid=1337 . Last time visited on 2nd July 2007.

238 'Abdul al-Salām, "*Qawā'id al-Aḥkām fī Maṣālaḥ al-An'ām*", P: 276-277 vol: 3

239 Ibid,

able to inherit the intellect of others which is "*asal*" so no one can inherit the intellectual property which is "*far'a*" (branch).[240]

The difference of opinion about the inheritance of it is based on the opinion that these are ḥaqūq *mujaridah* and this type of rights is personal attributes and has no relation with the *māl*. So these are not inheritable rights according to Ḥanafī scholars whereas Shāfi'ī and Mālikī allowed inheritance in these rights. [241]

But according to al-duraini this view is not correct. According to him intellectual property has two attributes which cannot separate from each others. These are:

1. Intellectual property is reflection of the personality of the author and is the base of right of author in his work and also for the element of liability.
2. Intellectual property which is result of the intellect of a person irrespective of its origin has separate existence from the author or inventor.

Intellectual property which has separate existence for example in the form of book exists even after the death of the source and is also considered as *māl*. So no one is entitled more than legal heirs to benefit of this work.[242] Wahbah Zohaili also allows inheritance of intellectual property on the basis of hadith of Prophet (P.B.U.H). He (P.B.U.H) said: **"whoever (among the believers) dies leaving some property then that property is for his heirs."**[243]

In this hadith the word *māl* is used in general sense and it includes all which a dead person left behind him whether it is *māl* or is related to it. The intellectual rights as discussed before have value and are used as a property rights. The most

240 Ibid, P: 276-277 vol: ; Al- Fatḥī al-duraynī, "*Ḥaqq al-Ibtikār*", P:55-80.

241 Abdul Ḥamīd al-Ṭaḥmāz, "*Ḥaq al-Tā'ilīf Wa Tūzī' Wa al-Nashar Wa al-Tarjamah*", page 183-185.

242 Al- Fatḥī al-duraynī, "*Ḥaqq al-Ibtikār*",P:55-80.

243 Wahbah Al-Zohaylī, "*Ḥaqq al-Tā'ilīf Wa al-Nashar Wa al-Tūzī*", P: 188-191

important feature of property rights (*ḥaqq mālī*) in is its sale for price and its inheritance.[244]

244 Al- Fatḥī al-duraynī, "*Ḥaqq al-Ibtikār*", P: 41, 139; Abdul Ḥamīd al-Ṭaḥmāz, "*Ḥaq al-Tā'ilīf Wa Tūzī' Wa al-Nashar Wa al-Tarjamah*", page 185

Chapter 3: Theories Of IPRs And Islam

This chapter first analyze the three theories of IPRs which were discussed in first chapter in the light of Islamic concept of maqāṣid and theory of knowledge and try to find out by comparing these three theories with the above mentioned Islamic concept whether both the systems have similar concept or there is any difference between them and to try reach on a conclusion whether muslims can adopt this IP system of non-muslims as it is or not. After this, in the second part of this chapter describes the IP situation in Pakistan.

1. Comparison Between Islamic Concept Of *'Ilm,* And Maqāṣid With Western Concept Of IPRs:

In western concept there are three basic theories mostly used for the justification of IP namely: Moral Desert Theory, Personality Theory and Utilitarian Theory. The concept given in these theories is compared with the Islamic concept of one by one.

The basic concept presented in personality theory is the preservation of the way in which the author presents his work to the whole world and the way in which he maintained his identification with the work.

The right of preservation of content integrity and the linkage of the owner with his work are also present in Islam.[245] As Fatḥī al-Duraynī and Wahbah Zoḥaylī said that the intellectual work represents the personality, capacity and intellectual

245 The basic principles and rules to protect this right are present in the Islam and were also practiced in Islamic history. See for detail chapter 2 of this work on P:29-49

efforts of author or inventors and that intellectual effort is the source of creation. So its owner has shar'ī right to protect his creation for himself. This established his connection with it.[246] This relationship between the creator and the result of his intellectual efforts is also evident from the fact that he is responsible for its results.[247] Even he remains responsible for his thoughts, knowledge, and words spoken or written and for deeds on the Day of Judgment.[248]

But there is a difference between the Islamic concept and the concept presented in personality theory. The two theories are similar on two points. Both holds that this right spring from the act of personal creation and remains linked to the author through out his life. However they differ from each other on two basic points. Islam upholds the authorship as an individual right, but at the same time equally emphasizes on its social role.

Second difference is that personality theory views work as a part of the author whereas the Islamic concept describes the linkage as purely intellectual and the preservation of the linkage is manifested as an extension of the responsibility and guidance. So the concept given by Islam is not for recognition of the commercial rights or inalienable property rights of the author in his intellectual property but is the endorsement for the accuracy of information provided for which author is personally responsible.[249]

The main point emphasizes in the moral desert theory is to compensate the time and labour of a person who produce or bring it first from the world of ideas into real world. The concept of this theory is similar to the concept given in the first acquisition theory of Islam about the compensation of laborer. But this doesn't mean that both present the same concept.

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246 Al- Fatḥī al-duraynī, "*Ḥaqq al-Ibtikār*", P: 16-19; Wahbah Al-Zoḥaylī, "*Ḥaqq al-Tā'līf Wa al-Nashar Wa al-Tūzī'*", P: 189.

247 Al- Fatḥī al-duraynī, "*Ḥaqq al-Ibtikār*", P: 16-19 ; Abdul Ḥamīd al-Ṭaḥmāz, "*Ḥaq al-Tā'ilīf Wa Tūzī' Wa al-Nashar Wa al-Tarjamah*", P: 174.

248 See P: 29-32 of chapter 2 of this thesis.

249 Ida Madiha , "*Authorship and Islam in Malaysia: Issue in perspective*", P:675.

The similar point in both is that both the theories say that the person who exert time and mixes his labor with a thing of common heritage of mankind (which does not belong to any one else before), he will be more entitled to it and to any monetary benefit arises from it.

But it differs from the Islamic concept on two points. The first is that the common heritage which Islam provides us is not only the common heritage consist of human knowledge and experiences. Islamic common heritage of knowledge consist of two types of knowledge: 1) Devine knowledge in the form of Qurān and Ḥadīth (which is true and permanent); and 2) experiences and knowledge of human being (which may be right or wrong).[250]

Divine knowledge is a permanent knowledge revealed by Allāh (S.W.T) as a gift for whole mankind. No one has power to alter it or change it or amend it or no one is allowed to mention it as his own words. It contains knowledge of each and every aspect and the knowledge which it has is for all the eras. It is not like the one given by human beings for example a theory which was presented in 18th century is not able to apply in the 19th century. Each and every word of this divine knowledge was true, is true, and always remains true. Whereas the common heritage in moral desert theory consists of human knowledge which is based on experiences and observation which may be right or may be wrong.

Secondly there is some knowledge the acquisition of which is not beneficial for human being. Muslim scholars divided knowledge into four categories: First which is beneficial up to the end. It is the knowledge of knowing God and its attributes and his laws. Second is harmful knowledge. Its acquisition and use is prohibited because its harm is greater than its benefits for example magic astrology or talismanic. Third one which is beneficial or praiseworthy upto certain limits like knowledge of medicine, mathematics etc; and the fourth one is such

250 See P: 29-32 of chapter 2 of this thesis.

knowledge which is not beneficial neither harmful.[251] So its acquisition is prohibited due to its harm because the purpose of Shari'ah is achievement of benefits and repulsion of damage.[252] Imām Ghazālī said: "knowledge is not held blameworthy except for one of the three reasons, firstly if it leads to the harm of another; it becomes blameworthy, such as magic, ṭalismān, sorcery. These sciences are true no doubt as Qurān testifies....2) the second reason is that if a science causes much harm to the acquirer, it is blameworthy, such as the science of astronomy....3) the third one is that it becomes of no use to one who acquires it, for example, learning of trivial sciences before the important ones, learning of subtleties before fundamentals..."[253] Every knowledge, creation, invention or trademark which is harmful or prohibited in Islam and which leads towards a harmful or prohibited things (whether harmful for religion or world or for both) is illegitimate. The general rule about the permissibility and prohibition of a thing is permission of benefits and prohibition of harms[254] and for the means or instruments used to achieve a purpose is that they are subordinate to purpose. So means or instruments which lead towards best purpose are best and those which lead towards or are cause of worst purposes are worst.[255] Every knowledge, published work, creation, and invention which is beneficial or leads towards the benefit is allowed in Islam.

As permanent committee for academic research and fatawaa said in his fatāwā about *bid'ah:* "invention of means of transport, means of communication, electronic devices, cooking devices, medicines and medical apparatus, cooling and heating devices, war weapons which are beneficial for human being there is no sin

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251 See Muḥammad Bin Muḥammad Imām Ghazālī, "*Aḥyā'u 'Ulum al-Dīn (translated into English by Fazlul Karīm)*", vol:1, (Published by Dārul Ishā'at, Karachi, 1st Edition,1993), P: 49; Muhammad bin 'Uthmayn, "*Kitāb al-'Ilm*", (Dār al-Thurayā, Rayāż, 1st edition, 1420 hijrah), P:124.

252 Imran Ahssan Khan Nyazee, "*Theories of Islamic Law: The Methodology Of Ijtihād*", P:213.

253 Imām Ghazālī, "*Aḥyā'u 'Ulum al-Dīn*", vol: 1, P: 43-45.

254 al-Shāṭibī, "*Al-Muwāfaqāt*", P:40.

255 See 'Abdul al-Salām, "*Qawā'id al-Aḥkām fī Maṣālah al-An'ām*", vol: 1, P:54; Shams Al-Dīn Abū Bakr Ibn-e-Qiyam al-Jūziyah, "*A'lām-ul-Mūqi'īn*", , vol:3, (Maktabah Ibn-e-Taymiyah), P:179.

in there creation or invention. If the purpose of their creation and for which it is used is welfare or benefit then it is also beneficial but if the purpose is destruction and damage then it is evil and harmful".[256] On another place answering another question about *bid'ah* they said: "scholars divided *bid'ah* into two types: *bid'ah dunyāwī* (related to worldly affairs) and second is *bid'ah dīnī* (related to deen).... In *bid'ah dunyāwī* if benefit (*maṣlaḥah*) prevails over harm (*mufsidah*) then it is permitted and if not then it is prohibited".[257]

According to Islam every work which does not make any positive contribution and which is against religion, indecent, immoral or against public policy is illegitimate but in west they have uncertain flexible man made moral and social values and rule made according to the wills of people. So they allowed many things which are harmful for the society and also prohibited in Islam for example they normally tolerated presentation of some sexual acts in t.v. programs.[258]

According to the Islamic concept men do not own their body. It is the "*amānah*"of Allāh (S.W.T) and its commercialization is not allowed in Islam. But west commercializes the human organs in the name of IP protection which is against the Islamic teachings and the dignity of human being.[259]

It is the duty of the ruler[260] to prohibit dissemination of every such knowledge or thing which is against the public interest or which has no benefits and make

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256 al-Dawaysh, "*Fatāwā al-Lajanah al-Dā'imah Lil Baḥūth Wa al-Ifta'i*", P:454, vol: 2.

257 Ibid, P: 458.

258 See for detail Ida Madieha Abdul Ghani Azmi, "*Authorship and Islam in Malaysia: Issue in perspective*", P:688-694.

259 See Dr. Munawar A. Anees, "*redefining the human*" a paper presented at the international conference on cloning organized by Forensic sciences Administration, Dubai, April 4-5, 1998; Ibid, "*Authorship and Islam in Malaysia: Issue in perspective*", P:666-671; C.R. Tayser, "*The Mejelle(English translation of the Majallah al-Ahkam al-'Adliyyah)*", Article 199, P:27, Law publishing company, reprint of 1901 edition, 1980.

260 See Article 58 of "*The Mejella*", P:10 which says " *the exercise of control over ri'āyah that is to say over subject depends on what is right to be done*"

possible dissemination of every such knowledge or thing which is beneficial for the public interest.[261]

The moral desert theory emphasizes more on individual but it also talks about the social responsibility of individuals "not to made worse off others by the acquisition" which according to Robert Nozick means that individuals are worse off if "they lose the opportunity to improve their situation." In the light of this if the current situations of developing countries and least developed countries with low income per capta who can not afford the new drugs to save their lives due to money and who cannot afford to buy new research which is also necessary for there progress has been analyzed than they are worse off.[262]

Whereas Islam stresses on the social role and also set some goals, rules and regulations and mentions the responsibilities of the individual towards society. The third theory "utilitarian theory" focuses on advancing the welfare of the group (i.e., society). According to them IP rights are granted as an incentive for invention and production, which, ultimately promotes economic growth.

This theory emphasizes on implementation of such laws which maximizes the wealth or utility. Some people confuse the concept of utility given by Bentham basis of axiom that nature has placed mankind under the governance of two masters, pleasure and pain and these two masters determine what human beings ought to do and what they should refrain from doing. According to his theory the motivation to do things springs from the human desire. The primary rule which he

261 "Once Mu'adh was along with Allāh's Apostle as a companion rider. Allāh's Apostle said, "O Mu'adh bin Jabal."Mu'adh replied, "Labbaik and Saadaik. O Allāh's Apostle!" Again the Prophet said, "O Mu'adh!" Mu'adh said thrice, "Labbaik and Saadaik, O Allāh's Apostle!" Allāh's Apostle said, "There is none who testifies sincerely that none has the right to be worshipped but Allāh and Muhammad is his Apostle, except that Allāh will save him from the Hell-fire." Mu'adh said, "O Allāh's Apostle! Should I not inform the people about it so that they may have glad tidings? "He replied, "When the people hear about it, they will solely depend on it." Then Mu'adh narrated the above-mentioned Ḥadīth just before his death, being afraid of committing sin (by not telling the knowledge); Al- Bukharī, "*Ṣaḥīḥ Bukharī (English translation)*", Vol: 1, Hadith no.130. This ḥadīth tells us not to disseminate knowledge which is of no benefit or harmful; Imām al-Nawawī, "*Ṣaḥīḥ Muslim bī Sharḥ al-Nawawī*", vol: 2, P: 328; Ibn-e-Qiyam al-Jūziyah, "*A'lām-ul-Mūqi'īn*", vol:3 P:304.

262 National White Collar Crime Center U.S, "*Intellectual Property and White-collar Crime: Report of Issues, Trends, and Problems for Future Research(May 2004)*", (Published by NCJRS) , P: 8.

used to highlight the utilitarianism is "The greatest happiness of the greatest number."[263] Whereas maṣlaḥah means "acquisition of benefit (*manfa'ah*) and repulsion of the harm (*mużarah*)".

The two theories are similar on the point that both give concept of acquisition of benefit and repulsion of harm. But differentiate on the two points that the goals in the utilitarian theory which they wanted to achieve for the welfare of the human are goals set by human according to his own desire. Whereas the Islamic concept of maṣlahah, it actually means "the preservation of the ends of shari'ah" for acquisition of *manfa'ah* (benefit) and repulsion of *mużarah* (harm). The goals (*maqāṣid*) are set by Allāh for acquisition of benefit and repulsion of harm and these are not dependent on human reason as the case in utilitarian theory.[264] Second Islam also has its own rules of preferences of interests (*manfa'ah*). These *maqāṣid* are five namely:

1. religion (al-*dīn*)
2. Life (al-*nafs*)
3. Progeny (al-*nasl*)
4. Intellect (al-'*aql*)
5. wealth (al-*māl*)

The number indicates the priority. These five purposes are primary purposes designated as necessities (*żarūrāt*) and the whole Islamic system, laws and principles are made to achieve these goals. These *maqāṣid* are of dual face. Each purpose has positive or aggressive aspect and a negative or defensive aspect. From the positive aspect the interest is secured by establishing what is required by the shari'ah through each of its maqāṣid. Thus, the interest of Dīn is secured by the

263 Class notes of Imran Ahsan Khan Nyazee

264 Imran Ahsan Khan Nyazee, "*Theories of Islamic Law: The Methodology Of Ijtihād*", published by Islamic research institute and international institute of Islamic thought, P:213.

creation of conditions that facilitate the worship and help to establish the other essential pillars of Islam. The interest life, it is secured by creating conditions for the existence of life. Interest of progeny is supported by facilitating and establishing family life. Similarly in case of intellect, this interest is secured by promoting the means of the intellect. From the defensive aspect, these interests are protected by preventing the destruction or corruption of the positive aspect. For example prayer, fasting, pilgrimage and *zakat* help to establish Dīn, while jihād is prescribed for defending it. Similarly in case of intellect, preservation of 'Aql is achieved through the provision of education and healthy growth of it, while penalties are provided for the consumption of the substances that destroy the intellect. Preservation of wealth is achieved by encouraging its growth, while theft or misappropriation of wealth is punished through penalties. [265]

In Islam the purpose of all the rules and principle is to achieve these five basic purposes. Economic growth is also included in these purposes but it is at the lowest number. Each '*maqṣad* (purpose) has preferences over the other and the number shows the preference. That means religion has preference over life and life over the progeny and progeny over the intellect and intellect over the wealth. To save dīn, the interest of life, progeny, intellect and wealth has been left and similarly preference given to other maqāṣid number wise. For example in case of jihad preference has been given to the interest of dīn over life and similarly in case of wine it was prohibited in normal circumstance to protect intellect but it is allowed to drink to save life. So in this situation we prefer the interest of life over intellect.

These five purposes are called *żarūrāt* (necessities). For the protection and support of these there are *hājāt* (needs). These are additional purposes required by the basic purposes, even though the primary purpose would not be without *hājāt.* The

265 Ibid;

third type of purposes is *tahsināt* that seeks to establish ease and facility. Both *hājāt* and tahsināt support and protect *żarūrāt.*[266]

The general rule of preference in case of contradiction of two interests and two harms is achievement of most beneficial interest by missing the least beneficial and repulsion of severe harm by lighter harm.

'Iz Bin 'Abdul Islām said: "shari'ah achieve the better interest by missing the good as repels severe damage by doing less damage".[267]

Ibn-e-Taymiyah said: "shari'ah came for achievement and completion of interests and for repulsion and suspension of harms. Its desire is to choose higher of two interests and to choose lower of two harms if achievement or repulsion of both are impossible."[268]

The second rule of preference is that in case of contradiction of public interest and private interest, public interest will prevail over the private.[269] The reason of preference of public interest over private is that it is the benefit for whole society. The harm occurred due to failure of achievement of public interest is more than the harm occurred due to failure of achievement of private interest.

A need (*hājāt*) when becomes need of public at large it is reduced to the degree of necessity as Shaṭibī said: "public need is reduced to the degree of necessity against the right of individual person and if the need of people is general than there is right of Allāh (S.W.T) in it"[270]

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266 Ibid P:214.

267 'Abdul al-Salām, "*Qawā'id al-Aḥkām fī Maṣālah al-An'ām*", P: 5-9, vol: 1; Ibn-e-Qiyam al-Jūziyah, "*A'lām-ul-Mūqi'īn*", P: 354, vol: 3

268 See Ahmad Bin 'Abdul Halīm Ibn-e-Taymiyah, "*Majmū'a al-Fatāwā*", (Dār A'lām al-Kutub, 1412 hijrah/ 1991), vol: 1, P: 376, vol: 23P:343, 182; see Article 27, 28,29,30,31 in "*The Mejelle*" by C.R.Tayser, P: 6-7.

269 al-Shāṭibī, "*Al-Muwāfaqāt*", P:350, vol: 2; see article 26 in "*The Mejelle*" by C.R.Tayser, P: 6.

270 al-Shāṭibī, "*Al-Muwāfaqāt*", P:350 vol: 2.

Ibn-e-Taimiyyah said: "what is needed by people as public need then there is right of Allāh (S.W.T) in it against the rights of individuals".[271]

On another place he said that if people are in dire need of food and there are some people or tribe who have extra storage of food then it is compulsory for them to sell it to those people and it is the duty of the ruler to compel them to sell it to those people because this act is compulsory for them. Similarly every thing of which people are in dire need in which any person is rich it is compulsory for him to sell it for money.[272]

Let's analyze Intellectual Property rights in the light of these maqāṣid. First of all, Knowledge plays very important role in establishing conditions for securing the interest of dīn. Understanding and transmission of the knowledge is very important for the propagation of dīn. Without the understanding the order of Allāh written in the holy book Qurān no one is able to establish and secure this top priority purpose. Secondly it is also important for securing the interest of intellect. Intellect and the knowledge are linked with each other and provision of knowledge is necessary for the good health intellect and there are many verses in which Allāh ordered us to seek knowledge to transmit that knowledge to other and Allāh define certain rules and regulation regarding this for securing the healthy intellect which discussed earlier in chapter 2 of this work.[273] So, these two interests have priority over the interest of wealth. If the wealth becomes hindrance in attaining the above two purposes it must be left to save those interests.

The right given to the producer of knowledge through IPR laws provides the producer an excessive monopoly for example life plus fifty years right in case of author of a book and 20 years in case of patents. The least developed countries

271 Ibn-e-Taymiyah, "*Majmū'a al-Fatāwā*", vol: 28, P: 100.

272 Ibid, vol: 29,P: 192.

273 P: 29-40 of chapter: 2 of this thesis.

who can not afford buying of these new books and other research and technologies would not be able to benefit from these. Until the end of that time period the developed countries progress further and the poor countries remain dependent on them and wealth concentrated in the hand of few developed countries.

These laws create hindrance in transmission of knowledge which is actually hindrance in attaining the above discussed two maqāṣid (Dīn and healthy Intellect) of Islam. According to Islamic law the interest of public prevails over the individual's interest. So preference of the individual's interest of lower priority is not allowed to prevail over other high priority interest.

IIPA criticizes section 36(3) of Pakistan copy right ordinance 2000 which "allows royalty free compulsory license for books." According to them it is against the provisions of Bern convention and the Trips agreement.[274] Consider a country where 38% of the population earns less than a dollar[275] can they afford to buy a book of a foreign writer? Are there children able to gain knowledge of new research and technology? The answer is no. until the end of the Long protection period this knowledge does not reach to them. This long term protection hinders the attainment of high priority purposes (Dīn and intellect). This is also against the basic human rights described in the charter of United Nations. Similarly in the case of sub Saharan countries where the daily income of the majority population is less than a dollar and majority is patient of HIV aids and people spend health expenses out of their pocket cannot afford to buy medicines can left to die for the interest of individual? According to a report one third of the world's population has no access to essential drugs, a figure that rises to half the population in the poorest countries of Africa and Asia.[276]

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274 IIPA, "*IIPA special 301 report about Pakistan*", (2007), P: 358. http://www.iipa.com/rbc/2007/2007SPEC301PAKISTAN.pdf (Last visited on 25th march 2007).

275 Hafiz Aziz_ ur_ Rehman, "*Trips and public health implications for Pakistan*" Islamabad Law Review, Vol: 1 Nos.3&4, 2003, P: 457-489.

276 Ibid; The Panos Institute (written by Martin Foreman and edited by Nikki Van Der Gaag) "*Patents, pills and public health*", Report No 46,P:2

In the light of theory of maṣlahah life has preference over the wealth and public's interest of life can not leave for the individual's interest of wealth. This is also against the human rights given by the western system. There is a weakness in the IP system it cannot differentiate between necessities and unnecessary things.

The above discussion does not mean denial of the rights of owner of IP. But the purpose is to point out the problem which in my opinion is lack of balance in the system. There is a strong need to create a balance between the rights of the owner and public. In my opinion a balanced system can be achieved if the term of protection of owner's right has been shorten the to six or seven year or introduction of any other provision which will help to create balance between the interests of two or any special provision to provide basic necessities to poor people.

Ostergard in "Intellectual Property: A Universal Human Right?" Writes that "access to ideas has proven to be essential in developmental stages of economic growth. Restricting access to IP, therefore, does not clearly produce long-term benefits of economic growth". The American themselves before fifties copy all the knowledge from the other countries to fulfill their need and did not adhere to the IPR and after satisfying their need and making progress they strictly adhered to the IPR laws. Similarly did the Japanese and now a day's China works on the similar strategy.[277]

Table no.1:

277 National White Collar Crime Center U.S, "*Intellectual Property and White-collar Crime: Report of Issues, Trends, and Problems for Future Research(May 2004)*", , p: 8-9.

World trade indices							
		Unit	2001	2002	2003	2004	2005
World Merchandise trade (based on export)		US $ billion	6,132	6,429	7,465	9.067	10,339
	Normal growth rate	%	-3. 9	4. 8	16. 1	21. 5	13.2
	Real growth rate	%	0. 0	4. 0	6. 0	12.6	7. 5
	Export price growth rate	%	-3. 8	0. 8	10.2	8. 8	5. 6
World trade in service		US $ billion	1,495	1,601	1,834	2,180	2,415
	Nominal growth rate	%	0. 2	7. 2	14.5	18.8	10. 8
World real GDP growth rate		%	2. 6	3. 6	4. 1	5. 3	4. 8
Growth in mining and manufacturing industrial production index (industrialized economies)		%	-3. 0	-0. 5	1.1	3.4	1. 9
Crude oil	Price (average)	US $ barrel	24. 3	25. 0	28. 9	37.8	53.4
	Demand	Million barrels/ day	77.4	77.8	79.4	82.5	83. 6
Change in normal effective exchange rate of U.S dollar		%	5. 9	-1. 6	-12. 3	-8. 2	-1. 5

(Source: IMF; IFS; and WEO; IEA and national trade statistics)

NOTE:

1. 2005 trade value and growth rates are JETRO estimates.
2. Real GDP growth rates based on purchasing power parity.
3. A negative change in the nominal effective exchange rate of the US $ indicate depreciation.

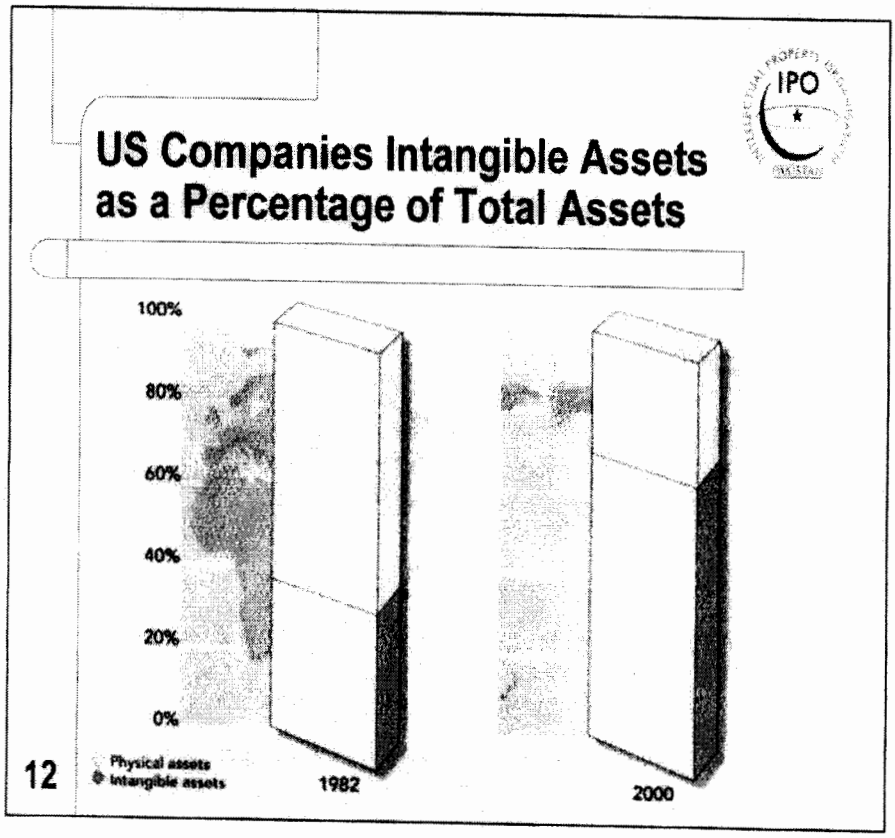
Actually all the agreements of WTO are tools to control the world trade used by developed countries. If the world trade static in table no1. [278] it has been found that the trade which has been done from the start of trading up till 2001 was 6,132 billion dollar[279] and the trade which had been done from 2001 to 2005 in four years was 10,339 billion dollar which is four times more than 2001 figures and major part of that trade was done by the developed countries and not by the least developed countries or developing countries. The intangible assets of US in1982 were only 40% total assets but in 2000 its intangible assets were 70 % of the total assets. Figure no.2.[280]

278 Source: IPO office Islamabad Pakistan.

279 D.G IPO office Islamabad Pakistan.

280 Ibid;

Figure no.2:[281]



Western system has the only one goal to achieve economic growth and wealth maximization and all the principles and policies are made to achieve this goal and it has priority over all other things. To attain this goal they commercialize each and every thing even they make human body a commodity. There is no content based restriction regarding the knowledge transmitted. Whereas in Islam there is a content based restriction and every one who transmitted knowledge he is responsible for its consequences.

2. Intellectual property rights situation in Pakistan:

281 Source: IPO, Islamabad.

2.1. Situation before Trips or Pre Trips Era:

The Pakistani law in general provides protection for IPR from the very beginning. The first patent office was established in Karachi in 1948 (with in a period of one year after its independence) which function under the Patents and Design Act 1911 and the patent rules 1933. And the first trade mark office was established in Karachi in 1948 under the Trade Marks Act 1940. The Copy right protection was provided in 1962 and first copy right office was established in Karachi in 1963.[282]

Pakistan became member of Bern convention in 1948 and of WIPO in 1977. Before Trips Pakistan has the following legislation:

1: Patent and Design act; 1911

2: Trademarks act; 1940

3: Copy right ordinance; 1962

4: Merchandize Marks act; 1889

5: Pakistan penal code, and

6: custom act; 1969

The legislation for the IPR protection was there but the rate of piracy of IPR remains high due to inadequate protection, lack of enforcement and fragmented IP management. The copy right was managed by the Ministry of education, patent was under the control of Ministry of Industries and production and the trade marks was managed by the Ministry of commerce.[283]

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282 IPO , "*IPO Pakistan, review 2005*", P:17-19.

283 Ibid, P: 28

The Copyright law in Pakistan is governed by the Copyright Ordinance 1962. Significant changes in the Ordinance were introduced through the Copyright (Amendment) Act 1992 and the Copyright (Amendment) Ordinance 2000. The types of work protected under the Ordinance are original (1) literary works, including, computer programs; (2) dramatic works; (3) musical works; (4) artistic works, including drawings, maps, photographs and architectural works; (4) cinematographic works and (5) records. In 1992, an amendment was made in the definition of "literary work" to extend coverage to computer programs. Sections 18 to 23 of the Ordinance lay down the term of copyright in respect of different works. For example, the period of copyright of a published literary, dramatic, musical or artistic work (other than a photograph) is the life of the author and 50 years after his death. In the case of a cinematographic work, record and a Photograph, copyright subsists until 50 years from the beginning of the calendar year from publication of the work. An offence under this law is cognizable and non-bail able. It provides punishment upon conviction of up to Rs. 100,000 (Rs. 200,000 on second conviction) or 3 years imprisonment or both.

Patents are granted for up to 16 years from the date of application and may generally be extended for a five-year period and, under some circumstances, for an additional five years. But it only protects process patent and did not provide protection for pharmaceutical products. Trade marks are registered for seven years from the date of application and the registration may be renewed for an additional fifteen years. Pakistan has been on the Special 301[284] Watch List since 1989 due to widespread piracy, especially of copyrighted materials, inadequate patent protection and occasional instances of trademark which includes of infringement

284Pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994) ("Special 301"), under Special 301 provisions, USTR must identify those countries that deny adequate and effective protection for IPR or deny fair and equitable market access for persons that rely on intellectual property protection. Countries that have the most onerous or egregious acts, policies, or practices and whose acts, policies, or practices have the greatest adverse impact (actual or potential) on the relevant U.S. products must be designated as "Priority Foreign Countries." Under Special 301 provisions, USTR must identify those countries that deny adequate and effective protection for IPR or deny fair and equitable market access for persons that rely on intellectual property protection.

of trademarks for toys, playing cards and industrial machinery. "Trends in Software Piracy 1994-2002," a BSA study says that software piracy rate in Pakistan was 95 percent in 1994.[285] U.S industry has complained that the right of the patentee is not adequately protected in the law with the result that the infringer continues to freely manufacture the illegal product. In addition, only the patent-owner, not licensees, can file a suit against an infringer and there is always the threat of revocation of the patent through compulsory licensing[286].

Alone, in the area of copyright infringement, the International Intellectual Property Alliance estimated that piracy of films, sound recordings, computer programs, and books resulted in trade losses of $62 million in 1994[287] and $45 million in 1995[288]. The U.S. Embassy estimates an impact of less than $10 million for patent and trademark violations[289]. In 1994, EMI Pakistan was forced to close its shop due to piracy. [290] According to a report of INTA (International Trade Mark Association) in 1995 in apparel and foot ware trade mark owners due to infringement and counterfeit bear loss of $2,219.[291]

2.2. Intellectual Property Situation In Years In Between Pre Trips and Post Trips Or Mid Period:

In 1995 Pakistan joined WTO and being its member accepted the trade related intellectual property rights (TRIPS) obligations due to the 'single undertaking'

285 The tribune, "*Pakistan, the hotbed of piracy*" Monday, October 20, 2003, P: 1. http://www.tribuneindia.com/2003/20031020/login/index.htm (last visited on 29th March 2007).

286 USTR: "*National Trade Estimate-Pakistan*",(1996), P: 2. http://www.ustr.gov/Document_Library/Reports_Publications/1996/1996_National_Trade_Estimate/1996_National_Trade_Estimate-Pakistan.html (last time visited on 29th March 2007).

287 "*Intellectual Property Rights in the Indian subcontinent*" P: 9, www.bustpatent.com/froindi.htm#PAK . (last visited on 30th March 2007)

288 USTR: "*National Trade Estimate-Pakistan*",(1996), P: 3.

289 Ibid;

290 Ziad Zafar, "*The Big Steal*",(July 2005, News line, Karachi), P: 4.

291 INTA (International Trade Mark Association): "The *economic impact of trade mark counterfeiting and infringement (estimation of impact of trade mark counterfeiting and infringement on world wide sales of apparel and footwear) April 1998*", (Geneva, 17-18 October 2005), P: 8.

requirement. According to this Pakistan was given five years time period (1995 to January 2000) to bring its Intellectual property laws and enforcement efforts into line with the TRIPS compliance. Pakistan remains on watch list of special 301 during the whole period of five year due to weak enforcement and high level of IPR infringement. EU custom seized some IPR infringing goods from Pakistan which includes foot ball and labels.[292] According to a study "Estimation of the impact of trade mark counterfeiting and infringement on worldwide sale of apparel and foot wear" by the international trade mark association (INTA) in 1998 the total sale in Pakistan in apparel and footwear for the year 1995 was $7,300 and the loss due to weak trade mark protection to trade mark owners was $2,219 which was -30%.[293]

In 1997 and 1998, USTR noted that piracy of computer software, videos, and books remained widespread. In 1999, IIPA recommended that Pakistan remain on the Watch List, and noted for the first time the sudden arrival of CD manufacturing capability. USTR noted the CD plants and Pakistan's TRIPS-incompatible laws. In 2000, IIPA again recommended that Pakistan be kept on the Watch List, again noting the increasing pirate CD production problem. Piracy level remains very high for all the copy right industries and estimated trade losses increased to more than$ 136.9 million in 2ooo.

Table: 3

Table: Level of piracy in Pakistan and losses in US dollars[294]

292 Prepared by Ms. Hema Vithlani of Counterfeiting Intellugence Bureau, "*The Economic Impact of Counterfeiting*", Published by OECD (Organization for Economic Co-operation and Development) 1998 P:22,.

293 INTA (International Trade Mark Association): "*The economic impact of trade mark counterfeiting and infringement (estimation of impact of trade mark counterfeiting and infringement on world wide sales of apparel and footwear) April 1998*", (Geneva, 17-18 October 2005), P: 8.

294 See IIPA, "*IIPA special 301 reports about Pakistan*", (2001,2002,2003,2004,2005,2006 and 2007 available), Visit http://www.iipa.com/country reports.html#P (Last visited on 25th march 2007).

industry	2000		1999		1998		1997		1996		1995	
	Loss	level	Loss	level	Loss	level	Loss	level	Loss	level	Loss	level
Motion pictures	10.0	60%	9.0	60%	9.0	60%	9.0	70%	10.0	80%	10.0	100%
Sound recordings / musical composition	65.03	90%	3.0	90%	2.0	95%	2.5	95%	2.0	95%	5.0	94%
Business software application	16.9	84%	14.1	83%	18.1	86%	16.4	88%	16.7	92%	10.5	92%
Entertainment software	NA	NA	NA	NA	11.1	94%	10..2	92%	9.8	93%	8.0	90%
Books	45.0	NA	42.0	NA	40.0	NA	30.0	NA	30.0	NA	30.0	NA
Total	136.9		68.1		80.		2 68.1		68.5		63.5	

Source: International Intellectual Property Alliance

2.3. Intellectual Property Situation After Trips Or Post Trips Era

2.3.1. Amendments In Legislation:

In order to make its IP laws compatible to Trips Pakistan amended its major IPR laws and also made some new legislations in 2000 which are

1. Copy right ordinance 1962 was amended and now called copy right ordinance 2000;

2. Patent and design act 1911 was amended and now called patent ordinance2000;
3. Trade marks ordinance was amended and now called trade marks ordinance 2001;
4. The registered Designs ordinance 2000;
5. The registered lay-out Designs of integrated circuits ordinance 2000;

1. Copy Right Ordinance 2000:

In order to combat piracy Pakistan amended its Copyright Ordinance, 1962. The amendments made are as follows:

1. It provides "rental right" for computer programs (and cinematographic works) but not for producers of sound recordings. Rental" is defined as "the authorization to use the original or a copy of a computer program or a cinematographic work for a limited period of time for consideration." The definition of "copyright" includes the exclusive right to authorize the rental of computer programs and cinematographic.[295]
2. Producers of sound recordings receive neighboring rights, including a rental right in pursuant to section 24A.
3. It provides for civil *ex-parte* search orders (without notice to the defendant), essential to enforcement against end-user piracy and required by Article50 of TRIPS.

295 Section 2 and 3 of *the copyright ordinance* 2000.

4. provides for criminal penalties to up to three years imprisonment or a fine of 100,000 rupees (approximately U.S $1,660), which are doubled for second or subsequent offenses[296]
5. broadens the Registrar's authority to prohibit (seize, detain, etc.) the export [297]out of Pakistan of infringing copies in addition to infringing imports coming into Pakistan, and includes goods to which infringing labels are applied as subject to this prohibition.[298]
6. Provides a new right in "typographical arrangement" of a published edition of a work (with a term of protection of 25 years from publication).[299]
7. Provides express protection for compilations of data.
8. Section 60-A provides "Special remedies for infringement of copyright," permitting the owner of an infringed work or subject matter to apply to the court for immediate provisional orders to prevent infringements and preserve evidence. The court would have the power to order the search without notifying the defendant if it determines that any delay would risk frustrating the proceedings; the copyright owner or other person seeking the order would be bound to file a suit or other civil proceeding within 30 days of initiating the provisional proceedings; and
9. A new Subsection 60-A (3) provides for border measures (including the court's ability to refuse to release goods destined for import or export that are suspected of being infringing into the channels of trade, until the matter is decided by the court).

An offence under this ordinance is non-bail able or cognize able which is not a requirement of trips.[300]

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296 Ibid:Section 66

297 It is not required in trips agreement.

298 Section 58 *of the copyright ordinance* 2000

299 Ibid:Section 28

2) Patent Ordinance2000:

Salient features of the new Patents Ordinance can be summarised as follows:

1. Product patent filing was made possible.
2. Elaborate criteria for patentable inventions were provided, including the requirement of industrial application.[301]
3. Novelty requirement was changed from local to international disclosure.[302]
4. Term of patent was increased from 16 years to 20 years.[303]
5. EMR (Exclusive marketing rights) were made available for inventions covered by black-box applications for pharmaceutical and agricultural chemical products.[304]
6. A system of effective provisional measures against infringement of patents was provided.
7. Effective border measures were also introduced.

In 2002, some amendments were made in the patent legislation. These amendments are as follow:

1. Term of patent increased from 16 years to 20years.[305]
2. Groups of inventions excluded and separate applications will have to be filed for each intermediate and the final product and to the extent required also the process of manufacture.[306]

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300 By making an offence cognizable under this ordinance means that the offence is of serious nature equivalent to murder. Also It is not required in Trips agreement and similarly check on export is also not Trips requirement and these provisions made this legislation a Trips plus legislation.

301 Section 2 of "*The Pakistan patent ordinance 2000*"

302 Ibid, section 8

303 Ibid, section 31

304 Ibid, section 30(4)

305 section 31 and 106 (4)

306 see Sections 13(3), 15(2A) and 15(8)

3. Separate applications required for each derivate and salt of a chemical product intended for use in agriculture or medicine
4. Biological products per se cannot be patented – both process and product must be novel: sub-section (8) of section 15 of the Patents Ordinance provides that in the case of chemical products, such as biological products, for which it is not possible to provide a structural description of the product, the biological product cannot be claimed per se and must be claimed along with the process by which such biological product is made. Thus, not only the biological product but also the process by which it is made must be novel. Further, the sub-section provides that the patent protection is available for the biological product only if made by the process claimed. In the old legislation it would have been possible to obtain a patent for a new biological product which is produced through a known the new biological product is manufactured through a known process no patent rights may be granted in respect of such biological product. [307]
5. Novel process for preparing admixtures not patentable.[308]
6. An application for the grant of exclusive marketing approval is now required to be filed with the Controller of Patents and not the Ministry of Health.[309]
7. Parallel imports allowed.[310]

Before 2002 amendment a group of inventions which are cognate or so related as to constitute one invention or where one invention is a modification of another, may be included in a single application for the grant of a patent. So for example a specification which claims the manufacture of one class of compounds and includes separate claims for the process of manufacture and also for the products obtained may be included in a single application. Also, a specification which describes a chemical manufacture taking place in two or more stages, involving the production of one or more group of intermediate products which are distinct in character from the product, then a single application may claim a patent for the final products and also the intermediate products. Paris convention and Trips (by reference to the Paris Convention) also provide for the filing of divisional applications.

307 See Section 2(s), 7 (4) (d) and 15 (8)

308 Section 15(8)

309 Section13 (9), 30(4)

310 Section 30 (5) (a)

8. Bolar Exception: permits third parties to take actions necessary for seeking approval of a product for its commercialization – but no time limit prescribed for this.[311]
9. New or subsequent use of a known product or process prohibited. [312]
10. State of the art: disclosure of an invention in breach of confidence and unlawful disclosure is no longer protected.[313]
11. Revocation of patent by Federal Government: two new grounds of revocation have been included in section 48: "b) a patent has been obtained through concealment or misrepresentation in the application; or

    (c) where the compulsory license granted to prevent the abuse which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work or in relation to anti-competitive practices, has not been sufficient, it may, after giving the patentee an opportunity of being heard, make a declaration to that effect in the official Gazette, and...."[314]

12. Compulsory Licensing, grant by Federal Government at any time: Two new circumstances have been included in section 58(1) of the Patents Ordinances in which the Federal Government may grant a compulsory license to a government or agency or a third party. These two new sub-clauses are: "iii) the patent holder refuses to grant a license to a third party on reasonable commercial terms and conditions; or iv) where patent has not been exploited in a manner which contributes to the promotion of technological innovation and to the transfer and dissemination of technology".[315]

311 Section30 (5) (e)

312 Section 7 (4) (d)

313 Section 8 (3)

314 Section 48 (b) (c)

315 Section 58 (1) (iii) (iv)

13. Non-Voluntary License grant by the Controller to prevent abuse: Sub-section (1) of section 59 has been reworded as follows: "On request, made to the Controller after the expiration of a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever period expires last, the Controller may issue a non-voluntary license to prevent the abuses which might result from the exercise of the rights conferred by the patent, for example, failure to work"

14. Relieves in suits for infringement: A new sub-section (1) has been substituted for the original Sub-section. The original sub-section contained an elaborate list of relieves which may be granted by the Court in any suit for infringement. [316]This list has now been reduced to just two clauses as follows:

In any suit for infringement the Court shall have the power-

(a) to grant relief by way of damages, injunctions or accounts provided that, where permitted, effective provisional measure may also be ordered by the Court;

(b) to order, if the subject matter of a patent is a process for obtaining a product, the defendant to prove that the process to obtain an identical product is different

316 Old section 61(1) In any suit for infringement the Court shall have the power-

(i) to order to desist from infringement;

(ii) to prevent the entry into the channels of commerce of imported goods that involve the infringement immediately after custom clearance of such goods;

(iii) to order the infringer to pay to the right holder damages adequate to compensate for the injury he has suffered because of infringement;

(iv) to pay the right holder expenses which may include appropriate attorney's fee;

(v) in appropriate cases, to order recovery of profits, damages and pre-established damages even where the infringer did not knowingly or with reasonable ground to know, engage in infringing;

(vi) to order that goods found to be infringing be, without compensation of any sought, disposed off outside the channels of commerce;

(vii) to order that material and implements the predominant use of which has been in the creating of infringing goods be, without compensation of any sought, disposed off outside the channels of commerce in such a manner as to minimize risk of further infringement, and in considering such orders, the need for proportionality between seriousness of infringement and remedies ordered as well as interests of third parties shall be taken into account;

(viii) unless this would be out of proportion to the seriousness of infringement, to order infringer to inform the right holder of the identity of third parties involved in production and distribution of the infringing goods and of their channels of commerce; and

(ix) to order a party at whose request measures were taken and who has abused enforcement procedure, to provide to a party wrongfully enjoined or restrained, adequate compensation for injury suffered because of such abuse; and

(x) to order the applicant to pay the defendant expenses, which may include appropriate attorney's fee.

from the patented process and that the identical product in question shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process provided that the product obtained by patented process is new if it has not been put into the market for more than one year before the date of the initiation of the judicial action by the patentee: Provided that this provision shall apply subject to the prior proof by the plaintiff that the allegedly infringing product is identical to the product directly produced by the patented process: Provided further that in the adduction of proof to the contrary, the legitimate interests of defendants in protecting their manufacturing and business secrets shall be taken into account"[317]

3) Trade Marks Ordinance:

The Trade Marks Act 1940 was replaced by the Trade Marks Ordinance 2001, which, though promulgated in 2001, was enforced in the year 2004. The new law introduces some new concepts and some significant extensions are made to the previous trade mark law. The following are among the most significant changes:

1. the definition of mark is broadened to include figurative element, colors and sound marks;[318]
2. Service marks are registrable;[319]
3. It has Provisions regarding protection of "well-known" marks, "collective marks", "certification marks" and "domain names".
4. the law extends to provide protection for geographical indications and well known trademarks;[320]

317 Section 61 (1)

318 Section 2 (xxiv) of *Pakistan Trade marks ordinance, 2001*

319 Ibid, Section 12

320 Ibid, Section 2 (xix) and Section 86

5. the definition of what constitutes "trade description", "trade names" and "service" has been incorporated; [321]
6. the law also defines "use" to include use of a trade mark on signboards, advertisements and business documents; [322]
7. significant changes to the law concerning trade marks infringements has been embodied to extend the range of activities that will infringe a registered trade mark;
8. introducing comparative advertising and allowing its practice; [323]
9. defining unfair competition and including provisions constituting an act of unfair competition;[324]
10. provisions are made for an application to claim priority by applicants of a convention country for some or all of the same goods or services, for a period of six months from the date of filing of the first such application;[325]
11. the law provides for the prohibition and seizure of goods with infringing trade marks by the Collector of custom and excise; [326]
12. The law also grants temporary protection to those who have exhibited a mark in respect of goods/services at an officially recognized international exhibition to apply for registration of the mark within the next six months. [327]
13. Initial period of registration has been extended from 7 to 10 years. [328]
14. Period for registration renewal has been reduced from 15 to 10 years [329]

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321 Ibid, Section 2 (xlvi)

322 Ibid, Section 3 (1)(c) (iii and iv)

323 Ibid, Section 2 (vi) and section 68

324 Ibid, Section 67

325 Ibid, Section 25

326 Ibid, Section 53 to 56

327 Ibid, Section 26

328 Ibid, Section34

329 Ibid, Section35

4. **Designs Law:** The Industrial Designs Law provides for the registration of designs for a period of 10 years, with the possibility of extending the registration for two additional 10-year periods. The Law for Layout Designs of Integrated Circuits provides for protection of layout designs for 10 years starting from its first commercial exploitation anywhere in the world. Penalties and legal remedies are also available in case of infringement on industrial designs and layout designs.[330]

2.3.2. Situation of IPRs Violations In This Era:

In 2oo1, the first year of Trips period, Pakistan was again placed on watch list in special 301 reports due to highly level of piracy.[331] Estimated trade losses due to piracy increased to more than $143.3 million in 2001.[332] Pakistan has emerged in 2001 as one of the World's largest producers for export of pirate CDs and other optical media (media read with an optical device such as a laser, including CDs, VCDs, DVDs, CD-Rs, CD-ROMs, etc.).[333] In 2001, IIPA filed a petition with USTR's GSP Committee requesting that it evaluate Pakistan's eligibility for the trade benefit program due to country's poor record of copyright protection and enforcement.[334] Again in 2002 and 2003 USTR retained Pakistan on watch list due to the infringement of IPR.[335]

According to the 2003 USTR's Special 301 Announcement Pakistan was the "fourth largest source of counterfeit and piratical goods seized by the U.S.

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330 See "*The registered Designs ordinance 2000 and The registered lay-out Designs of integrated circuits ordinance 2000*".

331 IIPA, "*Historical Summary Of Selected Countries' Placement For Copyright-Related Matters On The Special 301 Lists*" (February 2004), P: 32. http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf (Last time visited on 1st April 2007)

332 IIPA, "*International Intellectual Property Alliance special 301 report Pakistan*" (year 2002) P: 191. http://www.iipa.com/countryreports.html#P (Last time visited on 1st April 2007)

333 Ibid, P: 192

334 Ibid, P: 191.

335 IIPA, "*Historical Summary Of Selected Countries' Placement For Copyright-Related Matters On The Special 301 Lists*" (February 2004), P: 32-33; USTR, "*Special 301 Report Watch List of year 2002 and 2003*", (Date:5/1/02 and 5/1/03), P:7 for year 02 and P: 11 for 03. visit http://www.ustr.gov/Document_Library/Reports_Publicatios/2002/2002_special_301_Report/Special_Watch_List.html and http://www.ustr.gov/Document_Library/Reports_Publicatios/2002/2002_special_301_Report/Special_Watch_List.html (Both last time visited on 1st April 2007)

Customs Service" in 2002.[336] Again in 2004 USTR Announced Pakistan as the fourth largest source of counterfeit and piratical goods seized by the U.S. Customs Service and elevated Pakistan to the Priority Watch List, citing worsening piracy and counterfeiting problems. The vast majority of these goods were both apparel and pharmaceuticals with counterfeit trademarks or, optical media products.[337] USTR retained Pakistan on the Priority Watch List in its Special 301 2005 Announcement stating that, "... the overall piracy and counterfeiting problems in Pakistan have not improved significantly over the past year..."[338]

A study by Brifa mentioned that Pakistan counterfeit drugs make up 40-50% of the market. [339] US department of commerce said: "US companies have concerns about continuing problems with pharmaceuticals patent infringement and trade mark counterfeiting in Pakistan."[340]

According to ifpi reports Pakistan is one of the largest exporters of pirate discs in the world and 13million pirated discs exported from Pakistan per month to more than 46 countries.[341]

Software piracy rate was also very high in Pakistan. According to a study conducted by BSA (business software alliance) in 2001, it mentioned Pakistan amongst ten countries with highest piracy rate. Pakistan was at sixth number with

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336 IIPA, *"Historical Summary Of Selected Countries' Placement For Copyright-Related Matters On The Special 301 Lists"* (February 2004), P: 33

337 IIPA, *"Historical Summary Of Selected Countries' Placement For Copyright-Related Matters On The Special 301 Lists"* (February 2007), P: 45 http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARYFINAL021107.pdf (Last time visited on 1st April 2007) ; USTR, "Special 301 Priority Watch List 2004", (Date: 5/3/04) P:7. http://www.ustr.gov /Document_Library/ Reports_Publications/2004/2004 _Special_301/Special _301_Priority_ Watch_List.html . (Last time visited on 1st April 2007).

338 IIPA, *"Historical Summary Of Selected Countries' Placement For Copyright-Related Matters On The Special 301 Lists"* (February 2007), P: 45; USTR, *"Special 301 Priority Watch List 2005"*, P:5. http://www.ustr.gov /Document_Library/ Reports_Publications/2005/2005 _Special_301/asset _upload_file519_7649.pdf . (Last time visited on 1st April 2007).

339 Briffa, *"Countering the drug counterfeiters"*, October 2004, P:1 www.briffa.com. (Last time visited on 3rd April 2007).

340 IPO, *"IPO Pakistan: review 2005"*, P:3.

341 Ifpi (International Federation Of The Phonographic Industry), *"The recording industry piracy report 2006"*, P: 17 ; see IPO, IPO Pakistan: review 2005, P:3.

a piracy rate of 83%[342] and in 2002 country ranks seven among the 25 countries with the highest software piracy rates in the world[343], and was on ninth number according to BSA study 2004.[344] In 2005 according to BSA piracy study Pakistan was 12th country piracy rate of 82%[345] and fifth country with a piracy rate of 86% according to 2006 BSA piracy study.[346]

Cable piracy was also wide spread in Pakistan. According to an article in News line it is estimated that there are just over 10 million TV sets in Pakistan, of which three million have cable connections. Most of cable operators illegally air Indian TV channels like Zee TV, B4U and a host of others, while there are half a dozen channels devoted to screening the latest films. In Karachi alone, there are over 200 cable operators almost all airing pirated content with impunity. According to a Nielsen survey in 2002, 19 million Pakistanis viewed pirated VCDs and DVDs every month through pirated cable channels alone.[347]

Book piracy is also rampant. IIPA (International Intellectual property Alliance) said "Pakistan is one of the worst markets for books, as piracy of published material is rampant". [348]

Mainly illegal printing of medical texts, computer books and other academic titles, English Language Teaching materials, and reference materials such as dictionaries, but also commercial photocopying is rampant. All popular titles have several illegal editions, with pirates competing for market share. The book bazaars in Karachi and Lahore are teeming with pirated engineering and computer science

342 BSA, "*Seventh Annual BSA Global Software Piracy Study*",(June 2002) P: 4; Krishnan Thiagarajan, "Copycats get bolder" (Wednesday, Jun 26, 2002, Financial Daily from THE HINDU group of publications), P: 1

343 BSA (Business Software Alliance), " *Eighth Annual BSA Piracy Study: Trends in software Piracy1994-2002*" (June 2003), P: 2; Also mentioned in The Tribune, "*Pakistan, the hotbed of piracy*" (October 20, 2003), P: 2 http://www.tribuneindia.com/2003/20031020/login/index.htm

344 BSA and IDC, "*First Annual BSA and IDC Global Software Piracy Study*",(MAY 2004) P: 3.

345 BSA and IDC, " *Second Annual BSA and IDC Global Software Piracy Study*",(MAY 2005) P: 3.

346 BSA and IDC, "*Global Software Piracy Study*",(MAY 2006)P: 4

347Ziad Zafar, "*The Big Steal*",(News line July 2005, Karachi), P: 4 http://www.bilaterals.org/article.php3?id_article=2246 . Last visited on 30th March 2007.

348 IPO, "*IPO Pakistan: review 2005*", P:3

books. Entire books are photocopied and available for sale in stalls and bookstores.[349]

According to Ameena Sayyid, president of the Oxford University Press (OUP), any book that sells over 300 copies is sure to be pirated. The legitimate turnover of the book industry in Pakistan is estimated at 400 million U.S dollars by OUP, which claims that it is losing more than 50 per cent of its business to piracy. [350]

In 2005 Pakistani government took the following out of the box parallel decisions to fight against IPR infringement namely:

- Establishment of IPO Pakistan for integrated management of IP enforcement coordination as a focal organization.
- Empowerment of FIA to eliminate piracy by including the copy right ordinance 1962 in the schedule of FIA Act, 1974; and
- Activation of Pakistan customs to indirect import and export of pirated optical discs (CDS, DVDS, and cards) by establishment of anti piracy cells (APC's) at Pakistan's international air ports.

The IPO, FIA and Pakistan custom fight together and changed the situation. In 2006 USTR's special 301 report Pakistan was removed from priority watch list to watch list. [351] Different international organization appreciated this effort of government of Pakistan in the following words:

US trade representative in a press release said:

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349 IIPA, "*IIPA special 301 report about Pakistan*", (2007), P: 356. http://www.iipa.com/rbc/2007/2007SPEC301PAKISTAN.pdf (Last visited on 25th march 2007).

350 Ziad Zafar, "*The Big Steal*", (News line July 2005, Karachi), P:6.

351 USTR "*Special 301 Priority Watch List of year 2006*", P:8 http://www.ustr.gov /Document_Library/ Reports_Publications/2006/2006_Special _301 _ Review/asset_upload_file190_9339.pdf . (Last time visited on 1st April 2007); IIPA, "*Historical Summary Of Selected Countries' Placement For Copyright-Related Matters On The Special 301 Lists*" (February 2007), P: 45.

"Pakistan's concentrated efforts since April 2005, particularly its enforcement action resulted in concrete results including destruction of the pirated optical discs, plant closures, arrests, and confiscations of imported discs...In recognition of these positive developments, the U.S has closed the review of GSP petition concerning IP rights protection and enforcement in Pakistan. We look forward to working together with Pakistan to ensure thus enforcement actions continue and that further steps are taken to strengthen its IP environment."[352]

The International federation of the Phonographic industry (IFPI) said:

"The results (of the Government's concentrated efforts since April 2005) are evident that the export of pirated optical discs from Pakistan's major international airports has completely dried up."[353]

IIPA has recommended to USTR:

"That Pakistan be moved from the priority watch list to watch list, with an out-of-cycle review to evaluate that Pakistan continues to make progress in tackling book piracy and reducing pirate optical disc production."[354]

The recording industry association of Pakistan (RIAA) has also appreciated the Pakistan's action in the following words:

"We congratulate Pakistan on its excellent efforts, and we commend USTR for terminating the investigation."[355]

The American business council of Pakistan said in its perception survey 2005:

352 IPO, "*IPO Pakistan: review 2005*", P:4.

353 Ibid;

354. Ibid.

355 Ibid.

"Our member holds positive opinion about the business environment and remain optimistic about the investment opportunities in Pakistan."[356]

The U.S embassy in Pakistan sent a non-paper to the government of Pakistan with the following opening remarks:

"The united states government wishes to inform...that the US appreciates the work that the government of Pakistan, particularly the Federal Investigation Agency (FIA), Pakistan customs, and Intellectual property office (IPO), have done in enforcing IPRs in Pakistan."[357]

Pakistan remains on the watch list of USTR special 301 report 2007 due to wide spread book piracy which Pakistan failed to address in a meaningful way and weak trademark enforcement, lack of data protection for proprietary pharmaceutical and agricultural chemical test data, and problems with Pakistan's pharmaceutical patent protection.[358]

According to IIPA's 2007 special 301 report the academic market in Pakistan has been completely overrun by piracy. Elementary and high school courses taught in English routinely feature pirate versions of books. Piracy at the university levels is even worse, with rates soaring over 90%. Urdu bazaars in different cities are riff with pirated books.[359]

IIPA also show special concern about the section 36 (3) of the copy right ordinance 2000. That Section allows a royalty-free compulsory license of books which violates the Berne Convention and TRIPS agreement. According to them

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356 Ibid.

357 Ibid;

358 USTR "*Special 301 Priority Watch List*" (year 2007), P: 6.

359 IIPA, "*IIPA special 301 report about Pakistan*", (2007), P: 357. http://www.iipa.com/rbc/2007/2007SPEC301PAKISTAN.pdf (Last visited on 25th march 2007).

this provision threatens to further diminish a market. So, government of Pakistan must repeal it.[360]

Table: 4

Table: Level of piracy in Pakistan and losses in U.S dollars[361]

industry	2002		2003		2004		2005		2006	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion pictures	NA	NA	NA	NA	12.0	NA	12.0	95%	12.0	95%
recordings and music	25.0	100%	25.0	100%	70.0	100 %	70.0	100%	60.0	83%
Business software application	20.0	84%	26.0	86%	4.0	82%	9.0	83%	11.2	80%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	55.0	NA	55.0	NA	52.0	NA	44.0	NA	44.0	NA
Total	100. 0		106. 0		148. 0		135.0		127.2	

Pakistan needs to work hard to establish strong IP environment in the country to protect not only the foreign investor but also to protect Pakistan from IPR violation losses. The government according to a rough estimate loses Rs. 10

360 Ibid, P: 358.

361 See IIPA, *"IIPA special 301 reports about Pakistan"*, (2001,2002,2003,2004,2005,2006 and 2007 available), Visit http://www.iipa.com/country reports.html#P (Last visited on 25th march 2007).

billion annually in terms of direct and indirect revenue because of counterfeiting and trade mark infringement. [362]

IPR Violation Losses[363]

Oil & Lubricants Industry

Annual Revenue Loss to Govt.	Rs. 1600 million.

Cigarette Industry

Annual Revenue Loss to Govt.	(approx.) Rs. 1350 million
Revenue loss to companies	Rs.250-300 Million

Books & Publishing

Revenue Loss to Govt.	Rs.40million

IT Industry

Job Losses	31000 approx.

362 Losses in terms of the inability to attract fresh investment due to rampant infringement of Intellectual Property. See Giulia Di Tommaso, "*Enforcement in third countries IPR/Anti-Counterfeiting Industry Perspective*", (19th April 07 Munich), P: 17.

363 Ibid, P: 16 .

Conclusion:

Intellectual property rights are negative rights which are given by legislature to the writers, artists, inventors and the owner of the trade marks to prohibit others from using their works for the purpose of commercial gains. There are three basic philosophies mostly considered by them for granting these rights. The first is moral desert theory which allows allocation of these rights to the owner of intellectual property for the labour, time and money which he spent on a thing to bring it into existence from an abstract world and added a value to the society. The second is the personality theory who presented the concept of moral right of preservation of the way in which the owner of intellectual property presented his work to the whole world and the way in which he maintained his identification with the work. It views work as a part of the author or inventor. The third theory is the utilitarian theory which allows the allocation of these rights as an incentive for technological and economical development for the benefit of society.

In Islamic texts no clear order is given regarding any such rights, but if the concepts related to '*ilm* given in the Qurān and ahādīth (because all these rights are related to knowledge) has been studied carefully it reveals that Islam has its own theory of knowledge and Islam gives protection to the content of knowledge and also to the link between the owner and the work. This is evident first of all from the protection given to the contents of Qurān and secondly in case of aḥādīth chains of transmission in which everyone accepted the responsibility of their quotation. A ḥadīth without quoting authority would be ignored. Islam encourages dissemination of knowledge but at the same time also give rights to the knowledgeable person to select recipient of knowledge. Islam always prohibits false attribution of ḥadith, Qurān and knowledgeable persons. Islam also has a general rule that every one is responsible for his words deeds and thoughts. The thorough and careful reading of Muslim history reveals that they followed these

rules in their educational systems and also in other fields of science and technology. If the work of our forefathers has been observed it reveals that they quoted the words of other people by attributing it to the person who utter these words. The used method of certificate (Ijāzah) for transmission of work .All these practices and general rules are evidence of the moral rights of author in Islam so this concept is ethically embedded in the Muslim culture but these rights are not used as the western society uses them for commercial purposes.

The Muslims who prohibit the allocation and trade of these rights raise the objection that these are intangible rights and Islamic law recognizes as *māl* only things having corpus.

Actually this definition is given by the Ḥanafī School only. The other three schools do not stipulate corporeality of a thing as a criterion of *māl.* Even in the Ḥanafī school some examples have been found in which Ḥanafī scholars allow the sale of manfa'ah and rights for example in the case of right of way in the adjacent land owned by other person, they allow the sale of that right by saying that it is right attached with a thing which has corpus so it can be sold like a corporeal thing. All the jurist are agreed that custom plays an important role in deciding the value of a thing and Intellectual property is traded as property so it has value in the eyes of people and there is no text of Qurān and Sunnah which prohibits from trading them as property. So for the benefit of society it can be recognized as property. The usufructuary rights of intangible property are similar to the usufructuary rights of tangible property. It can be transferred, transacted on, inherited and disposed of at will like tangible property. The only difference between the tangible and intangible property rights is that they have no physical medium.

Our history also shows that knowledge was used by our prophet P.B.U.H in place of property two times first as *Mahar* and secondly as a *fadā'i.* There are also a ḥadīth that allowed the acceptance of remuneration for all services rendered with

respect to Qurān. There are some *muḥadīths* who did not allow others to quote hadith narrated by them without taking money although some scholars dislike this practice. There are evidences which tell us that Muslim scholars sold their books to others and also purchase the works of others.

Another evidence for these rights is customary practice of Muslim rulers to grant scholars and researchers precious and valuable things to appreciate their work. This practice was started by our prophet P.B.U.H when he gave his '*abā'i* (cloak) as gift to a poet.

Another important reason for justification of these rights is first acquisition theory of Islam. According to this theory anyone who precedes others in acquiring which has never been acquired before he has the better right of priority over it.

The protection of these rights in western system is for attainment of commercial gain. They commercialize each and every thing for this purpose and there is no content based restriction which is inconsistent with the Islamic concept. Islam prohibits the acquisition and dissemination of all those knowledge and things which are harmful itself for the society or all those which leads towards prohibited or harmful knowledge or things.

The philosophy of utility which is mostly used by westerners for justification of these rights practically fails because the main purpose of granting these rights is welfare of society but when the situation of developing countries and specially the least developing countries observed it has been found that this theory only works for the betterment of individuals only. This system fails to strike balance between the right of society and the right of owner of intellectual property. Islam protected the owner's rights in intellectual property. It does not prohibit the transactions involving IP. But this does not mean that Muslims adopted the IPRs laws as it is. Knowledge in Islam also has important roles to play for establishing and securing

the interest of Dīn and for establishing healthy intellect. If the interest of an individual clashes with the attainment of high priority interest of public then interest of the individual should be left for attaining those maqāṣid.

It is also found that IP system is weak and it fails to differentiate the necessary and unnecessary things for example medicine, and education are necessary thing. Whereas the CD's and DVD's are not necessary. The long term protection of IP leads towards excessive monopoly which hinders establishment of the above two maqāṣid (dīn and healthy intellect). There is need to establish balance between the rights of owner and rights of public.

According to my opinion this balance can be achieved if the term of protection lessens down to six or seven years. In this way the owner of the IP gains the profit from its property and after that period this knowledge enters into the common heritage and remains easily available to developing and least developed countries.

Pakistani legislation also granted long term protections to the owner of IP. It is the duty of Muslims that they should keep in mind all the norms and rules of Islam in our mind during legislation of law. Because they have rules and norms which are different from the west.

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