



A discordant dichotomy or business as usual?
Shariah can be seen as just another facet of international culture, says
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The Custodian of the Two Holy Mosques, Fahad bin Abdul Aziz Al Saud, king of Saudi Arabia from 1982 to 2005, promulgated in the Trademark Law: “The following signs, emblems, flags, and others as listed below, shall not be considered or registered as trademarks: Any expression or sign or drawing violating religion or which is identical or similar to a symbol of religious nature.”

Likewise, the Patent Regulation of the Cooperation Council for the Arab States of the Gulf says: “An invention shall be patentable ... if it is ... not contrary to the laws of Islamic Shariah, or public order, or to morality observed in the Cooperation Council States, whether that was pertaining to new products, industrial processes, or to manufacturing methods.”

Similar provisions can be found in many intellectual property laws set up by states that follow Islam, either by constitution or because the majority of their population is Muslim. The latter is the case in the following 56 territories: Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Brunei, Burkina Faso, Chad, Comoros, Djibouti, Egypt, Eritrea, Gambia, Gaza, Guinea, Guinea Bissau, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kosovo, Kurdistan, Kuwait, Kyrgyzstan, Lebanon, Libya, Malaysia, Maldives, Mali, Mauritania, Mayotte, Morocco, Niger, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, Syria, Tajikistan, Tunisia, Turkey, Turkmenistan, United Arab Emirates, Uzbekistan, West Bank, Western Sahara and Yemen (India counts more than 160 million Muslims, but as a minority).

In order to get a better picture of the possible repercussions of religion on IP rights, we will briefly delve into the concept of shariah, analyse its impact on IP, and compare this to the situation in countries in the west.

What is shariah?

In classical Arabic, the noun shariah denotes “a path leading to a watering place”. Considering that water symbolises (eternal) life, and that the path thereto has been codified by the three Abrahamic religions (jointly also called ‘book religions’), the term shariah has been adopted to collect all Islamic laws under one tenet.

There are two primary sources for the shariah: the Holy Quran and the Sunnah, ie, the examples given by the life and teachings of Prophet Muhammad.

Both have at length been elucidated in deep treatises by different respected scholars, which—from way back then until today—remain the utmost authorities in all questions of their interpretation (fiqh).

As a third fountain, the consensus of the leading scholars (ijma) is sought, and, in the last resort, analogy (qiyas) may be used.

Nowadays, occasionally doomed as a synonym for intolerant rules stemming directly

from the Dark Ages, an unbiased definition can be found in the Encyclopedia Britannica: “The fundamental religious concept of Islam, namely its law, systematised during the 2nd and 3rd centuries of the Muslim era (8th–9th centuries AD). A system of duties that are incumbent upon a Muslim by virtue of his religious belief. The law constitutes a divinely ordained path of conduct that guides Muslims toward a practical expression of religious conviction in this world and the goal of divine favour in the world to come.”

den. This last verdict regards, in fact, all things or actions that are injurious to man physically, spiritually, or socially.

Consequently, and witnessing that society is in constant evolution, the question of which previously unknown activity, object or right is at any one time allowed or forbidden can inevitably be decided on a case by case basis only—naturally, under the *condicio sine qua non* that the adherence to the aforesaid axiomatic guidelines is strictly safeguarded.

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Shariah is not an ancient set of self-contained rules, but a universal framework of ethic and moral principles, as well as their transposition into all aspects of everyday life, aimed at the continuous secular and spiritual betterment of its followers (understood both as individuals and the entire community).

It deals with all kinds of outward acts and omissions (islam), inward belief (imam), and God-consciousness (ihsan), leading to moral excellence (by subduing the ego and mirroring the divine attributes of love, mercy, and respect). Its quintessence can be found in the ‘constitutional declaration’ laid down in the Quran (16:90): “Behold, Allah enjoins justice, and the doing of good, and generosity towards one’s fellow-men; and He forbids all that is shameful and all that runs counter to reason, as well as envy.”

As a further preliminary remark, one has to keep in mind that according to Islamic beliefs, all actions can be classified in five categories: mandatory, recommended, permitted, not recommended, and forbidden. Trading, for instance, is recommended. Piracy, trademark infringement, and patent violations are forbid-

What does shariah have to say about IP?

Now, apparently, the protection of IP did not belong to the primary goals of the early Muslim community, so that we do not find direct teachings about patents or trademarks in the written or oral traditions of the above principal sources of law.

This means that any possible regulation on how to deal with IP rights has neither expressly been imposed nor expressly been forbidden. Considering, furthermore, the general rule that “all which has not been explicitly declared banned is allowed” (Quran 5:4), the protection of IP rights has to be seen as permitted.

Regulating the details of all matters allowed is then essentially left to the discretion of the governments—provided that, in order to apply the regulations, fundamental religious maxims are not violated.

This assumption is indeed the basis of modern IP laws in Islamic states, defining the edges for the interspersing between shariah and the protection of intangible assets.

Some examples

Historically, in ancient Arabia a kind of copy-right protection was known for poems, which are so dear to the Arabic culture.

Although, in the last resort, all property belongs to Allah, private property has always been recognised, at least between the owner and other individuals or the state. As such, it is regarded as inviolable, as indicated in the Quran (2:188): “And devour not one another’s possessions wrongfully.”

The above concept of exclusive ownership has more recently been applied to intangible assets of every kind, too.

Obviously, the exception follows the rule. For instance, the possibility of compulsory licensing is nowadays generally accepted (see Articles 19 to 22 of the GCC Patent Law).

Similarly, certain dispositions of one’s rights, such as licensing, have again been held as being perfectly lawful (see Article 17 of the GCC Patent Law).

The Quran itself provides for many inheritance rules, which have been extended to IP titles without any hesitancy (see Article 23 of the GCC Patent Law).

Summed up, the basic principles of IP law, in particular, exclusiveness, free disposition of rights, and pursuing profits, are not at all in contrast to shariah, but fall under its general precept: private interest is permitted unless overruled by public interest, which is another principle of utmost importance for a proper understanding of many Islamic rulings.

The general concord between IP laws and religious laws is also reflected by the fact that among the 56 Islamic states, 43 are signees of the Paris Convention, and 32 are members of the Agreement on Trade-Related Aspects of Intellectual Property Rights (also known as TRIPS, and coincidentally, concluded in Morocco).

Also, since all six GCC states (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates) have included their signature at Marrakesh, even the GCC laws themselves have to be fully TRIPS-compliant.

Examples on absolute grounds

What nevertheless merits a further glimpse is the dominion of the shariah over single IP titles.

As is well known, Islamic states usually ban the possibility to register trademarks for alcoholic beverages in Nice Class 33 and for pork in Class 29 (see, for example, the UAE Trademark Law).

Moreover, it is likely that applications that cover casinos, discotheques, escort services, gambling, gaming, night clubs, and the like will be rejected.

Absolute grounds of refusal will also apply in case of trademarks incorporating unwanted terms or alluding to any such prohibited goods and services.

As another example, in Saudi Arabia it is not permitted to register figurative trademarks depicting a person or the shape of a (female) body. In the UAE, the trademark ‘The Naked Pizza’ has, seemingly, not been put to the test before the IP office, but as a precaution been filed directly as ‘The NKD Pizza’.

Using any such refused mark may even be a criminal offence under certain local laws.

As for patents, inventions relating to the production, storage or consumption of alcohol or pork, or introducing new means of gambling, should consequently be excluded from gaining protection.

The above is a much condensed and by no means exhaustive summary according to mainstream Islam.

The exact methodologies of the finding of justice vary—sometimes more, sometimes less—widely in-between the different schools of Islamic thought.

What do non-Muslims say?

Vatican

If there is any other non-Muslim state strictly adhering to religious principles, then it is the Vatican. The Holy See is a WIPO member and signee of the Paris Convention. And indeed, due to articles of the Law on the Sources of Law, patents and trademarks are recognised in accordance with the IP laws currently effective in Italy.

Furthermore, the law also states: “The reception (of the Italian IP Law) is ordained unless the same results to be contrary to the precepts of the Divine Law, or to the general principles of the Canonic Law, or to the norms of the Patti Lateranensi and successive treaties.”

This clearly echoes the same dictum observed in the Islamic countries on the prevalence of religious rights.

OHIM

The Community Trademark Regulation says: “The following shall not be registered: trade marks which are contrary to public policy or to accepted principles of morality.”

In practice, the Office for Harmonization in the Internal Market (OHIM) would refuse the following marks: names of terrorist groups, Nazi emblems, offensive or vulgar words, terms with a religious meaning, symbols with a spiritual value, or religious symbols.

Likewise, the Community Designs Regulation

says: “A Community design shall not subsist in a design which is contrary to public policy or to accepted principles of morality.” Designs that portray or promote violence or discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation will be refused (this edict corresponds to the Treaty on the Functioning of the European Union).

Others

The Paris Convention, the European Patent Convention (EPC) and TRIPS carry similar messages, with the former saying trademarks should be granted unless “they are contrary to morality or public order”.

Patents must not be granted for inventions whose commercial exploitation would contravene this same rule, a point on which the EPC and TRIPS agree.

Co-existence is key

In the present context, shariah can rather be seen as just another facet of international culture and trade than as an antagonistic discord for IP owners.

Employing local notions to decide what is morally reprehensible is indeed an operation that can safely be attributed to virtually all known legal systems.

The daily applicability of shariah, humanistic thoughts, or Christian beliefs on modern IP does not seem to lead to results that would be situated too far away from each other.

Privy councillor Johann Wolfgang von Goethe already had a premonition of this when composing, 200 years ago, his West-Eastern Diwan (a collection of poems inspired by Goethe’s lecture of the verses of Hafiz (1320-1389), the famous Persian poet and Sufi mystic):

“He who knows himself and others, / Shall recognize therefore: / Orient and Occident / Are not separable anymore.” **IPPro**



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