

BOOK REVIEW

An Islamic Vision of Intellectual Property: Theory and Practice

by Ezzeddin Elmahjub. Cambridge: Cambridge University Press, 2018. 214 pp. Hardback: £106.00.

Ali Ekber Cinar

Faculty of Law, McGill University, Montreal, Quebec, Canada

(First published online 5 January 2024)

Intellectual property is a subject of relatively recent origin and ongoing controversy. In this carefully argued and accessible book, Ezzeddin Elmahjub presents a novel perspective on the notion, exploring how Islamic legal philosophy addresses property rights in intellectual creations and seeking to identify an Islamic viewpoint on the governance of intellectual creation that integrates intellectual property within a comprehensive framework of broader principles of social justice. This perspective encompasses intricate deontological and consequentialist aspects, without entirely dismissing merit-driven and utilitarian rationales. On this basis, Elmahjub also discusses potential differences with conventional intellectual property doctrines.

The book consists of seven chapters. Chapter 1 announces the aim of the book, which is to incorporate Islamic concepts of the social good into the global discourse on modern critiques of intellectual property. According to Elmahjub, the Islamic vision resonates with the concerns of developing nations and critical comparative scholarship. In this vision, intellectual property is not solely a reward for creators or a tool for maximising output.

Chapter 2 introduces the key aspects of Islamic doctrine related to intellectual property. It explores the intertwining of deontological and consequential ethics and argues that Islamic social good is not rooted in consequentialism. Redefining the social good aspects of *maqāṣid al-sharī'a* (the objectives of Islamic law), Elmahjub suggests that *maqāṣid's* conception of the social good is not based on increasing average income or happiness, but on deontological considerations and the satisfaction of essential needs for human flourishing.

Chapter 3 begins by reviewing existing scholarship, followed by the introduction of 'an alternative conceptual framework' – an Islamic vision of intellectual property. Elmahjub argues that by drawing on Islamic legal sources on physical property, it is possible to establish a theoretical foundation for justifying intellectual property. Notably, rather than positing a singular framework within Islamic law to substantiate intellectual property, Elmahjub contends that Islamic sources provide the groundwork for a comprehensive theoretical framework that amalgamates notions of fairness, utilitarianism, and personality theories.

Chapter 4 investigates the interplay between key features of the global intellectual property system and *maqāṣid's* plural values. This exploration asserts that the practical implementation of intellectual property predominantly prioritises economic efficiency and favours developed nations, with a primary focus on promoting economic expansion and financial gains, while paying limited heed to the ethical values advocated by *maqāṣid*. In contrast, *maqāṣid* places economic efficiency as a secondary principle and underscores the significance of prioritising deontological values.

Chapter 5 contends that an Islamic conception of a well-ordered society is one of prosperity, where its institutions collectively enhance the well-being of all. It argues that the Islamic notion of social justice serves as an alternative to utilitarian and merit-driven perspectives and includes

at least three overarching principles: (1) the paramount importance of a set of ethical plural values consistent with the *maqāṣid* framework for human flourishing, (2) equitable access to opportunities as a fundamental divine entitlement, and (3) the continual adjustment of disparities in the allocation of resources to promote equitable access to opportunities and enhance conditions for marginalised sections of society.

Chapter 6 places intellectual property in the context of Islamic principles concerning the regulation and allocation of intangible assets. According to the Pact of *Istikhhlāf* (the concept that God designed the Earth, endowed it with resources, and entrusted humans with their management), intangible assets are ultimately owned by God, which signifies a collective ownership aimed at serving the public good. This has two significant consequences. First, private intellectual property rights can regulate knowledge and culture, but should not impede human prosperity and essential needs. Second, God's common ownership opposes exclusionary control by the state or religious entities, and the common good takes precedence over private property.

Finally, in Chapter 7, Elmahjub examines the potential of the Islamic ethical structure in aligning intellectual property regulations with considerations of social justice. By drawing parallels between the Islamic perspective that he offers and a body of scholarship that he refers to as 'critical intellectual property studies' (CIPS) – which, in Elmahjub's view, mirrors the social justice concerns within the Islamic worldview – and contrasting them with how conventional normative approaches establish limitations and exceptions, he contends that a fundamental shift in thinking is imperative: rather than viewing users' entitlements as constrained exceptions, they should be viewed as affirmative legal rights.

The book offers a clear, succinct, and easily comprehensible text for the justification of intellectual property within the framework of the Islamic legal tradition. Elmahjub's courageous attempt to establish the legitimacy of intellectual property under Islamic law is a laudable yet challenging endeavour. Throughout the book, one can observe the central role of *maqāṣid* in Elmahjub's presentation, aligning with the notable trend of reliance on *maqāṣid* in contemporary Islamic legal scholarship. He adeptly draws comparisons between modern conceptions of intellectual property and the fundamental tenets of Islamic law, demonstrating a solid command of contemporary intellectual property theory. While he is not the first scholar to attempt a justification of intellectual property under Islamic law, his undertaking still stands as original in a field where many works merely echo one another.

Nevertheless, his account could have included two crucial points that would have significantly enriched the book's argument.

First, the book relies extensively on traditional concepts (eg, *maqāṣid*, *istikhlāf*, *maṣlaḥa*, and *ihyā' al-mawāt*), but refrains from delving into the classical tradition in which these concepts have been developed over centuries. In fact, the book is often content with modern scholarship with little or no reference to the classical tradition (see, eg, pp 34, 51, 125, and 138), and, when citing Qur'anic verses or sayings of the Prophet, it overlooks how these sources have been interpreted over the course of the past fourteen centuries (see, eg, pp 79, 131, 133, 138, 144, and 145). These occasional omissions at times leave the concepts bereft of context or shrouded in shadows. While this reviewer believes that an examination of the classical tradition would have greatly enriched the book's argument, the decision not to include it in the analysis might be justified by the relative novelty of the book's subject matter (ie, intellectual property). However, as the book offers no explanation for its exclusion of the classical tradition, the author's rationale for this choice remains unclear to the reader.

Second, while well-positioned within the scholarship on intellectual property, the book hardly engages with broader questions of Islamic legal scholarship. While it is acknowledged that the primary focus of the book need not include such questions, one might reasonably expect that a comprehensive examination of intellectual property in Islamic law would at least consider the broader questions that are integral to the book's undertaking. The lack of such engagement is evident in

various instances, such as with regard to the *practical* implications of an ‘Islamic vision’ of intellectual property (p 8). While the book suggests that this perspective can make substantive contributions at both the philosophical and doctrinal levels, a question arises as to whether this framework can be extended beyond the theoretical realm, in particular whether and how it can effectively align the existing intellectual property system with principles of fairness, efficiency, and overall betterment for all stakeholders. Needless to say, such an inquiry would extend beyond the specific scope of Elmahjub’s work to the practical relevance of Islamic law in the twenty-first century. But a brief discussion of such questions might have been beneficial, as the book leaves its readers wondering: is the ‘Islamic vision of IP’ solely an intellectual exercise, or does it hold tangible practical implications? Other broader questions of Islamic legal scholarship that could have been addressed encompass the model of lawmaking within Islamic law (p 18), authority and legal actors (p 42), the role of Islamic law in contemporary Muslim societies (p 87), and the significance of *uṣūl al-fiqh* in lawmaking (p 93). An examination of these matters could have steered the book towards a more nuanced perspective grounded in Islamic law.

Although the book as a whole presents a well-structured argument, there are moments where the author could have strengthened the substantiation of his assertions. In several instances, it remains unclear whether a particular point is in compliance with Islamic law or should be promoted by *maqāṣid* (see, eg, pp 10–11, 17, and 80). In addition, some statements tend to lean towards generality and could benefit from more specific elaboration. For example, the book does not always differentiate between various types of intellectual property (eg, copyright, patents, and trademarks), but rather discusses them collectively. Furthermore, although the importance of defining boundaries for intellectual property ownership is explicitly recognised, the level of detail in exploring these boundaries remains broad (with the exception of a few more specific but still general points at pp 66–67). Similarly, the question of whether *madhhabs* (legal schools) remain relevant in contemporary discussions of intellectual property is not addressed.

Moreover, while Elmahjub’s comparative undertaking to identify an ‘Islamic’ perspective on intellectual property betrays a sharp divide between the ‘West’ and ‘East’ – the book begins with an assertion that ‘Intellectual Property (IP) is a product of the Western normative environment’ (p 1), and the author explicitly states that he ‘see[s] no problem in using a Western context to explain an Eastern concept’ (p 50) – Elmahjub does not provide clear and precise definitions for what he characterises as ‘Western’ and ‘Eastern’.

Be that as it may, Elmahjub’s book undeniably stands as a significant and distinctive addition to the ongoing discourse on intellectual property. Most importantly, it offers an original and accessible perspective on the justification of intellectual property within the context of Islamic law. The questions it addresses are not exclusive to Islamic law, but also resonate in the broader realm of intellectual property. Consequently, the book transcends the confines of Islamic legal scholarship and has the capacity to present a compelling alternative to prevailing paradigms of intellectual property. Elmahjub’s work fills the void it addresses and establishes itself as a crucial starting point for future debates on the subject.