Knowledge Protection: A Comparative Study of the Foundations and Development of Intellectual Property Rights Under Islamic Law, the English Common Law, and the Chinese Legal System

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INTRODUCTION

Intellectual property ("IP") rights are intangible property rights which protect new ideas and creations and reward innovative activity.[1] While IP is not a singular legal concept and stretches across different areas of industry, design, art, and literature, some elements are shared by all: "the construction of scarcity, temporal limitations, and the individualization of knowledge creation."[2] Accordingly, for the purposes of this study, the discussion of IP will largely avoid the distinction between industrial IP (i.e., patent rights[3]) and artistic IP (i.e., copyrights[4]).[5] A full-scale IP regime consists of laws that provide for the recognition of certain rights as well as the protection of those rights, e.g., through enforcement measures. Legal systems around the world recognize IP rights to varying degrees and each provide for different enforcement measures.[6]

Long before national legislation or international agreements became the norm for the grant and regulation of IP rights, these rights were protected, to various extents, by royal prerogatives, natural law, and rules of justice.[7] Legal instruments—from medieval diplomas to royal decrees to modern patents—memorialize a community's members' "performative intention" to bind themselves to each other and to their national governments.[8] The modern nation-state system has developed alongside and benefitted extensively from the gradual yet intentional creation of institutionalized intellectual property regimes. As an infrastructure of state power, IP operates by promoting *large-scale* technological innovation and

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[1] *See* PAUL TORREMANS, HOLYOAK & TORREMANS INTELLECTUAL PROPERTY LAW 13 (9th ed. 2013).
[2] *See* Susan Sell & Christopher May, *Moments in Law: Contestation and Settlement in the History of Intellectual Property*, 8 REV. INT'L POL. ECON. 467, 47 (2001).
[3] A "patent" is a legal document granting its holder exclusive rights over a particular invention or innovation. A patent gives the patentee the privilege to make, sell or use a particular invention to the exclusion of all others for a specified period of time. *See* ARTHUR R. MILLER & MICHAEL H. DAVIS, INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS & COPYRIGHT 10 (1983).
[4] "Copyright" refers to exclusive privileges granted to authors and publishers of text as well as to the creators of other audiovisual works. *See* DONALD A. GREGORY ET AL., INTRODUCTION TO INTELLECTUAL PROPERTY LAW 165 (1994).
[5] This "dichotomy" becomes more relevant in reviewing their historical development, especially under the English Common Law. TORREMANS, *supra* note 1, at 6.
[6] *See generally* Irene Calboli, *A Call for Strengthening the Role of Comparative Legal Analysis in the United States*, 90 ST. JOHN'S L. REV. 609 (2016).
[7] *See* SALAH ZAIN ALDIN [صلاح زين الدين], INTRODUCTION TO INTELLECTUAL PROPERTY: ITS INCEPTION AND ITS CONCEPT, SCOPE, IMPORTANCE, ADAPTATION, ORGANIZATION AND PROTECTION [مقدمة في الملكية الفكرية: أصلها ، مفهومها ، نطاقها ، أهميتها ، تكييفها ، تنظيمها وحمايتها] 99-100 (3rd ed. 2015).
[8] LAURA R. FORD, THE INTELLECTUAL PROPERTY OF NATIONS 406 (1st ed. 2021).

literary production as part of a "joint project of economic expansion."[9] Thus, it is no surprise that developing nation-states that have joined the forum of international competition/cooperation have had to contend with IP—legally, politically, and economically—as part of their own projects of state-building and development.[10] Today, *knowledge* is a vital resource in the development of economies, and IP laws serve as the main corpus of laws regulating knowledge.[11]

The advent of comparative legal study in the field of IP dates back to the nineteenth century, and, ever since, it has become an important legal methodology in the analysis and development of IP law.[12] Legal scholars resort to comparative analysis for various purposes.[13] This Paper will focus on exploring the social, cultural, and economic environments that give rise to the recognition of IP by different legal systems.[14]

A close look at legal systems' treatment of IP will demonstrate that a state's willingness to recognize such rights or enforce them on behalf of its citizens is largely a function of the political and economic context of the time. The "[l]aw both constitutes and is constituted by social, political, and economic struggles."[15] The "swing of the pendulum" between "dissemination [of knowledge] and exclusion" is a result of external and internal influences that attempt to shape the character and purpose of IP laws in a legal system.[16] As such, the justifications for the development of IP rights under each legal regime can vary widely. Western scholarship has focused on Locke's Labor-Desert theory[17], the European

[9] *Id.*, at 405.
[10] *Id.* at 413.
[11] *See* Mariano Zukerfeld, *On the Link Between the English Patent System and the Industrial Revolution: Economic, Legal, and Sociological Issues*, 8 STAN. J. SCI. TECH. & SOCIO. 1, 1-2 (2014).
[12] Calboli, *supra* note 6, at 620.
[13] *Id.* at 623 (discussing various comparative law purposes such as (1) acquiring information about other countries' legal systems; (2) comparing and contrasting this information with domestic law or other countries' laws; and (3) attempting to reach conclusions about those legal systems).
[14] *See* Joahan Bärlund, *The Regulation of Comparative Advertising and Cultural Variations*, *in* PRIVATE LAW AND THE MANY CULTURES OF EUROPE 269 (Thomas Wilhelmsson et al. eds., 2007).
[15] ALAN HUNT, EXPLORATION IN LAW AND SOCIETY: TOWARDS A CONSTRUCTIVE THEORY OF LAW (1993).
[16] Sell & May, *supra* note 2, at 470.
[17] Intellectual property would be regarded as a direct reward for intellectual labor.

author/inventor's rights theory[18], and economic necessity to explain the development of IP rights over the past two centuries.[19]

However, as in any comparative study, it is vital not to automatically take the path that Western countries have followed as the "normal" course against which non-Western developments are to be evaluated. While inevitably the act of comparing IP law in non-Western legal systems involves reliance on Western-originated terminology and definitions of IP, cognizance of the "risk of extrapolating normality from the West" will help conduct a balanced and realistic comparison of the foundations and development of IP rights under different legal regimes.[20]

With that in mind, this Paper will focus on three legal systems: (1) classical Islamic law (*Shari'a*), (2) the English common law, and (3) the Chinese legal system. About 20% of the world's population consists of Muslims—a figure which is rapidly growing.[21] There are also over fifty Muslim-majority countries.[22] An accurate understanding of how classical Islam approaches IP will yield a more thorough understanding of Western IP frameworks from an Islamic law perspective, which can enrich the discussion between the West and *Shari'a*-based countries.

England, on the other hand, was the only country that had stabilized its IP regulations by the time of the Industrial Revolution in part thanks to its adherence to core common law traditions such as *stare decisis*.[23] Early on, Britain moved to a systematic manner of granting IP protections under a formalized IP regime, the general contours of which remain unchanged to date.[24] Today, as more countries transition to knowledge-based economies, analyzing the underlying reasons for and methodologies through which Britain spearheaded such a transition under the English common law will be instructive in assessing two

[18] Referring to the inalienable rights of individuals to be associated with their inventions/creations.
[19] Sell & May, *supra* note 2, at 483.
[20] WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 4-5 (1995).
[21] Steven D. Jamar, *The Protection of Intellectual Property Under Islamic Law*, 21 CAP. U. L. REV. 1079, 1079 (1992).
[22] *See id.*
[23] Zukerfeld, *supra* note 11, at 3; *see also infra* Part II.A.
[24] *See* Sell & May, *supra* note 2, at 479.

things: the amenability of the common law system to—and its role in—the gradual formalization of laws, including IP laws, over the past three centuries; and the future trajectory of developing countries that may be following a similar path.

Moreover, this Paper will focus on the Chinese legal system for two primary reasons: its uniqueness and its generalizability. China has gained increasingly more weight in the global political and economic context thanks to its large population and rapidly growing economy.[25] In addition, the study of China's IP laws and their foundations remains underexplored.[26] Through a holistic analysis, this research seeks to explore the primary factors—for and against—that have impacted the society's perspective towards and governmental regulations surrounding IP rights in China. Finally, Part IV will consolidate the lessons learned from analyzing the three legal systems' approaches to IP rights and attempt to extrapolate broader insights into those systems' character, purpose, and sources of law.

I. ISLAMIC LAW

A. Introduction to Shari'a

Shari'a is an Arabic word which means "the path to follow."[27] It was compiled during the first three centuries following Prophet Mohammad's death.[28] Muslims believe that God prescribed *Shari'a* to lead believers on the narrow path to salvation.[29] *Shari'a*[30] encompasses immutable God-given religious principles that guide Muslims around the world.[31] Broadly speaking, the "legal domain of the Sharia includes all fields known in Western law."[32] The primary sources of law under *Shari'a* consist of the Qur'an—the direct words of God revealed to Prophet Mohammad (S.A.)—and the Sunnah—the recorded

[25] *See* ZHENQING ZHANG, INTELLECTUAL PROPERTY RIGHTS IN CHINA 14 (2019).
[26] *Id.*
[27] *See* Ahmed Zaki Yamani, *The Eternal Sharia*, 12 N.Y.U. J. INT'L L. & POL. 205, 205–06 (1979).
[28] *Id.*
[29] *See* Rudolph Peters & Peri Bearman, *Introduction: The Nature of the Sharia*, *in* THE ASHGATE RESEARCH COMPANION TO ISLAMIC LAW 2 (1st. ed. 2014).
[30] Islamic law and *Shari'a* are often used interchangeably.
[31] *Shari'ah, Fiqh, And State Laws: Clarifying the Terms*, MUSAWAH 1 (2016), https://www.musawah.org/wp-content/uploads/2019/02/KnowledgeBuildingBriefs-1-Shariah-Fiqh-and-State-Laws-EN.pdf.
[32] Peters & Bearman, *supra* note 29, at 5.

statements and actions of the Prophet during his lifetime.[33] Topics not addressed directly by the Qur'an and the Sunnah may be covered by secondary sources of law, namely *ijma* (consensus), *qiyas* (analogical reasoning used by Sunnis), and *aql* (human reasoning used by Shias).[34] There are other jurisprudential tools about which not all Muslim scholars are in agreement.[35] Those include *istihsan* (juristic preference), *istishab* (presumption of continuity), *maslaha* (public interest), *darura* (necessity), and *urf* (custom).[36] Finally, *ijtihad*, the process of engaging in intellectual effort in the pursuit of knowledge, is a necessary component of achieving legal consensus.[37]

Fiqh consists of legal rulings, juristic scholarship, and jurisprudential material produced by Muslim jurists.[38] *Fiqh* represents the human understanding of *Shari'a* and can change based on new information and time.[39] Islamic schools of jurisprudence utilize various interpretive tools, which differ based on the Shia view or the Sunni view.[40] There are four primary Sunni schools of jurisprudence: *Hanbali*, *Maliki*, *Shafi'i*, and *Hanafi*. Shia schools, on the other hand, are divided into three major sects: *imamites* or Twelvers, Ismailis, and Zaydis.[41]

It is important to note that, in practice, most countries that follow *Shari'a* follow them in conjunction with civil codes or other forms of self-prescribed laws.[42] Nonetheless, it is often the case that

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[33] *See* QUR'AN 4:59; *see also* Bashar H. Malkawi, *The Alliance Between Islamic Law and Intellectual Property: Structure and Practice*, 10 U. ST. THOMAS L.J. 618, 621 (2013).
[34] Samiul Hasan, *Islamic Jurisprudence: Sources and Traditions Creating Diversity in Human Relationships*, *in* THE MUSLIM WORLD IN THE 21ST CENTURY: SPACE, POWER, AND HUMAN DEVELOPMENT 26 (Samiul Hasan ed., 2012)
[35] RAJ BHALA, UNDERSTANDING ISLAMIC LAW (SHARI'A) 331-42 (2nd ed. 2011).
[36] Malkawi, *supra* note 33, at 621.
[37] *Id.* A person who engages in *ijtihad* is called a *mujtahid*—a Muslim who has to be knowledgeable in the Quran, Sunna, and principles of *fiqh*. *See* Hasbullah Haji Abdul Rahman, *The Origin and Development of Ijtihad and its Application to Solving Modern Complex Legal Problems*, 16 MUSLIM EDUC. Q. 55, 57-58 (1999).
[38] *Id.*
[39] *Id.*
[40] *See* Faisal Kutty, *Islamic "Adoptions": Kafalah, Raadah, Istilhaq, and the Best Interests of the Child*, *in* THE INTERCOUNTRY ADOPTION DEBATE: DIALOGUES ACROSS DISCIPLINES 526, 538 n. 57 (Robert L. Ballard et al. eds., 2015).
[41] MATHIEU GUIDERE, HISTORICAL DICTIONARY OF ISLAMIC FUNDAMENTALISM 319 (2012). Most Shias around the world are Twelvers such that the term "Shia" often refers to Twelvers by default. *Id.* As such, the discussion of Shia jurisprudence in this Paper will focus on the Twelvers' legal thought.
[42] As a case in point, Iran's civil code dates back to the pre-revolutionary period and has been influenced by the French and German civil codes. *See* QANUN-I MADANI [CIVIL CODE] 2007, art. 190 (Iran) (Mostafa Shahabi trans.) (post-Revolution Code); *see also* Nima Nasrollahi Shahri & Erfan Nourmohammadi, *An Overview of Iran's Comprehensive IP Bill*, 46 MAX PLANCK INST. INNOVATION & COMPETITION 212, 212-20 (2015). Another example is Saudi Arabia that has enacted "a significant number of statutory laws … in the areas of criminal, administrative,

according to their Constitutions, any civil or penal codes cannot violate *Shari'a* principles. As a case in point, Article 4 of the Constitution of Iran, a Shia-majority country, provides that "[a]ll civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria."[43] Similarly, Article 7 of the Constitution of Saudi Arabia (the Saudi Basic Law), a Sunni-majority country, states, "the regime derives its power from the Holy Qur'an and the Prophet's Sunnah which rule over this and all other State Laws."[44] Therefore, given the supremacy of *Shari'a* in many Muslim-majority countries, the need to understand the compatibility of the principles of *Shari'a* with IP concepts becomes apparent.

B. *Sharia*'s *Treatment of Intellectual Property*

Shari'a attempts to describe all human conduct as obligatory, recommended, neutral, objectional, or forbidden.[45] However, some conducts are not addressed by the Qur'an or the Sunnah; these actions are allowed to the extent that they are not otherwise barred by an explicit prohibition elsewhere in the *Shari'a*.[46] Intellectual property—exemplified by the grant of rights and their enforcement—is one area for which classical Islamic law has not prescribed detailed rules.[47] Furthermore, up until the past century, debates regarding IP and its compatibility with *Shari'a* were absent from the jurisprudential writings of Islamic scholars—i.e., the principles of *fiqh* were also silent on IP issues.[48]

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and commercial law. The king occupies an essential legislative role in support of Sharia rule." *The World Factbook: Saudi Government*, CIA, https://www.cia.gov/the-world-factbook/countries/saudi-arabia/ (last updated Nov. 29, 2022).

[43] QANUNI ASSASSI JUMHURI ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 4.

[44] AL-NIZAM AL-ASASI LLHOKM [BASIC LAW OF GOVERNANCE], Royal Decree No. (A/90) 27 Shaban 1412 H. [Mar. 1, 1992], https://www.constituteproject.org/constitution/Saudi_Arabia_2005.pdf.

[45] *See* Malkawi, *supra* note 33, at 622-23.

[46] *Id.*

[47] *See id.* at 623 (arguing that protection of IP is acceptable "because of the lack of any express statement(s) in the Qur'an or other Sharia sources against it").

[48] *See* Pirhaji et al, *Legitimacy of Intellectual Property in the Law of Iran*, 10 Asian Social Science 283, 285 (2014) (quoting Abolghasem Gorji, *Legitimacy of Intellectual Property Rights and its Award*, 1372 TEHRAN U. J. L. & POL. SCI. 3, 4, 16 (1992)). This right is a new issue which Shia scholars and jurists call "updated issues." *Id.*

Historically, there were some protections afforded to authors in early Persian and Arab societies. They were rooted not in legally protected rights but social norms observing ethics and honor.[49] For example, while there is little evidence of inventor/authorship rights in Persia, the respect accorded to poets by each other and by Persian kings is a testament to their high standing within the society. Specifically, poets would always use some form of reference to other poets when quoting their work.[50] There are also records of Caliphs—religious/political leaders who succeeded Prophet Mohammad—buying books they considered valuable and reproducing them after adequately compensating the authors.[51] Nonetheless, several centuries later, when Islamic scholars and jurists first engaged in the debate regarding intellectual property, they objected to its recognition as "permissible" or "protected" property because it was intangible.[52] This Part will analyze the shift from that perspective which occurred largely due to political economic changes of the past century.

C. Shari'a Principles Affecting Intellectual Property Rights

This Section will introduce fundamental *Shari'a* principles that may affect the recognition and enforcement of IP rights. Their close review suggests that they largely support IP rights protections; however, they also impose wide-ranging limitations on these rights. Those frictions will be discussed in Part I.D.

a. Milkiyyah Theory

Under *Shari'a*, all property belongs to God.[53] Human beings can hold physical property on earth as trustees of God's land.[54] There are provisions in Qur'an that attest to the sanctity of private property

[49] *See* Malkawi, *supra* note 33, at 631.
[50] MOHAMMAD BAGHER SADRA, INDUSTRY OF LITERARY 131, 132 (1st ed., Amirkabir Publication 2000).
[51] *Id.*
[52] Rehana Anjum, *An Introduction to Intellectual Property Rights in Islamic Law* 8–13 (Apr. 18, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3397868.
[53] QUR'AN 3:129 ("To Allah belongs what is in the heavens and what is in the earth . . . .").
[54] *See* QUR'AN 57:7 ("Believe in Allah and His Messenger, and spend of that whereof He hath made you trustees … ."); *see also* QUR'AN 10:14.

rights: "And do not consume one another's wealth unjustly … ."[55] As for the means of acquiring property, the Prophet Mohammad, Peace Be Upon Him, ("PBUH") reportedly said, "nobody has ever eaten a better meal than that which one has earned by working with one's own hands. . . ."[56] Thus, under *Shari'a*, real property can be acquired through development of vacant land (*mawat*). In fact, the Prophet stated, "Whoever revives a barren land, then it is for him."[57]

Therefore, under the *Milkiyyah* theory, intellectual property is recognized as a form of property (*mal*) as it satisfies the criteria set forth above for the acquisition of property. That is, by analogy (*qiyas*), the idea of acquiring ownership over unclaimed objects can logically be applied to rationales of obtaining rights to novel inventions and original works of authorship.[58] In other words, according to the principle of *mawat*, utilizing one's intellectual creativity to develop new inventions that contribute to the progress of arts and sciences should make one entitled to those creations. Today, most schools of law, Sunni and Shia, recognize intellectual property as a species of property.[59] The Hanbali, Shafi'i, and Maliki schools reached this conclusion by focusing on the usefulness of the subject of property protection (the doctrine of usufructs). They contend, "[p]roperty can be anything that is useful or of value."[60] The Shia, specifically the Twelvers, follow a different rationale. Relying on *urf* (custom), most Shia *mujtahids* have concluded that IP rights are legal because the appropriate subject of property protection is taken from custom, and today almost all the scholars around the world agree as to the legitimacy of IP rights and consider their violation a form of oppression.[61]

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[55] QUR'AN 2:188. There are several other references in the Qur'an that support property rights. *See, e.g.*, QUR'AN 2:205, 2:220, 4:2, 4:5-6, 4:10, 4:29, 17:71, 38:24, 59:8.
[56] 3 SAHIH AL-BUKHAARI, THE BOOK OF SALES AND TRADE 34:286, https://sunnah.com/bukhari:2072.
[57] 3 JAMI` AL-TIRMIDHI, THE CHAPTERS ON JUDGEMTNS FROM THE MESSENGER OF ALLAH 13:1379, https://sunnah.com/tirmidhi:1379.
[58] Amir H. Khoury, *Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A focus on Trademarks*, 43 IDEA 152, 169 (2003).
[59] *See* Muhammad Wohidul Islam, *Al-Mal: The Concept of Property in Islamic Legal Thought*, 14 ARAB L.Q. 361, 363 (1999).
[60] *Id.*
[61] *See* Ayatollah Makarem Shirazi, *"Ruling on the Legitimacy of Intellectual Property Rights,"* THE OFFICIAL WEBSITE OF AYATOLLAH MAKAREM SHIRAZI (last visited on October 8, 2021), https://makarem.ir/main.aspx?typeinfo=21&lid=0&catid=&mid=260641; Aghamashhadi & Asghari, *Jurispredential Analysis of Intellectual Property in Light of Imam Khomeini's Opinion*, 48 Matin Bulletin 8-10 (2009) (citing Naghibi, *Reproduction of Handwritten Editions of Shahid Motahhari Library Books*, 2 RAHNEMOON Q. 191, 207-13

b. Haqq Theory

Under the *Haqq* theory, an owner of IP will be able to enjoy the wide array of rights that property holders traditionally enjoy, including the right to enjoin others from unauthorized use of their property without just compensation. While *haqq* can refer to several concepts including "proven fact," "ultimate truth," and "obligation," the Qur'an speaks directly of "rights."[62] There is also wide consensus among Islamic scholars that, when used in its practical sense, *haqq* refers to "right." According to a prominent tenth century scholar, "Al-haqq means an interest of a person established by law or Shariah."[63] For example, in the IP context, the Fatwa Committee of Al-Azhar has defined plagiarism as a violation of an author's copyrights—the author's *haqq* in her literary property—which is unlawful under *Shari'a* and gives the author the right to seek redress.[64]

One cannot speak of the concept of rights (*huqquq*) without referencing its corollary, the principle of *darar* (damage) or, more accurately put, *la darar* ("do no harm") as noted in the words of Prophet Mohammad.[65] This principle represents one of the most important limitations on rights under *Shari'a*. Simply stated, it holds that a right is protected only to the extent that its practice does not harm others.[66] In addition to *la darar*, there are other considerations baked into the *haqq* doctrine. The Qur'an and Sunnah order Muslims to uphold social solidarity and justice (*takaful*)—which is itself an offspring of the *la darar* doctrine as social solidarity carries an implicit agreement not to bring harm to others.[67]

(2003)) (noting that two highly revered Shia *mujtahids* have recognized IP rights because civilized and intellectual societies have come to recognize those rights))); *see also* Yazdani, C C, *Copyright in the thoughts of Contemporary Shia jurists*, J. ISLAMIC BOOKS 9, 37 (2003) (discussing the jurisprudential basis for finding that urf (custom) is indeed protective of author's copyrights)).

[62] "And in their wealth and possessions (was remembered) the *right* of the (needy), for him who asked and him who was prevented (from asking)." QUR'AN 51:19.

[63] Syed Mohammed Anwar, *Normative Structure of Human Rights in Islam* POL'Y PERSPS., Vol. 10, No. 1 (2013), pp. 79-104 (26 pages) https://www.jstor.org/stable/42909299.

[64] *See Islam Forbids the Violation of Copyrights and Laws Regarding Intellectual Property*, THE ISLAMIC WORKPLACE (Sept. 3, 2008), https://theislamicworkplace.com/2008/09/03/islam-forbids-the-violation-copyright-laws-and-laws-regarding-intellectual-property/.

[65] 2 Ibn Majah, SUNAN IBN MAJAH 32 (9th Cent. repr., Beirut: Dar al-Kutub al- 'Ilmiyyah n.d.).

[66] The wrongful exercise of rights or misuse of rights has been prohibited according to Hadiths from the Prophet. *See* 2 ABU DAWUD AL-SAJISTANI AL-AZDI, SUNAN ABI DAWUD 252 (9th Cent. repr., Beirut: Dar al-Jil 1988) (holding that if a man was so stubborn in the exercise of his rights so as to constitute a "nuisance" to his neighbors, his right to the particular item or property at issue may be suspended).

[67] *See* QUR'AN 5:2 ("[A]nd cooperate in righteousness and piety, but do not cooperate in sin and aggression.").

Furthermore, the Qur'an instructs property-holders to effectively utilize their resources for the good of the community, including the promotion of wealth.[68] Finally, as in all things, *Shari'a* instructs moderation in the exercise of rights. Absolute rights don't exist under *Shari'a*, particularly when it comes to an intangible concept such as IP.[69] Therefore, all property rights, including IP rights, must conform to the above *maqasid* or objectives of Islamic lawmaking.[70]

A review of modern Islamic jurisprudence suggests that IP rights protection overall meets the above objectives of Islamic lawmaking (*maqasid*), seeing as it is perceived to increase the society's wealth by incentivizing economic activity, furthering conformity with civilized nations (i.e., increasing social solidarity), and preventing injustice to owners of IP.[71]

c. Massaleh doctrine

One of the core objectives of *Shari'a* is to maintain harmony within the Islamic community (the *Ummah*). Broadly speaking, the *massaleh* doctrine is a public interest doctrine.[72] Its main purpose is to maintain public welfare and prevent public harm.[73] As will be discussed in the subsequent Sections, depending on the political economic factors of the time, this doctrine can cut either way on the issue of recognizing and enforcing IP rights. For example, the *massaleh* doctrine could affect IP rights and their enforcement by empowering states to implement compulsory licensing regimes. Simply put, the state could argue societal interest (*massaleh*) in avoiding harm (*darar*) and advance laws and policies that circumscribe authors' and inventors' IP rights, be they individuals or entities.[74]

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[68] *See* QUR'AN 10:14 ("Then We made you successors in the land after them so that We may observe how you will do.").
[69] FATHI EL-DERINI, THE RIGHT AND THE STATE'S POWER AND THE THEORY OF ABUSE OF RIGHT BETWEEN SHARIA AND THE LAW 67 (1925).
[70] EZIEDDIN ELMAHJUB, AN ISLAMIC VISION OF INTELLECTUAL PROPERTY 42-67 (2019).
[71] Aghamashhadi & Asghari, *Jurispredential Analysis of Intellectual Property in Light of Imam Khomeini's Opinion, 48* MATIN BULL. 1, 11-12 (2009).
[72] MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 352 (1989).
[73] *Id.*
[74] Conversely, the Shia doctrine of *velayat-e-faghih* empowers the *vali-e-faghih* (the supreme religious leader) to protect IP rights of authors and inventors if "the good of the society" necessitates protection of such rights. Aghamashhadi & Asghari, *supra* note 71, at 12 (quoting Haeri, *Jurisprudential Analysis of Copyright,* 23 Ahl-e-Bayt Fiqh 96, 99 (2000)).

D. Frictions Between Shari'a and Intellectual Property Rights Protection

A *Shari'a*-based legal system can recognize and safeguard private property rights. However, there are restrictions to property ownership that protect societal rights and seek to maintain socioeconomic equity.[75] A primary risk inherent in an IP protection regime is that of monopolistic behavior (*ihtikar*). An illegal monopoly is one that withholds commodities in a way that imposes financial hardship on the public.[76] *Ihtikar* is prohibited under *Shari'a* per the Sunnah. Prophet Mohammad stated, "[t]he monopolist is a sinner."[77] Monopolistic behavior not only violates the principle of *la darar* (do no harm) vis-à-vis individuals, but also endangers public welfare. Accordingly, the grant of exclusive rights over a technology or work of literature may be considered exploiting a right against public interest such that may require the state to invoke the *masaleh* doctrine to alleviate the perceived harm. However, whether IP protection results in an unlawful monopoly may largely depend on whether the IP at issue is a public necessity.

Furthermore, gaining profits without labour (*mayser*) is prohibited under *Shari'a*.[78] In the IP context, *mayser* may lead to questions regarding the fairness of profits earned via indiscriminate enforcement of IP rights. The prohibition against profit without labor is particularly relevant in IP transactions if the IP rights holder gains "significantly disproportionate" profits as compared to the resources invested in developing the creation.[79] By the same token, regarding usury (*riba*), the Qur'an states, "[t]hose who consume interest will stand 'on Judgment Day' like those driven to madness by Satan's touch. That is because they say, 'Trade is like interest.' But Allah has permitted trading and forbidden interest …. Allah has made interest fruitless and charity fruitful."[80] As such, usury, whether

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[75] *See* Hayatullah Laluddin *et al.*, *Property and Ownership Rights from an Islamic Perspective*, 6 ADVANCES IN NAT. & APPLIED SCIS. 1125, 1126 (2012).
[76] *See* 2 ENCYCLOPAEDIA OF ISLAMIC ECONOMICS 97-105 (Abdelhamid Brahimi and Khurshid Ahmad eds., 2009).
[77] SAHIH MUSLIM, KITAB AL-JIHAD WA'L-SIYAR 2:4456.
[78] The Prophet said, "Nobody has ever eaten a better meal than that which one has earned by working with one's own hands. The Prophet of Allah, David used to eat from the earning of his manual labor." SAHIH BUKHARI BOOK 34:276, http://www.searchtruth.com/book_display.php?book=34&translator=1&start=0&number=281.
[79] Heva A. Raslan, *Shari'a and the Protection of Intellectual Property: The Example of Egypt*, 47 IDEA 497, 528-29 (2007).
[80] QUR'AN 2:275-76.

standing on its own or as a form of *mayser*, is forbidden. The collectors of IP licensing fees may engage in usury if the profit collected exceeds the value of their creation and amounts to collecting interest. However, neither the prohibition against *mayser* nor that against usury will be implicated as long as IP owners recover only the fair value of what their initial investment has produced.[81]

Another important doctrine is that of prohibition of concealment of knowledge. The Qur'an has likened the concealment of knowledge to depriving society of its heritage and has warned against the repercussions of doing so on the Day of Justice.[82] Opponents of the recognition of IP rights as legitimate property rights traditionally resorted to this doctrine. One of the most prominent Shia religious leaders and a *mujtahid*, Ayatollah Khomeini, considered intellectual property rights illegal because, in his opinion, no one except the Islamic ruler had the right to issue orders that had the effect of monopolizing knowledge.[83] He and his disciples believed that recognizing and enforcing private citizens' IP rights would increase the costs of commodities and widen the socioeconomic gap within society.[84]

Similarly, the Hanafi school of jurisprudence rejected the idea of recognizing IP rights as legitimate property rights, in part, because they believe that certain forms of idea-based property should remain public goods, and knowledge and its derivatives must be used for the benefit of the general public.[85] Their argument presumes that "the benefits achieved by protecting and enforcing intellectual property rights are minimal compared to the harm that is inflicted on the public in the form of price increases and restrictions on access to knowledge."[86] The Hanafi school also objects to IP rights because they believe that the only acceptable criterion for money is *heiaza* (physical property). Therefore, they contend that there can be no cognizable legal rights in IP because ideas are "incorporeal."[87]

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[81] Silvia Beltrametti, *The Legality of Intellectual Property Rights under Islamic Law*, *in* THE PRAGUE YEARBOOK OF COMPARATIVE LAW 55-95 (T. Mach. et al. eds., 2010).
[82] QUR'AN 2:42, 2:140, 2:174.
[83] *See generally* Khomeini Vaghef, Registration of Moral Property (1st ed. 1987); *see also* 2 RUHOLLAH KHOMEINI, TAHRIR AL-WASILAH (Najaf: Matba'at al-Adab, 1967).
[84] *See generally* Yazdani, *supra* note 61.
[85] Elmahjub, *supra* note 70, at 125-48
[86] Raslan, *supra* note 79, at 525-26.
[87] Muhammad Wohidul Islam, *Al-Mal: The Concept of Property in Islamic Legal Thought*, 14 ARAB L.Q. 361, 363 (1999).

As mentioned at the beginning of this Part, since IP issues are not directly addressed by *Shari'a*, it is up to *mujtahids* to rely on the sources of *Shari*'a and principles of *fiqh* to ascertain their validity and scope. That said, today, scholars and jurists who object to recognition and enforcement of IP rights constitute the minority. Most scholars, Sunni and Shia, motivated by political economic realities—whether it is to increase wealth, incentivize innovation, or keep up with the customs of civilized and intellectual societies—have recognized the legitimacy of IP rights under *Shari'a*.[88] Yet, the limitations and guardrails imposed by *Shari'a*, especially those contained in the Qur'an and Sunnah, remain supreme, and legislators and jurists must take them into account as they contend with the scope of rights and protections afforded under a *Shari'a*-based country's IP laws.

II. THE ENGLISH COMMON LAW

A. Introduction to the English Common Law System

The origins of the English common law trace back to the eleventh century. King Henry II put in place a central system of justice to replace the localized customary-law based system that permeated the Island.[89] Initially, the King promoted the laws that he had promulgated by sending his judges around the country to apply them—this came to be known as the King's Court.[90] Gradually, more people started turning to the King's Court rather than their local courts because of their accessibility and predictability—given that the King's Court applied the developed law uniformly across the land.[91] In fact, this practice gave rise to the all-important principle of precedent, which is a central and distinctive tenet of the English

[88] *See, e.g.*, *supra* notes 58-61 and accompanying text. In another example, the current Supreme Leader of Iran—who is also a Shia *mujtahid*—has stated in a *fatwa* regarding IP rights, "believing in the intellectual property right for the domestic authors and composers [and inventors], is quite a rational matter." *See* Yazdani, *supra* note 61, at 38.
[89] *See* H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 237-40 (5th ed. 2014).
[90] *Id.* Therefore, under the English Common Law system "a law may … be defined as any rule which will be enforced by the Courts." ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 38 (4th ed. 1893).
[91] FORD, *supra* note 8, at 249-52. "The centralization of royal control over a developing, national system of courts was a significant factor in the professionalization and differentiation of English common law." *Id.* "Increasingly formal rationality in law and procedure … drew increasing numbers of litigants into the royal courts." *Id.*

common law system.[92] Later on, the legal systems of several other countries including Australia, the United States, Canada, and New Zealand were modeled after this system.[93]

Under the common law system in place in Great Britain, in addition to judicial precedent, which is a vital source of law, there are several other sources of law. Britain does not have a codified Constitution; instead, it has a collection of principles and foundational laws that are referred to as the Unwritten Constitution.[94] One of the most important constitutional principles is Parliamentary Sovereignty which contains the following three basic tenets: (1) Parliament could make or unmake any law whatsoever, (2) no other body could set aside Parliament's enactments, and (3) no Parliament could bind future Parliaments or be bound by its predecessors.[95] It follows from the foregoing that Acts of Parliament serve as a central source of law in Britain. British courts have also accepted customary international law as a source of the common law.[96]

Today, there are codified laws that govern the grant and protection of IP rights under the British legal system. Parliament enacted the Patents Act 1977, which incorporates requirements such as patentable subject matter,[97] novelty,[98] and the written specification[99] as well as the compulsory licensing provision.[100] It also enacted the Copyright, Designs and Patents Act 1988, which includes modern definitions of author and the requirement of originality.[101] While these statutes reflect the latest developments in IP law, in conformity with judicial precedents and international agreements, the core

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[92] GLENN, *supra* note 89, at 260-72.
[93] Murray Gleeson, *Global Influences on the Australian Judiciary*, 22 AUS. BAR REV. 184 (2002).
[94] Lord Neuberger, President, Supreme Court U.K., Inaugural Freshfields Annual Law Lecture at Cambridge's Private Law Centre: The British and Europe (Feb. 12, 2014) ("Unlike every other European country, we have no written constitution and we have parliamentary sovereignty. Indeed, it may be said with considerable force that we have no constitution as such at all, merely constitutional conventions, and that it is as a consequence of this that we have parliamentary sovereignty.").
[95] Dicey, *supra* note 90, at 38; *see also* Explanatory Notes to Accompany the original Text of the European Union (Withdrawal Agreement) Act 2020, ch. 51, sec. 38 (2021) (recognizing that "as a matter of law, the Parliament of the United Kingdom is sovereign").
[96] Patrick Butchard, *Principles of International Law: A Brief Guide*, HOUSE OF COMMONS LIB. (Sept. 21, 2020), https://researchbriefings.files.parliament.uk/documents/CBP-9010/CBP-9010.pdf.
[97] Patent Act, 1977, c. 37, § 1 (U.K.).
[98] *Id.* § 2.
[99] *Id.* § 14.
[100] *Id.* § 48.
[101] The Copyright, Designs and Patents Act, 1988, c. 48, §§ 1, 9, 10 (U.K.) [hereinafter The Copyright Act].

tenets of patent law and copyrights included therein were developed under the English common law over the past few centuries. Therefore, the best way to study the foundations of IP rights and their development under the English common law is through a historical analysis of the social, political, and economic factors that gave rise to their recognition and evolution under this legal system.

B. The Royal Prerogative as Antecedent to Formalized Grants of Exclusive Rights to the Dissemination and Practice of Knowledge

The State practice of granting and enforcing exclusive rights to knowledge to individuals and entities dates to the twelfth century England. Starting then up until the eighteenth century, the English Monarch awarded exclusive trade-related rights, including IP rights, as privileges on a case-by-case basis.[102] The Monarch's Privy Council—a council of advisors[103]—oversaw the process of deciding the subjects of royal grants under the royal prerogative.[104] Unsurprisingly, rewarding innovation was not the priority; instead, the Monarch "rewarded loyalty with monopoly."[105] As a case in point, when a group of publishers called Stationers organized themselves into a guild, they effectively lobbied the Crown for a charter that would reserve them the exclusive right to print.[106] In granting this printing monopoly, the Crown sought to implement a censorship regime in cooperation with church authorities.[107] As such, the Privy Council instituted a licensing regime according to which printing of new books required royal permission, and printing of higher-demand books, such as the Bible and law books, was reserved to the Stationers who were loyal to the Monarch.[108]

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[102] *See* Sell & May, *supra* note 2, at 479.
[103] By the fifteenth century, grants by kings formally noted that they were being granted "by the advice" of the Privy Council. Ford, *supra* note 8, at 254.
[104] Zukerfeld, *supra* note 11, at 5-10. IP rights grants can be traced back to the Middle Ages when Inventor privileges were granted all across Europe. TORREMANS, *supra* note 1, at 6. At the time, property that belonged to no one, *res nullius*, belonged to the king, including knowledge. 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 42 (Samuel E. Thorne trans., 1968-1977) [hereinafter BRACTON]. Thus, the king could grant exclusive rights to certain kinds of knowledge as gifts by means of letters patent or charters. *See id. See also* LAURA R. FORD, THE INTELLECTUAL PROPERTY OF NATIONS 230-32 (1st ed., 2021).
[105] TORREMANS, *supra* note 1, at 46.
[106] *Id.* at 9.
[107] *See* FORD, *supra* note 8, at 234.
[108] *Id.*

The typical method of conveying rights was through writs and letters patent—the ancestors of modern patents.[109] Early judicial cases under the English common law regarding questions of IP involved parties seeking to enforce their letters patent against each other. Disputes involving letters patent became most prevalent in the late seventeenth century and occurred at different judicial levels—the Court of Common Pleas, the House of Lords, and the King's Bench. Early judicial decisions uniformly affirmed the Monarch's power to grant exclusive rights to knowledge under the royal prerogative.[110] Therefore, by the seventeenth century, the royal prerogative tradition—which was key to the legitimation of the State's rulership over grants to exclusive rights to knowledge—had been well-developed and -recognized under the English common law.[111]

In addition to maintaining control over the dissemination of knowledge, the State—which prior to the seventeenth century practically meant the Crown—had economic motives for granting such rights. During the fourteenth and fifteenth centuries, the Hundred Years War between England and France and the Black Death were two events that severely strained England's economy.[112] The Monarch thus needed to ensure the State's self-preservation by attracting large-scale investment in the wealth of the kingdom.[113] Therefore, the Monarch granted more and more patents to foreigners to enable transfers of technology into the kingdom.[114] Under the current Patents Act, those patentees would not be entitled to patents as their inventions would likely not satisfy the novelty requirement, but during the fifteenth century, "the national development of industrial know-how was something to encourage" through all means.[115] This history demonstrates that before there were formalized requirements for the grant of IP rights, including

[109] *See* BRACTON, *supra* note 104, at 166-70. There are Roman law roots for the writs. *Id. See also* FORD, *supra* note 104, at 232.
[110] *See* Stationers Co. v. The Patentees about the Printing of Roll's Abridgement (the "Atkins" Case) [1666] 124 Eng. Rep. 842; Roper v. Streater [1672] 90 Eng. Rep. 107; The Company of Stationers v. Seymour [1677] 1 Mod. 256, 86 Eng. Rep. 865 (Ct. Com. Pl.); Company of Stationers v. Lee [1681] 2 Shower 259, 89 Eng. Rep. 927 (King's Bench).
[111] *See* FORD, *supra* note 8, at 238.
[112] *See id.* at 254.
[113] *Id.*
[114] *Id.* at 255.
[115] *Id.*

that the idea/creation be novel, political economic factors prompted the State to adjust its IP regulations—to the extent that there were any—to meet the needs of the time.

C. The Increasing Role of Parliament in the Award of Exclusive Grants During the Seventeenth and Eighteenth Centuries

During the seventeenth century, there was wide discontent within the British society over perceived abuses of the royal prerogative. The issues of access to commodities and knowledge and the curtailment of privilege turned into key drivers towards Parliamentary innovations that marked the beginning of modern intellectual property.[116]

In addition to pushing back against royal cronyism, there was another reason why Parliament was eager to join the anti-monopoly movement. By striking a blow at the royal prerogative, Parliament wanted to solidify its role as the State's center of political deliberation and lawmaking.[117] Even though Parliament's vision was not realized until several decades later, this period was seminal in the establishment of the principle of Parliamentary Sovereignty. Parliament started to become a vital intermediary between the people and the Monarch—i.e., an institution which would perceive itself as front and center in the protection of citizens' rights, especially property rights.[118] Hence began "a slow transition away from the prerogative tradition" to a "regulatory regime [of IP protection]" with Parliament as the overseer.[119] The evolution of the British IP regime tracks the broader "institutionalization of state-society relations" which was a function of political and economic circumstances of that period.[120]

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[116] Sell & May, *supra* note 2, at 481.
[117] This was a development that was long in the making, starting from the Magna Carta in the thirteenth century. *See* FORD, *supra* note 8, at 244. Over centuries, Parliament, which consisted of aristocratic laity, with the help of churchmen pressured the crown for a "higher law" that superseded the writs and charters issued by the Monarch. *Id.* at 242-49. After many revolts, Parliament was slowly turning into an independent assembly from which the Monarch sought council. *Id.* Of course, the passing of the Statute of Monopolies was not the end of this effort, and, in fact, the seventeenth century saw more violent revolts including the Glorious Revolution of 1688. *Id.*
[118] FORD, *supra* note 8, at 255.
[119] *Id.* at 262.
[120] Sell & May, *supra* note 2, at 481.

The Statute of Monopolies 1623 emerged against such a background, and it repealed the practice of royal monopoly grants *with one major exception for patents*.[121] The history of IP legislation begins with the Statute of Monopolies which formalized patents.[122] For the first time, this statute codified into law those rules and regulations, with regard to patents, that made up common law.[123] Section 6 of the Statute of Monopolies provided that "the true and first inventor" would be granted exclusive rights "upon any manner of new manufacture" for a certain period of time.[124] At the time, this was a unique statutory declaration that patents for new inventions are legal and stand in contradistinction to illegal monopolies.[125] Under this legislation, both devisors and importers of technological know-how would be rewarded.[126] Thus, "the development of industrial activity, growth, and employment" emerged as the top objective of legislators.[127]

Several decades later, with the advent of the eighteenth century, Parliament passed its first copyright law ever: The Statute of Anne 1709.[128] The law was issued "for the encouragement of learning."[129] This Act marked the establishment of ownership rights in works of literary.[130] While the statute notably granted the "sole right and liberty of printing books" to authors and their assignees, albeit for a limited period of 14 years, it explicitly named printers and booksellers as the authors' assignees.[131] Commercial exploitation—in this case, of literary material—thus continued to be a key driver for IP

[121] *See* English Statute of Monopolies of 1624, 21 Jac. 1, c.3, § 6 [hereinafter Statute of Monopolies].
[122] *Id.*
[123] Sell & May, *supra* note 2, at 480.
[124] Statute of Monopolies, § 6.
[125] FORD, *supra* note 8, at 260-62. This canonical text had a significant impact in the development of IP rights in British colonies, e.g., Australia. *See* Chris Dent, *'Generally Inconvenient': The 1624 Statute of Monopolies as Political Compromise*, 2009 MELB. U. LAW. REV. 415, 415–17 (2009) (discussing the significance of the Statute of Monopolies for Australian patent law).
[126] During the early period following the passing of the Statute of Monopolies, the State adopted a loose translation of "inventor" such that those who imported ideas into the Kingdom, "even if they were not their ideas," were "inventors." Sell & May, *supra* note 2, at 480.
[127] TORREMANS, *supra* note 1, at 6.
[128] *See generally* Act for the Encouragement of Learning [1710] 8 Ann., c. 19 (Gr. Brit.) [hereinafter Statute of Anne].
[129] *Id.*
[130] *Id.*
[131] *Id.* § 1.

legislation.[132] Other sociopolitical factors, however, were also influential in the evolution of copyrights. As a case in point, about a century later, playwrights and composers engaged in group lobbying to obtain a "use" right. As a result, Parliament created "a performing right" for dramatic works in the Dramatic Copyright Act 1833.[133]

As the foregoing historical analysis illustrates, the foundations of modern IP law under the common law cannot be traced back to a single factor. Nonetheless, one can find their justification in two theories: the economic theory and the labor-desert theory. During the seventeenth and eighteenth centuries, a struggle for political and economic control was emerging around the world as part of the effort to establish national colonies.[134] Nations such as Britain, Holland, and France were competing for means to extend their trading networks.[135] An institutionalized and formalized IP regime was the surest way of fostering the "international mobility of skilled engineers and artisans" which Britain needed to maintain its advantage.[136] Furthermore, by the eighteenth century, England had arrived at a fully developed natural law theory of IP.[137] In his Commentaries on the Laws of England, Blackstone discussed "another species of property[] which [was] grounded on labour and invention."[138] He was talking about copyrights "which an author may be supposed to have in his own original literary compositions."[139] What Blackstone so lucidly articulates in his commentaries as modern IP rights is clearly rooted in John Locke's Labour theory which posits that: (1) everyone has a property right in her physical and intellectual labor, and (2) the application of human labor to an unowned object grants that person a property right in that object.[140]

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[132] TORREMANS, *supra* note 1, at 9. Notably, during the same time, continental Europe did not even use the term "copyright"; instead, it referred to those rights as "authors' rights." *Id.* at 11.
[133] Dramatic Copyright Act [1833] 3 & 4 Will. 4, c. 15 (U.K.); *see also* TORREMANS, *supra* note 1, at 10.
[134] *See* FORD, *supra* note 8, at 241-42.
[135] *Id.*
[136] Mario Biagioli, *From Print to Patents: Living on Instruments in Early Modern Europe, 1500-1800*, 44 HISTORY OF SCIENCE 139, 146-48 (2006).
[137] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765–1769 72 (U. of Chicago Press, 1979).
[138] 2 *Id*. at 404-405.
[139] *Id.*
[140] *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 27 (C. B. Macpherson eds. 1980) (1690).

The effects of IP legislation were manifold. The number of patent applications dramatically increased, and the need for clear rules and procedures slowly arose.[141] The Patent Law Amendment Act 1852, followed by several subsequent legislative updates, eliminated the procedural inefficiencies and uncertainties associated with obtaining a patent.[142] The codification and formalization of IP law notwithstanding, Parliament remained cognizant that IP laws could be misused to monopolize knowledge that is essential to the public. Accordingly, Parliament devised the concept of compulsory licensing as a safety valve according to which an IP holder would lose some or all their IP rights should they refuse to share the full benefits thereof with society.[143] That being said, Parliamentary legislation was informed by judicial decisions that were contemporaneously developing the IP law of Great Britain.

D. The Role of the Judiciary in the Stabilization of Intellectual Property Law in Britain

One cannot understand the foundations of IP law under the English common law without studying the consequential role of the courts in ensuring the IP regime's stability and predictability. British courts joined the anti-monopoly tradition early in the seventeenth century. In *Darcy v. Allen*, a court held illegal a letter patent that granted a fourteen-year monopoly on the entire trade of playing cards on the grounds that it constituted an unreasonable monopoly.[144] The case is significant in two ways. First, it turned into precedent establishing the invalidity of monopoly grants.[145] Second, it stands for the power of a common law court to limit certain property rights based on the inherent rights of Englishmen in trade and Parliament's legal sovereignty in addressing trade-related matters.[146] This case would be later invoked to argue in favor of IP rights term and subject matter limitations to prevent detrimental monopolies.

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[141] TORREMANS, *supra* note 1, at 46.
[142] Patent Law Amendment Act [1852] 15 & 16 Vict., c. 83; TORREMANS, *supra* note 1, at 7 (discussing the development of a more streamlined patent application system with the advent of the Industrial Revolution).
[143] *See* Patent Act 1977, c. 5 (UK).
[144] *See* Darcy v. Allen (The Case of Monopolies) [1603] 77 Eng. Rep. 1260 (King's Bench).
[145] *See* FORD, *supra* note 8, at 257-58.
[146] *Id.*

Following the passing of the Statute of Monopolies and the Statute of Anne, the House of Lords, serving in its judicial function, and the court of King's Bench, England's highest common law court, decided two seminal cases which "solidified the legal foundations" of IP rights under the English common law.[147] In *Millar v. Taylor*, the majority of the Justices in the court of King's Bench held that IP was not different from other types of property.[148] The arguments against granting IP legitimacy under the law were primarily rooted in concerns about monopolies (and unjust enrichment) as well as freedom of the public to access knowledge.[149] Additionally, in *Donaldson v. Becket*, the Court of Parliament—i.e., the House of Lords sitting in its judicial capacity—affirmed Parliament's legal authority to delineate the contours of IP rights to legislatively support goals such as economic protectionism and creative developments in the arts and literature.[150] These two cases stand for the notion that, under the English common law, IP falls within the conceptual boundaries of property. But they also reaffirm the status of IP rights as "beneficial monopolies" granted for a limited duration with the understanding that their subject matter would ultimately be left for public consumption—i.e., enter the "public domain."[151]

Furthermore, the stabilization of the IP rights system via judicial means gradually gave rise to the concept of the author/inventor as the owner of exclusive rights.[152] Section 2 of the Statute of Monopolies, which required common law judges to supervise the grant of patents, went fully into effect two centuries after the Statute was passed.[153] For example, common law courts began defining the "novelty" requirement—that IP rights be granted to the "true and first inventor"—more strictly starting in the late eighteenth century. Lord Mansfield famously stated in *Liardet v. Johnson* that, "[t]he great point is, is [the

[147] *See Id.* at 272, 280-84, 287-301.
[148] Millar v. Taylor [1769] 4 Burr. 2303, 98 Eng. Rep. 201 (the plurality based its decision on legal precedent arguing that the royal prerogative tradition was a long-established means of transferring privileges, freedoms, and powers from monarch to subject through legal instruments).
[149] *Id.*
[150] Donaldson v. Becket [1774] 4 Burrow 2408, 98 Eng. Rep. 257.
[151] FORD, *supra* note 8, at 298.
[152] This development did not take place until after jurisdiction over patent matters was transferred from the Privy Council to the Common Law judges. Edward Wyndham Hulme, *Privy Council Law and Practice of Letters Patent for Invention from the Restoration to 1794 (Pt. II)*, 33 L.Q.R. 180, 194 (1917) (citing Baker v. James, PC2/103, 320-21 (1753)).
[153] *Id.*

invention] a new thing in *the trade*, or was it used before and known by them? If it is an old thing[,] it is a *prejudice*."[154] Thus began a metamorphosis towards the modern conception of "novelty," a key patent law requirement that serves as a fusion of two main tenets: (1) only the true author/inventor should be entitled to enjoy IP rights (closely tied to Locke's Labor-Desert theory); and (2) in societies with increasingly knowledge-based economies, the economic benefits of incentivizing industrial, scientific, and literary activity cannot be outweighed by the harm inflicted through the loose and unrestricted grant of IP protections.

The same rationales gave birth to the legal requirement of a written description under today's patent law. Lord Mansfield added in *Liardet* that an inventor must specify the details of their invention "in such a way as shall teach an artist, when [the patent's term] is out, to make it: *for then at the end of the term, the public have the benefit of it*."[155] Ever since, the concept of "the public domain" has only grown in prominence under the English common law. It reaffirms that patents are granted to disseminate knowledge—which presumably would otherwise be kept as a trade secret or never be discovered—"in a controlled manner and in the specific area for which they were granted."[156] As a legal and historical matter, the foregoing analysis similarly applies to the emergence of the "original author" requirement and the concept of author under the modern copyright law of Britain.[157]

Consequently, by the early twentieth century, the common law had shaped a "new kind of individual," one who saw herself as more of a right holder than a supplicant for royal concessions.[158] The above analysis demonstrates how England developed detailed laws delineating the concepts of "inventor," "author," and "public domain" through statutes and key judicial rulings. It also shows how the English common law infused new ideas about individualism, property, rationality, and rights into its legal doctrine

[154] Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 Hastings L.J. 1255, 1308 (2001); Liardet v. Johnson [1778] 1 WPC 53, 5354 (KB).
[155] *See id.* at *1292.*
[156] Zukerfeld, *supra* note 11, at 13.
[157] *Id.* at 11.
[158] *Id.*

(particularly surrounding IP) to adapt to new technological developments and the political economic imperatives to which those developments gave rise.[159]

III. THE CHINESE LEGAL SYSTEM

A. Introduction To China's Legal System

From a historical standpoint, Chinese legal development has been through three major periods: (1) the imperial period, (2) the Westernization period, and (3) the communist period. From the Qin dynasty (221-206 B.C.) through the Qing dynasty (1644-1911 A.D.), Chinese positive law (*fa*) was restricted to solely criminal-law (penal) purposes.[160] The civil law thus remained highly underdeveloped, and issues typically covered in the modern era under civil law were instead addressed by Chinese local customary law.[161] Notwithstanding the top-down promulgation of criminal codes, during the imperial period, the Chinese society never saw positive law as the central focus of social order, nor was it attuned to the rigid divisions between civil and criminal law.[162] Traditional Chinese thought instead relied on various alternative instruments—influenced primarily by Confucian ethics—to uphold social harmony and administer the State.[163] The preferred means of guidance, ordered hierarchically in terms of desirability, were *tainli* (heavenly reason), *tao* (the path), *de* (morality), *li* (ritual propriety), *xixu* (custom), *xiang yue* (community compacts), and *jia cheng* (family rules).[164] As such, the societal conditions gave

[159] While there have been numerous multilateral and international efforts geared towards harmonizing countries' IP laws over the past century, they have not meaningfully altered the core IP concepts described in this Part. They have however had a role in building up on the English common law's conceptions of inventor, author, novelty, etc. As a case in point, one can find traces of continental Europe's influence in the United Kingdom's copyright law by looking at the incorporation of authors' rights in the Copyright, Designs and Patents Act 1988. *See* The Copyright Act, § 9 (UK).
[160] *See* 2 JOSEPH NEEDHAM, SCIENCE AND CIVILISATION IN CHINA 524 (Cambridge Univ. Press, 1956-2004).
[161] *Id.* at 524-40 (discussing village and clan elders acting pursuant to custom); *see also* John Alan Lehman, *Intellectual Property Rights and Chinese Tradition Section: Philosophical Foundations*, J. OF BUS. ETHICS 1, 2 (2006) ("An important aspect of Roman law which differs from Chinese law is the division into criminal and civil law.").
[162] *See* ALFORD, *supra* note 20, at 10.
[163] *See* LEHMAN, *supra* note 161, at 2.
[164] *See* ALFORD, *supra* note 20, at 10.

rise to a pluralist legal system whereby the society resorted to positive law only when other means failed to guide its members towards the appropriate behavior.[165]

Beginning in the late nineteenth century, following the Opium War (1839-42), Chinese society was forcibly exposed to Western legal systems.[166] This exposure came about partly because of treaty commitments that required that foreigners accused of crimes against Chinese citizens be tried according to their national laws.[167] In addition, as foreign powers, especially Britain, further entrenched themselves in the country, they started hearing cases involving Chinese defendants in their foreign consular representatives offices or in the Mixed Court, which was founded to adjudge cases in the foreign-run Shanghai.[168] As a result, the Chinese society, originally familiar only with the criminal sphere, became exposed to civil cases too.[169] But the contrast was severe. Already accustomed to an inquisitorial system of truth-finding under the supervision of authoritative figures—whether it be the Emperor, the Provincial rulers, or the village elders—the Chinese people now had to avail themselves of the British adversarial system, a legal regime that widely differed from the Chinese legal tradition.[170]

Upon the establishment of the People's Republic of China in 1949, the Chinese government eliminated all previous regulations and laws and replaced them with new regulations and directives.[171] The period between 1949 to 1979 was a period of extreme central planning.[172] During the Cultural Revolution (1966-1976) in particular, legalism (*Fajia*)[173]—the top-down imposition of laws without the civil society's participation or involvement in their creation—heavily permeated the Chinese legal culture.[174]

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[165] LEHMAN, *supra* note 161.
[166] WESLEY R. FISHEL, THE END OF EXTRATERRITORIALITY IN CHINA 5-6 (1952).
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] ALFORD, *supra* note 20, at 33.
[171] Deli Yang, *The Development of Intellectual Property in China*, 25 WORLD PAT. INFO. 131, 132-35 (2003).
[172] *Id.*
[173] Legalism or "centralized, hierarchical system" in China has its roots in the first Emperor's reign when the State promulgated necessary laws to maintain control across the vast Chinese territory. *Id.* at 135.
[174] *Id.*

Starting from 1979, China "opened its door" to the international community.[175] The current leadership in China is striving to shape a legal system that can accommodate a society with Confucian, communist, and capitalist elements.[176] One area where the task has proved particularly challenging is IP. The Constitution of the People's Republic of China guarantees its citizens' right to hold private property.[177] Furthermore, Article 20 obligates the State to "promote[] the development of natural and social sciences, disseminate[] scientific and technical knowledge, and *commend[] and reward[]* achievements in scientific research as well as technological discoveries and inventions."[178] Article 22 requires the State to "promote[] the development of literature and art" with the caveat that such works must "serve the people and socialism."[179]

Accordingly, subject to special limitations that arise out of China's unique political culture, the current Chinese law *can* at a minimum accommodate both modern copyrights and patent rights. In fact, the post-1979 Chinese government promulgated its first patent law in 1984. The Patent Law of the People's Republic of China, in effect since 1985, protects "the lawful *rights* and *interests* of patentees" with the stated objective of "promoting the advancement of science and technology and the economic and social development."[180] Similarly, the Copyright Law of the People's Republic of China, in effect since 1991, states, "copyright shall include … personality rights and *property* rights" in a work.[181] The stated objective of the Act is "the construction of socialist spiritual and material civilization, and … the development of … the socialist culture and science."[182] The State is empowered to "supervise and manage

[175] *Id.* at 137-39.
[176] ALFORD, *supra* note 20, at 7.
[177] XIANFA art. 13 (1982) (China) [hereinafter P.R.C. Constitution].
[178] *Id.* art. 20 (emphasis added).
[179] *Id.* art. 22.
[180] Patent Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, effective Apr. 1, 1985) (China) (emphasis added) [hereinafter Patent Law of China].
[181] Copyright Law of the People's Republic of China, art. 10 (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991) (China) (emphasis added) [hereinafter Copyright Law of China]. The property rights recognized by this law are very similar to those granted under Western IP laws, and they include the rights of publication and authorship.
[182] *Id.* at art. 1.

the publication of works" to ensure that copyright holders do "not violate the Constitution or laws or prejudice the public interests."[183]

China's IP law is textually very similar to its Western counterparts.[184] Patent requirements of novelty and written specification, and copyright requirements of authorship and originality are all present among other requirements in the corresponding IP statutes of China.[185] There is even a chapter in the Chinese patent law entitled "Compulsory License for Exploitation of a Patent" that addresses monopoly and unfair competition concerns.[186] That being said, these statutory codes are perhaps the least consequential factors in the founding and development of IP rights under the Chinese legal system. Instead, IP rights recognition and protection under China's law is heavily a function of cultural as well as political economic factors that have historically affected the State's approach towards regulating IP and the society's understanding of such rights. In the following Sections, the legacy of China's past, large traces of which remain omnipresent across various layers of the Chinese society to date, will be studied in relation to IP rights.

B. Political Cultural Factors Affecting Intellectual Property Rights in China

a. The Influence of Confucianism

Confucianism heavily dominated Chinese sociopolitical thought until the middle of the twentieth century.[187] As an ethical code premised on hierarchical relationships within society, Confucianism had a limiting effect on the development of IP rights in China.[188] For starters, the idea of IP as property conflicts with core principles of Confucianism. That is, if, as taught by Confucius, knowledge comes from

[183] *Id.* at art. 4.
[184] WIPO conventions relating to IP rights have served as model laws. *See, e.g.*, Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 13 U.S.T. 2, 828 U.N.T.S. 305 (revised at Stockholm July 14, 1967); Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, 828 U.N.T.S. 389 (revised at Stockholm July 14, 1967); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 299.
[185] *See* Patent Law of China, arts. 22, 26; Copyright Law of China, *passim*.
[186] Patent Law of China, *supra* note 180, at ch. 6.
[187] Yang, *supra* note 171, at 134.
[188] *Id.*

nature—not humans—then there is no basis for granting persons exclusive rights to that knowledge—i.e., IP rights. Relatedly, the ethical duty of senior members of the social hierarchies to nurture their juniors demands that they could "control access" to knowledge when necessary.[189] In other words, the ruler's (or senior's) fiduciary duty to determine dissemination-worthy knowledge militates against granting the fruits of intellectual labor private property status.[190] Accordingly, the propriety (*li*)-based legal system that Confucius envisions in *the Analects* does not vest those who have monopolies over particular items with "rights" that could be asserted against each other.[191]

Furthermore, at the heart of the Chinese society's approach to IP lie the Confucian tenets regarding the nature of civilization and the role of a shared and vital past in it.[192] As originally developed, Confucianism perceived itself as the reservoir of ancient custom.[193] According to the Confucian culture, obtaining knowledge is a process of recovery rather than discovery.[194] Confucius himself constantly emphasized that he was merely a "transmitter" of earlier materials and that he "never created or wrote anything original."[195] In addition to the foregoing tenets which appear at odds with modern concepts such as novelty, originality, and perhaps even authorship, Confucianism also teaches that profitmaking is unethical as a primary goal, and its pursuit undignified.[196] Therefore, as a matter of public policy, replicating others' work is both necessary and justified when done for the dissemination of accumulated knowledge, with innovation occupying little to no role in the society's improvement.[197]

The copyright infringement case involving G.&C. Merriam and the Commercial Press in Shanghai is illustrative of the above-described cultural influences. Merriam had invested heavily in the

[189] ALFORD, *supra* note 20, at 20.
[190] *Id.*
[191] 2 CONFUCIUS, ANALECTS, ch.3 (Waley trans. modified by William P. Alford).
[192] ALFORD, *supra* note 20, at 18.
[193] NEEDHAM, *supra* note 160, at 1970. As a matter of fact, the classical Chinese word *ru*, used for "Confucian," referred to an expert in ancient rituals. *Id.*
[194] Lehman, *supra* note 161, at 5.
[195] CONFUCIUS, *supra* note 191, at 2000; *see also* DANIEL P. REID, TAIWAN (INSIGHT GUIDES) 62 (6th ed. 1995).
[196] Lehman, *supra* note 161, at 5-6.
[197] *Id.* at 5-7.

bilingual version of *Webster's Dictionary* in the hopes of introducing it in China.[198] However, it soon discovered that the Commercial Press in Shanghai had already started disseminating its Chinese version of *Webster's*.[199] When Merriam brought suit against the Commercial Press before the Shanghai Mixed Court in 1923, counsel for the Commercial Press put on a strong public domain defense arguing, among other things, that its client deserved praise for its patriotism in making foreign knowledge available to the Chinese public.[200] The court ultimately ruled in favor of the Commercial Press on the copyright infringement issue, finding that *Webster's Dictionary* did not fall under the limited category of American works entitled to copyright protection.[201]

Confucianism has historically been unwelcoming towards litigation as a means of resolving conflicts. Confucius himself wrote, "[w]hat we need is for there to be no lawsuits!"[202] Traditionally, personalized social networks, otherwise known as *guanxi*, which emphasize trust, reciprocity, and mutual commitments have played a fundamental role in facilitating business transactions across China.[203] There are, nonetheless, historical instances when Chinese citizens resorted to some customary principles of equity to prevent unfairness. For example, when a party's trademark would be deceptively used in trade by a competitor, the businessowner would seek help from local officials, not based on any code provisions, but rather their role as "father" figures in the societal hierarchical relationships.[204] That said, there is no evidence of wide-spread resort to such customary notions of equity, and their use has been of questionable success.[205] Therefore, historically, despite some availability of legal or equitable avenues for redress, they were to be deterred by all means.[206]

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[198] Zhou Lin and Li Mingshan, *Zhongguo banquan shi yanjiu wenxian* [Historical Materials for the Studies of China's Copyright History] 199-202 (1999).
[199] *Id.*
[200] *Id.*
[201] *Id.*; *see also* ALFORD, *supra* note 20, at 43.
[202] 12 CONFUCIUS, THE ANALECTS OF CONFUCIUS 83 (2007).
[203] *See* THOMAS GOLD, DOUGLAS GUTHRIE & DAVID WANK, SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE AND THE CHANGING NATURE OF GUANXI (2002).
[204] *See* ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER LAW 21 (1987).
[205] *See* ALFORD, *supra* note 20, at 16.
[206] *See* GLENN, *supra* note 89, at 325.

b. The Cultural Revolution

As indicated above, Chinese culture traditionally did not instill rights consciousness within the society. Therefore, the anti-science, anti-elite movement that took shape in the 1960s and early 1970s in China did not have to fundamentally alter the country's legal system. During this period, China's nascent IP law was simply rewritten to reduce its concern with property rights and reliance on material incentives.[207] The government promulgated two sets of new permanent regulations that did away with patent protection in the law and declared new inventions and improvements in technology as the exclusive property of the State.[208]

The takeover of communism, especially the Cultural Revolution, reinvigorated legalism within the different layers of Chinese political and bureaucratic institutions.[209] Confucianism, though originally influenced by ancient Chinese legalist traditions, has historically been at odds with legalism's (over) reliance on positive law to organize society.[210] Upon close inspection. however, one will find a close synergy between the legalist culture of the Cultural Revolution and the Confucian tradition that has been embedded in the Chinese culture for millennia. That is, both systems endorse a multi-layered hierarchy and are highly dependent on "culturally instilled relation networks" throughout the society, one of which is the relation between government and the citizenry.[211] Accordingly, the government is deemed the patron of the society and the best judge of what is in its best interest. One can see these cultural influences clearly affecting the development of IP law in this era too: by promulgating restrictive IP regulations such as the ones discussed above, the government thus is fulfilling its duty and moral responsibility to the society.

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[207] ALFORD, *supra* note 20, at 62-64.
[208] Faming Jiangli Tiaoli [Regulations on Awards for Inventions], art. 23 (1963); Jishu gaijing jiangli tiaoli [Regulations to Encourage Technological Improvements] (1963); *see also People's Daily* (Dec. 2, 1963) ("All inventions are the property of the state, and no person or unit may claim monopoly over them. All units throughout the country, including collectively owned units, may make use of the invention essential to them.").
[209] *See supra* Part III.A.
[210] K.K. Lee, *The Legalist School and Legal Positivism*, 3 J. CHIN. PHIL. 23, 27-30, 40-41 (1975). *But see* Glenn, *supra* note 89, at 325 ("[T]he relational principles of Confucian society became integrated into legalist statements of positive law.").
[211] Yang, *supra* note 171, at 135.

c. Secondary Explanations for the Absence of Formalized Intellectual Property Rights Protections in China

In addition to the foregoing primary influences, legal historians have identified several secondary reasons that help explain why IP rights protection efforts in the twentieth century were not as well-received within the Chinese society as they were in the West. First, the rate of literacy in China was no more than twenty percent even by the early twentieth century, a factor that likely contributed to reduced innovation and original production of works and increased copying of others' literary and technological products.[212] Second, until the past several decades, business and manufacturing in China had yet to reach the low-cost mass production stage which is often closely associated with the evolution of IP law.[213] And the lack of a corporate form under Chinese law further impeded large capital formation.[214] Finally and relatedly, traditional Chinese culture highly valued agriculture.[215] As such, vast swaths of the society despised commercial and industrial development.[216] Therefore, up until the late twentieth century, China lacked sufficient top-down and bottom-up forces that would induce and compel systematic changes in the country's IP regime in favor of broader protections.

C. Political Economic Influences: From the Past to the Present

a. Maintenance of State Control by Subsequent Chinese Governments

With the advent of printing in China, imperial governments began sustained efforts to regulate the publication of printed materials.[217] While the State occasionally did support guild efforts to protect names and marks, these efforts were largely to maintain commercial order and preserve social harmony by reducing deceptive practices in trade.[218] Even today, there are provisions in the Chinese Constitution and its most modern Copyright Law which echo historic efforts to control the dissemination of heterodox

[212] ALFORD, *supra* note 20, at 18; *see also* RICHARD J. SMITH, CHINA'S CULTURAL HERITAGE 201 (2nd ed. 1994).
[213] DANIEL K. BERMAN, WORDS LIKE COLORED GLASS 105 (1st ed. 1992).
[214] ALFORD, *supra* note 20, at 18.
[215] Yang, *supra* note 171, at 133.
[216] *Id.*
[217] ALFORD, *supra* note 20, at 13 (describing Song Emperor's regulation that required printers to submit works for prepublication review).
[218] LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 36-41 (1st ed. 1968).

ideas.[219] These laws condition copyright protection on conformity of a work's content with state regulations about what is publishable. The high level of State interest in maintaining a grip over what was published across the Chinese mainland stemmed from domestic political considerations that did not directly apply to the reproduction of trademarks and patents—or their de facto equivalents. As such, up until the twentieth century, the Chinese State did not develop any comprehensive, formal legal protection for proprietary symbols or inventions.[220]

b. The Westernization Movement of the Late Nineteenth Century and the Foreign Pressure to Promulgate Intellectual Property Laws

As previously mentioned, following the Opium War in the nineteenth century, the British, and other world powers, increased their footprint in China. In the aftermath of the Boxer Uprising of 1900 and during the negotiations between the Chinese and the British, Americans, and Japanese, the latter three countries, among other things, pressured China to develop IP laws.[221] The ensuing treaties gave rise to multiple commitments by the Chinese government to protect various IP rights of foreign citizens in China. Therefore, one can trace the origins of IP protection in China to this Westernization movement.[222] Here, too, political economic factors are at play in China's decision to regulate the dissemination of knowledge and grant certain limited rights to those producing and practicing it. Specifically, at this time, China was motivated by the desire to preserve its sovereign equality vis-à-vis the foreign powers—by granting certain concessions—and to secure comparable IP rights protections abroad for its own citizens.[223] Moreover, this period coincided with the government's push for industrialization which required incentives for innovations.[224]

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[219] *See* P.R.C. Constitution, *supra* note 177 at art. 22; Copyright Law of China, *supra* note 181 at art. 14.
[220] Alford, *supra* note 20, at 15.
[221] *See* THE MACKAY TREATY [中英續議通商行船條約] (1902), *reprinted in* NORWOOD F. ALLMAN, PROTECTION OF TRADEMARKS, art. 7 (noting the undertaking of the Chinese government to "afford protection to British trade-marks against infringement, imitation, or colorable imitation by Chinese subjects"); TREATY BETWEEN THE UNITED STATES AND CHINA FOR THE EXTENSION OF THE COMMERCIAL RELATIONS BETWEEN THEM (1903), *reprinted in* TREATIES AND AGREEMENTS, art. 9 (MacMurray eds.) [hereinafter The 1903 Treaty] (discussing patents and China's commitment to provide limited patent protections "to citizens of the U.S.").
[222] Yang, *supra* note 171, at 132.
[223] The 1903 Treaty, *supra* note 221, at art. 9.
[224] Yang, *supra* note 171, at 133.

Notably, however, during this time, the nascent Chinese IP law did not provide any IP protections for Chinese nationals—i.e., the law was entirely geared toward the protection of foreigners' IP.[225] While reflecting the Chinese State's priorities at the time, this has clearly changed today and China's Constitution explicitly recognizes the right of its citizens to hold private property, including IP, subject to statutorily codified limitations.[226]

c. The Communist Influence

With the communist takeover of China, a new chapter emerged in the development of IP law in this country. The Chinese Communist Party extensively drew on the samples provided by the Soviet Union in mapping its own laws because of the conformity of the underlying values of the Soviet model with those reflected in traditional Chinese attitudes towards IP.[227] While some of the political factors discussed above, such as maintenance of State control, continued to play a large role in the regulation of IP rights, economic factors became more central to how the State approached IP regulation. Thus began a period of extreme economic (central) planning wherein the State advocated public ownership, resulting in the significant weakening of private property rights.[228]

The IP laws that the government promulgated in the 50s and 60s were designed to serve the State's national reconstruction policy through procuring the necessary technology.[229] New inventions would automatically become State property if they concerned national security or "affected the welfare of the great majority of the people."[230] While similar provisions exist today in China's Patent Law, such as the compulsory licensing scheme in Chapter 6, they are more restricted in the extent to which they allow

[225] *See* ALFORD, *supra* note 20, at 44.
[226] P.R.C. Constitution, art. 13; *see also* Copyright Law of China; Patent law of China.
[227] Marx wrote in 1844 that, "[e]ven when I carry out scientific work…I perform a social, because human, act…. For this reason, what I myself produce, I produce for society, and with the consciousness of acting as a social being." KARL MARX, EARLY WRITINGS 350 (1992).
[228] *See* ZHANG, *supra* note 25, at 35-36; Yang, *supra* note 171, at 134.
[229] *See* ALFORD, *supra* note 20, at 58-59.
[230] *Id.* at 41. In 1963, when socialist public ownership ideas were at their extreme, the government issued a new regulation which stated that "[a]ll inventions are national assets, any individuals and organizations are not allowed to apply for a monopoly. All the organizations across the country, including collectively owned enterprises can use them." Faming Jiangli Tiaoli [Regulation on Awards for Inventions], art. 24 (1963).

the State to limits one's IP rights. For example, current compulsory licensing provisions do not make the State the owner-in-propriety of the IP at issue and, in fact, limit the compulsory license in duration and scope.[231]

The pendulum of IP rights protection in China went through yet another swing by 1977. At that time, the Chinese government had weathered severe political turmoil and was now ready to focus on objectives such as reaching world-class strength in agriculture, industry, and science and technology.[232] This time the legal development of IP became subservient to pragmatic needs of the State and gave rise to the modern IP regime of China.[233]

d. Takeover of Pragmatism: The Socialist Market Economy

With the emergence of a new leadership in China came a fresh political economic policy which inevitably guided the legal philosophy of the State. China's new leadership believed in the importance of intellectual and scientific work and instigated efforts to enhance the positions of those researchers, scientists, and inventors who engaged in such efforts.[234] As the first iteration of post-1979 patent law makes clear, the Chinese sought to institute an IP regime that facilitated the "import[ation] [of] advanced technology for acceleration of the [State's modernization goals]."[235] Against a background of an immature market mechanism and planned economy, the modern Chinese IP law tries to strike a balance between inventors' and authors' rights and their responsibilities to the State.

The foregoing considerations ultimately culminated in the Patent Law of 1984 and the Copyright Law of 1990. Both laws have been subject to multiple revisions, gradually increasing the scope of rights covered as well as clarifying the contours of such rights.[236] External pressures, such as those from the United States pushing for stronger IP protection measures, and external incentives, such as gaining

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[231] *See, e.g.*, Patent Law of China, *supra* note 180 at arts. 55-58.
[232] ALFORD, *supra* note 20, at 65.
[233] For relevant IP-related codes of China, see *supra* Part III.A.
[234] *Id.*
[235] Tao-tai Hsia, *China's New Patent Law and Other Recent Legal Developments*, FAR EASTERN LAW DIVISION OF THE LIBRARY OF CONGRESS 23 (1984).
[236] *Compare* Patent Law of China, *with* Patent Law of the People's Republic of China (revised in 2021); *see also supra* Part III.A.

membership of the WTO, have played a role in expediting this process.[237] Hence, the socialist legality of the early communist period gave way to the "socialist market economy" of the post-1979 era.[238]

IV. COMPARATIVE TREATMENT OF THE FOUNDATIONS OF INTELLECTUAL PROPERTY RIGHTS PROTECTION ACROSS THREE DIFFERENT LEGAL SYSTEMS

A. Character of Law: Ideals and Realities Blended into Customs, Codes, and Legal Opinions

All legal systems are characterized by clashes between individuality and collectivism, between instrumentality and autonomy. Such strains are accentuated when a system is at nascent stages in the construction of its systems of formal legality or is in the process of recasting its core conceptions of social order. It would be crude and historically counterfactual to ignore the place of legality in different legal systems and associate certain legal systems with absolute individual rights. That notwithstanding, the foregoing study of IP law across three different legal systems serves as a window into the particular orientation of each system. That is, as typified by the study of the English common law, Western systems, through the influence of Roman law and liberal Christianity, focus on the free market and profits as the just reward for labor in creative endeavors.[239] Some other systems, including Islamic law and Chinese law focus on the distribution of wealth throughout society and are thus more communally oriented.[240]

Due to the large influence of the natural rights theory in England, British IP practitioners today carry with them the mindset of what is "right" and "just." However, the historical analysis demonstrates that IP rights development in England in fact arose out of political economic considerations, such as commercial necessity, and, as in the Chinese legal system, also carried elements of top-down legalism exemplified by the royal prerogative. That said, in contrast to the English common law, the Chinese legal

[237] *See* ZHANG, *supra* note 25, at 43. Note that this comparative study does not delve into modern controversies surrounding the extent to which Chinese persons and entities actually adhere to the current Chinese IP laws and the sufficiency of the State's efforts to enforce foreigners' IP rights in mainland China.
[238] *Id.* at 36.
[239] FORD, *supra* note 8, at 272, 405.
[240] HYUNG I. KIM, FUNDAMENTAL LEGAL CONCEPTS OF CHINA AND THE WEST: A COMPARATIVE STUDY 90 (1981); QUR'AN 2:270-73, 8:73.

system, due to its unique political culture, has been largely unwelcoming towards the privatization and commodification of knowledge.

As for Islamic law, although it is a religious law at its core, when it comes to property rights, including IP, it bears similarities to both Confucianism and the common law. That is, like the Labor-theory-derived concept of absolute ownership in the common law, under the concept of *mawat*, a person may acquire title to property by improving it through their labor. Yet, under the concept of *maslaha* (public interest) which encapsulates its distributive justice doctrine, Islam also reflects values parallel to those embedded in Confucianism. Therefore, as far as property rights go, Islam appears to take a middle view between Confucianism's communal property doctrines and the natural rights underpinning the Lockean Labor theory.[241]

On the other hand, concerns about restriction of knowledge and illegal/unjust monopolies are shared among the three legal systems. The doctrine of compulsory licensing, first passed by Parliament in the nineteenth century, protects against individual monopolistic excesses that could impede the public's access to vital knowledge. Additionally, the English common law developed the concept of the public domain which refers to knowledge that belongs to the public and cannot be monopolized or restricted. The requirements of novelty, originality, protection term limits, and patentable subject matter are also designed to narrow the realm of excludable and commodifiable knowledge.

Functionally analogous to the novelty requirement, the Islamic law concepts of *mayser* (gaining profits without labor) and *riba* (usury) serve as limits to what can be restricted under IP law and protect the public from undue exploitation of IP rights. Also, the *maslaha* doctrine—*Shari'a*'s counterpart to compulsory licensing—applies to knowledge too, and, thus, can be used to limit an IP owners' rights. Similarly, the values underlying the Chinese legal system, namely Confucianism, Marxism, and Maoism,

[241] Jamar, *supra* note 21, at 1090; *see also* Richard E. Vaughan, *Defining Terms in the Intellectual Property Debate: Are the North and South Arguing Past Each Other?*, 2 INT'L L. STUDENT ASS'N J. INT'L & COMPAR. L. 307, 357 (1996).

have historically provided for the sharing of knowledge for the "good of all."[242] This legal system has traditionally been concerned with ensuring society's unrestricted access to ancient knowledge, medicines, and educational content for the improvement and well-being of the society.[243] Reflecting its historical background, the current Chinese IP law also includes Compulsory licensing provisions. The relatively limited scope of the modern provisions might reflect the State's desire to transition away from traditional communal property-centric principles that have permeated the Chinese legal thought for millennia.

B. Purpose of Law: Safekeeping Community Values (society as it is) or Promoting New Values (society as it should be)

As should be apparent by now, the debate over IP rights recognition and enforcement is not merely a legal issue but also a key representation of the political economic priorities of each legal system. Intellectual property norms rest on protecting intellectual creations as a special form of private property.[244] This official recognition has come about at different stages in each legal system's development. While the English common law recognized intangible property as property in the seventeenth century in *Millar v. Taylor*, Islamic law and the Chinese legal system did not have to contend with this question until the twentieth century.[245]

Historically, the Chinese legal system has prioritized the maintenance of the status quo and "saving face."[246] The Confucian system of social hierarchical relationships highly influenced this system's development. As such, it is not surprising that virtually all recorded examples of IP protection in China seem to have been directed toward sustaining the State's power.[247] Notably, these efforts were not

[242] Simon Buckingham, *In Search of Copyright Protection in the Kingdom*, 11 MIDDLE E. EXEC. REP. 5, 11 (1998); Yang, *supra* note 171, at 134 ("Marxism, Leninism and Maoism advocated public ownership—in other words that individual welfare must be subordinate to social welfare, and the national interest is paramount.").
[243] Buckingham, *supra* note 242, at 11.
[244] ZHANG, *supra* note 25, at 5.
[245] *See supra* Part II.D.
[246] Graig R. Avino, *China's Judiciary: An Instrument of Democratic Change*, 22 PENN STATE INT'L L. REV. 369, 374 (2003).
[247] ALFORD, *supra* note 20, at 17.

dissimilar to those of the English Crown who limited what could constitute protectable knowledge out of a desire to prevent heterodox material from being published.[248]

However, factors such as economic competition with other world powers in the seventeenth and eighteenth centuries motivated the British to take a more progressive approach toward individual rights to incentivize economic development. In other words, the English common law institutionalized property rights, including IP, to foster long-term predictability in economic relations.[249] In contrast, imperial China remained indifferent to foreign manufactures and ideas and focused on preserving the State's authority. In a revealing note to King George III of England in 1793, the Qianlong Emperor said, "We possess all things. I set no value on objects strange or ingenious, and have no use for your country's manufactures."[250] The Chinese legal system, however, has undergone major transformations in the past century, in large part, due to its exposure to Western legal systems and its desire to compete economically with world powers. The recognition of citizens' right to hold private property and the codification of substantive IP laws are major steps toward imbuing IP rights consciousness within Chinese society.[251] That said, maintaining social harmony and stability remains a top priority for the State. Furthermore, the different actors within the Chinese civil society, including the relevant bureaucracies at the provincial level, owners of small and mid-sized businesses, and local judges, have yet to fully subscribe to the principles underlying the modern IP regime.[252]

Similarly, Islamic law is not immune to cultural, political, and economic influences. Even though detailed *Shari'a* provisions govern the daily lives of Muslims, novel issues of commerce, banking, and technology warrant resort to secondary sources such as *qiyas*, *aql*, *maslaha*, and *urf* which are more prone to adaptability. For example, the majority of Sunni schools who now accept IP rights as legitimate rights do so under the principle of usufructs.[253] These schools recognize the importance of economic

[248] PATTERSON, *supra* note 218, at 36-41.
[249] Sell & May, *supra* note 2, at 471.
[250] ALFORD, *supra* note 20, at 30.
[251] *See supra* Part III.A.
[252] *See, e.g.*, Zhang, *supra* note 25, at 4-5, 7-8; ALFORD, *supra* 20, at 94.
[253] *See supra* Part I.C.*a.*

development in the modern world and consider the transition towards knowledge-based economies—which are regulated by IP laws—as the primary means of generating wealth. Also, prominent Shia *mujtahids* now recognize IP rights based on *urf* (custom).[254] This, too, is a manifestation of how Islamic law can re-orient itself in accordance with modern economic realities (current customs), namely maintaining fair competition in the markets through protecting individuals' and entities' intellectual property.

None of the above must be taken to mean that IP rights recognition by a legal system is immediately translated into the society's internalization of those rights and their perfect enforcement. However, the foregoing historical and jurisprudential analysis demonstrates that, in each legal system, the evolution of IP law reflects deeper values which are subject to change based on cultural, political, and, especially, economic realities of the time.

C. Sources of Law: God, People, or the Elites

Islam is a religion, a philosophy, and a legal and political system all at once.[255] Its principles emanate from the words of God as revealed to prophet Mohammad, and its purpose is to organize society according to a divine purpose.[256] While Islam is primarily focused on the individual and her duties to Allah and her fellow man, the State too is subject to *Shari'a* with no special immunity.[257] At the same time, the interpretive role of Islamic jurists and religious scholars in how Islam is applied within the society cannot be overlooked. The English common law, though carrying strong traces of Christianity, is rooted in the particular history of a people sharing land in a common space. When the State was essentially the Crown, royal writs carried the most weight.[258] With time, they gave way to judicial opinions and Acts of Parliament, paving the way for the institutionalization of laws.[259] *Stare decisis* or

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[254] *See supra* Part I.C.*a*.
[255] ORIGIN AND DEVELOPMENT OF ISLAMIC LAW 85 (Majid Khadduri et al. eds., reprint 1984).
[256] *Id.*
[257] *See, e.g.*, *Responsibilities of the Government: Curb on Spending in Favour of the Rich*, AL-ISLAM, https://www.alislam.org/book/economic-system-islam/responsibilities-of-government/ (last visited Dec. 9, 2022).
[258] *See supra* Part II.B.
[259] *See supra* Part II.C.

precedent, developed by common law judges, has been enormously influential in the development of various areas of the law, including IP. The role of the citizenry, both through political activities, including those which brought Parliament into prominence, and through litigation which gives rise to judicial opinions, is also consequential to the evolution of law in this system.[260]

The Chinese legal system, on the other hand, has experienced a more unsteady development of its IP laws for several reasons. First, because of the strong Confucian influence, this legal system has historically prioritized conciliation over litigation, rendering precedent practically irrelevant. Furthermore, legalism in China appears to have always emphasized the role of State power in the hierarchical relational networks that permeate the Chinese society.[261] Thus, the law in China, both in character and substance, largely depends on its political leadership, who overshadow the function and independence of jurists, legal professionals, and civil servants—the actors most influential in a legal system's stabilization of its IP laws.[262]

That said, non-state actors have also played an important role in how China approaches legal development.[263] Many people in China perceive the Chinese government's adaptation of IP laws as concessions to the West which betray China's heritage and national interests.[264] Furthermore, as a practical matter, most small entities cannot afford to assiduously observe IP rights as their businesses often depend on what legal scholars in the West would classify as unfair competition practices.[265] Finally, the centrality of *guanxi* to day-to-day business transaction in China renders IP rights enforcement subordinate to the goal of cultivating interpersonal relationships.[266] As such, Chinese legislative, judicial,

[260] *See supra* Part II.C, II.D.
[261] *Id.*
[262] Yang, *supra* note 171, at 134 (referring to this characteristic of the Chinese legal system as "government by men").
[263] ZHANG, *supra* note 25, at 10.
[264] *Id.* at 21.
[265] *Id.* at 22.
[266] *See generally* Flora F. Gu, Kineta Hung, & David K. Tse, *When Does Guanxi Matter? Issues of Capitalization and Its Dark Sides*, 72 J. MKTG. 12 (2008).

and law enforcement bodies must contend with these cultural and socioeconomic realities, all of which highly affect the development of IP laws under their legal system.

CONCLUSION

Comparative legal scholar Richard Vaughan noted that "intellectual property has become the modern 'wealth of nations.'"[267] Over the years, this field of law has become so global and dynamic that has been heavily addressed at the international and regional levels. This comparative analysis of the foundations of IP law sought to help readers gain a deeper understanding of the background of foreign legal systems and the political, economic, and social conditions that underlie their evolution. It found that under Islamic law, the English common law, and the Chinese legal system, political, cultural, and economic factors undoubtedly play a role in shaping the law and the legal system itself. It also discovered that not only is IP law broadly reflective of the transformation of the law across different time periods but is also a great window to the subtle differences that exist between legal systems, such as differences in character, goals, and sources. In sum, IP law has proved to be a fascinating area through which legal scholars could study the differences and similarities between legal systems.

[267] Vaughan, *supra* note 241, at 311.