

Manchester Journal of Transnational Islamic Law & Practice

About

The Manchester Journal of Transnational Islamic Law & Practice (formerly the Journal of Islamic State Practices in International Law) was founded in 2005. The Journal is independent of any State, school of fiqh or institutional affiliation and has a diverse and global editorial board. It is indexed on Scopus and available both in electronic and printed forms.



Aims of the Journal

The principal objectives of the Manchester Journal of Transnational Islamic Law & Practice (MJTILP) are to provide a vehicle for the consideration of transnational forms of Islamic law and practice. Transnationalism in Islamic law is taken broadly as communications and interactions linking Islamic thoughts, ideas, people, practices and institutions across nation-States and around the globe. In recent times, research in Islamic law has shaped narratives based on nation-States, demographics, diasporic communities, and ethnic origins instead of developing around a central core. Contemporary issues of Islamic law are increasingly linked to geographical locations and ethnic or parochial forms of religious beliefs and practices. Expressions like American, European, British, Asian, and Arab Islam have widely gained acceptance.

Despite the growing importance of dialogue to develop shared understandings of issues facing Islamic law and proposing coordinated solutions, the contemporary research and scholarship has not developed harmoniously and remains piecemeal and sporadic. Researchers and practitioners of Islamic law are drawn from a wide variety of subjects and come from various regions of the world but have insufficient institutional support for sharing information and comparing experiences. Innovation in various strands and paradigms of Islamic law and practice is stifled because there are limited spaces where evolutionary, collaborative and interdisciplinary discourses can take place. This in turn hampers the ability to build on past research and record best practices, negatively impacting a consistent and orderly development of the field. There is a need to constitute a world community of Islamic law scholars based on interactions and aspirations moving across linguistic, ethnic, geographical and political borders.

The MJTILP is inspired by the need to fill these gaps. It provides a platform to legal and interdisciplinary scholars and researchers for critical and constructive commentaries, engagements, and interactions on Islamic law and practice that are built upon configurations in contemporary contexts. It welcomes contributions that look comparatively at Islamic law and practice that apprise and inspire knowledge across national boundaries whether enforced by a State or voluntarily practiced by worldwide Muslim communities. We are equally interested in scholarships on encapsulated cultural worlds, diaspora, identity and citizenship that are embedded and circumscribed by religious ties. As it has been the practice of the journal since its establishment in 2005, it also has a specific interest in issues relating to the practice of Muslim States in international law, international law issues that may concern Muslim countries, and all aspects of law and practice affecting Muslims globally.

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Contents

Articles:

The Concept and Essentials of Unstable Ownership and Its Effects in Imami Jurisprudence and Iranian Law

Mohammad Hosein Vakili Moghadam 1

A Comparative Analysis between the Implications of Paradigm and Ijma for the Cognition Element

Fatemeh Rezaei, Sayyed Mohammad Hadi Gabooli Dorafshan, Alireza Azad, Alireza Abedi Sarasia 19

Political Configuration and Characteristics of Legal Products of Islamic Law Based Reforms in Indonesia under the BJ Habibie Administration

Ibnu Radwan Siddik Turnip, Muhamad Hasan Sebyar 34

Ensuring Restorative Justice Through Penal Mediation in Indonesia: An Examination from the Perspective of Islah (Reformation) in Islamic Criminal Law

Joko Sriwidodo 45

Article 9 of the Constitution of Pakistan: The Right to Life or Substantive Due Process?

Amr Ibn Munir 58

Islamic Law As A Source of Legal Rules in the MENA Region

Maged Mamdouh Shebaita 78

Breaking the Glass Ceiling: A Semiotic Qualitative Study of Ellen Soebiantoro's Tenure as Indonesia's First Muslim Female Deputy Attorney General

Helena Octavianne, Fendy Suhariadi, Mohammad Fakhruddin Mudzakkir, Mia Amiati, Muhammad Ali Adriansyah 91

Female Madrasas and Islamic Agency of Afghan Girls and Women: How Religious Education is Being Used by Afghan Women and Girls under the Taliban Regime

Haroun Rahimi, Faiza Muhammad Din 101

Critical Analysis of the Legality of Kuwait's Boycott of Israeli Trademark in Light of TRIPS Agreement

Nawaf Alyaseen 119

Performing Salah in the Metaverse: Analysing the Perspectives of Ahl al-Hadith and Ahl al-Ra'yi within the Intersection of Technology and Religion

Mursyid Fikri, Indriana 135

Legal Protection for Non-Halal Traditional Culinary in Indonesia: Cultural, Religious and Economic Perspectives <i>Riana Susmayanti</i>	144
Between Reality and Aspiration: A Critical Review of the Principle of Judicial Independence Considering the Algerian Constitutional Amendment of 2020 <i>Samia Abdellaoui</i>	155
Preventing Child Marriage in Lampung: An Analysis of the Community Embedded Implementation Process Adopted for the Provincial Regulation Number 55 of 2021 and its Harmonisation with Local Custom and Islamic Law <i>Rohmadi</i>	165
Utilisation of Mosque Funds for Public Welfare Based on Maqasid al-Shari'ah Perspectives <i>Abdul Wahid Haddade, Sudirman, Abd. Rauf Muhammad Amin</i>	177
Examining the Role of Media in Raising Awareness of the Law and Practice of Endowment (Waqf): A Comparative Analysis of Islamic and Western Endowment Systems <i>Maryam Almansoori, Moath Alnaief, Aziz Farhan Al-enezy</i>	190
Determinants of Performance of Insurance Companies having Window Takāful Operations in Pakistan <i>Hafiz Rauf Iqbal, Muhammad Asghar Shahzad, Hafiz Ghulam Abbas, Muhammad Akmal</i>	202
Legal Challenges of Prosecuting War Crimes and Crimes Against Humanity: A Comparative Analysis of Islamic Law and Modern International Law <i>Nehaluddin Ahmad, Faizah Rahim, Danish Iqbal Ariffin</i>	216
Islamic and Christian Law on the People of Dhimmahh (non-Muslims Residing in an Islamic State): A Historical Comparative Analysis Drawn from Adam Metz's 'The Renaissance of Islam' <i>Yousif K. Al-Shimmary, Hamed Abd Al-Hamza Al-Janabi</i>	248
The Evolution of Sijuju' Sulo (Fire War) Tradition: A Maqāsid al-Shari'ah Perspective of the Socio-Cultural Practices in Indonesia's Pongka Village <i>Abdul Syatar, Andi Muhammad Awaluddin Arfah</i>	266
Sharing Interfaith Inheritance in Muslim Communities Based on Maqasid al-Shariah <i>Im Fahimah</i>	278
Integrating Maqasid al-Shariah into Legal Policies for Hybrid Working: Enhancing Flexibility and Protecting Employee Rights in Indonesia <i>Sapto Hadi Pamungkas, Sangga Aritya Ukkasah, Mu'adil Faizin</i>	287
Synergising Normative and Cultural Frameworks in Reforming Core Principles for Effective Zakat Supervision in Indonesia <i>Nurul Hak, Romi Adetio Setiawan, Adi Setiawan</i>	302

Can Cryptocurrencies Save Islamic Finance? <i>Frank Emmert</i>	317
Special Section on Recent Legal Developments in Egypt (Edited by Yasmine Abdel Moneim):	
Introduction to the Special Section on Recent Legal Developments in Egypt <i>Yasmine Abdel Moneim</i>	346
Evolving Jurisprudence of Supreme Constitutional Court of Egypt on Religious Institutions <i>Mohamed R. Abdelsalam</i>	350
Protecting the Rights of Children Without Parental Care in Egypt: A Review from the Perspectives of Islamic Law and UN Instruments <i>Fady Habashy</i>	355
Combating Discrimination in Egypt Since The 2014 Constitution <i>Ahmed Abdalla Elkholy</i>	363
Quantum Computing and Islamic Banking: Legal Framework for Transforming Egypt's Financial Sector <i>Ahmed Mokhtar Elmansy</i>	369
Confidentiality and Privacy in Personal Data Processing: An Analytical of Islamic Law and Egyptian Law No. 151 of 2020 <i>Ahmad Saeed Ezzat</i>	375
The Impact of Islamic Law on Cryptocurrency Regulation in Egypt <i>Hesham M. Abdelgawad</i>	381
The Philosophy of Punishment in Intellectual Property Rights Law: A Comparative Analysis of Emerging Technological Crimes Under Egyptian and Islamic Law <i>Abdallah Mohamed Nour El Dien</i>	389
Special Section on Recent Legal Developments in Malaysia (Edited by Mohamad Janaby):	
Introduction to the Special Section on Recent Legal Developments in Malaysia <i>Mohamad Janaby</i>	396
Application for Declaration of Religion's Status in Malaysian Shariah Court: An Analysis on the Judge's Approach Within the Purview of Maslahah <i>Mohd Lotpi bin Mohd Yusob, Abdul Karim bin Ali</i>	399
Statelessness of Non-Marital Children in Malaysia: Contemporary Perspectives on Shariah and Law <i>Rodziana Mohamed Razali, Aishah Mohd Nor</i>	404

Transnational Marriages of Rohingya Refugees: Legal Challenges of Islamic Family Law in Malaysia

Rodziana Mohamed Razali, Aizat Khairi, Tasneem Rahmatullah 412

Protecting Gig Workers in the Digital Labour Platform Through the Principles of Social Justice in Islam

Siti Suraya Abd Razak 420

Regulatory Reform to Strengthen Islamic Consumer Credit Business in Non-Banking Sector: The Case of Malaysia

Ibtisam @ Ilyana Ilias 425

The Role of Integrating AI-Powered Predictive Analytics in Arbitration for Resolving Islamic Banking Disputes

Mohamad Fateh Labanieh, Mohammad Azam Hussain, Muhammad Habibi Miftakhul Marwa, Hizri Hasshan 432

A Framework for Waqf-Linked Sukuk to Develop Idle Waqf Land in Malaysia

Mohamed Ayaz Mohamed Ismail, Aishath Muneeza, Magda Ismail Abdel Mohsin 438

Applying Hibah Trusts in Estate Planning: A Model for Malaysian Islamic Financial Institution

Mohd Izzat Amsyar Mohd Arif, Shofiyah Moidin, Mohd Afandi Mat Rani, Faezy Adenan 443

Combatting Ah Long Syndicates: Towards a Shari'ah-Compliant Legislative Framework for Financial Integrity in Malaysia

Nehaluddin Ahmad, Zheimie H. Zamri 449

Navigating the Paradigm Shift in Malaysia's Sustainable Responsible Investment Sukuks

Zakariya Mustapha, Sherin Kunhibava, Aishath Muneeza, Maryam Khalid 457

Abolishing the Death Penalty: A Crucial Legal Reform in Malaysia's Criminal Justice and Islamic Law

Mohd. Wasim Ali, Khalid Khan 465

Integrating Islamic Principles in Competition Law to Tackle the Challenge of Monopolies in Malaysia

Hatijah Mohamed Salleh, Khairunnisa Ishak, Farhana Hanim Mohsin, Norhayati Md Isa 470

Book Reviews:

***The Racial Muslim: When Racism Quashes Religious Freedom* Sahar F. Aziz (Author), John Esposito (Foreword), University of California Press, 2021, 365 p. ISBN: 9780520382299**

Md Asif Belal Ansari 476

***Peace and Reconciliation in International and Islamic Law* Kaleem Hussain, Cambridge Scholars Publishing, 2023, xix + 142 pp. ISBN: 978-1-527-50187-4.**

Tahir Ahmed Wani 479

The Philosophy of Punishment in Intellectual Property Rights Law: A Comparative Analysis of Emerging Technological Crimes Under Egyptian and Islamic Law

Abdallah Mohamed Nour El Dien*

Abstract: The Intellectual Property Rights Protection Law (2002) constitutes a distinct segment within the broader framework of economic legislation with a distinctive nature, setting it apart from other legal fields. This law aims to protect the rights and interests of innovators in the industrial, commercial, scientific, literary, and artistic domains, while also preserving societal interests in science and culture. This dual objective necessitates a nuanced approach to impose penalties on those who infringe on intellectual property rights. Islamic law also addresses the punishment of criminal acts to protect societal interests, ensuring that penalties are neither excessive nor deficient but are instead proportionate to the crime. The principle of “the punishment should fit the crime” is central, emphasizing proportionality between the crime and its corresponding punishment. This note aims to highlight the penalties imposed for intellectual property rights violations, along with their underlying philosophy. It assesses the adequacy of current penalties for these crimes within the framework of modern penal theories. Additionally, the note reviews the legislative efforts designed to address intellectual property rights violations, with particular emphasis on emerging technologies. This examination leads to propose solutions to assist legislators in formulating a comprehensive penal provision that aligns with the special nature of these crimes. The proposed penalties should correspond to the criminal provisions of the Intellectual Property Act committed, considering the implications of emerging technologies and artificial intelligence techniques.

Keywords: Philosophy of Punishment in the Intellectual Property Rights; Cybercrimes; Emerging Technological; Artificial Intelligence

I. INTRODUCTION

Crime is an inherently social phenomenon that has persisted throughout human history. It constitutes an unlawful act prohibited by legal norms, which imposes criminal penalties. The concept of punishment has long been intrinsically associated with crime, establishing a direct correlation between the two. Islamic law prescribes punishments to prohibit criminal acts,¹ and safeguarding societal interests.² It mandates that penalties be proportional to the crime, ensuring they are neither excessive nor deficient. This principle adheres to the fundamental rule that “the punishment must be of the same kind as the deed”³ and this is achieved through

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¹ Crimes in Islamic law are defined as “legal prohibitions that God has forbidden by virtue of a prescribed punishment or discretionary punishment.” See: Awda (n 4) 66.

² Al-Bukhari, *Sahih al-Bukhari, Oneness, Uniqueness of Allah (Tawheed)*, Eng Version, Vol. 9, Book 93, Hadith 473, state that Narrated Jarir bin `Abdullah: Allah's Messenger (ﷺ) said, “Allah will not be merciful to those who are not merciful to mankind.”

³ Tariq Muhammad Ghazali, ‘Punishment between Islamic Jurisprudence and Positive Law and its Application in the Saudi System’ (2020) 111 (539) Contemporary Egypt Magazine 127.

the proportionality between the crime and the punishment.⁴ This principle is rooted in the concept of justice, as illustrated in the Quranic verse: “Indeed, Allah commands justice, grace, as well as generosity to close relatives. He forbids indecency, wickedness, and aggression. He instructs you so perhaps you will be mindful.”⁵

Penalties in Islamic law are categorised into three main sections: *Hudud*,⁶ *Diya*,⁷ and *Ta'zir*.⁸ Most contemporary offenses, for which positive laws prescribe penalties, fall under *Ta'zir*, where public authorities⁹ are vested with the discretion to determine appropriate and deterrent penalties.¹⁰ Intellectual property crimes are classified under *Ta'zir* within the framework of Islamic law.

In contemporary legislation, the judiciary is entrusted with imposing penalties through a fair trial process, which may lead to the deprivation of some or all personal rights of an accused who has been proven guilty by a judicial ruling.¹¹ This approach ensures that the penalty fulfils its dual purpose of achieving justice from a social perspective and establishing general deterrence thereby warning the public of the consequences of violating the law.¹² Additionally, it aims to achieve specific deterrence by preventing the convicted individual from committing further crimes through reform, thereby mitigating the offender's criminal propensity.¹³

The topic of intellectual property rights represents a relatively new area within Islamic jurisprudence. The concept of intellectual property emerged alongside the context of printing and authorship, which explains why traditional Islamic jurisprudence articles do not address

⁴ Abdul Qader Awda, *Islamic Criminal Legislation Compared to Positive Law* (Part One, Dar Al-Kateb Al-Arabi, Press 2013) 384.

⁵ Qur'an, Surat An-Nahl (Bee) 16:90.

⁶ Hudud is defined as “the limit in Islamic law is a prescribed punishment that is truly obligatory for God Almighty.” Ahmed Fathi Bahnassi, *Introduction to Islamic Criminal Jurisprudence* (Dar Al-Shorouk, 4th edn, Press 1989) 21.

⁷ *Diya* refers to “crimes of retaliation and blood money: crimes that are punishable by either retaliation (*Qisas*) or the payment of blood money (*Diya*). Both retaliation and blood money are punishments that are determined by individual rights. The meaning of being determined is that it has one limit, so there is no upper or lower limit that ranges between them. As this is considered rights of the individual means that the victim holds the authority to grant pardon. If a pardon is granted, it nullifies the prescribed punishment”. Awda (n 4) 79.

⁸ *Ta'zir* crimes are defined as “disciplinary actions for offenses not covered by Hudud penalties, meaning they are punishments for all crimes that fall outside the scope of Hudud. *Ta'zir* encompasses a range of punishments, and it is the judge's responsibility to select the appropriate penalty for each offender, considering the individual's circumstances and whether they have previously committed a crime. The judge may gradually increase the severity of the punishment, reflecting the principle that Sharia was revealed for all times and places, and that the needs and circumstances of people evolve over time. Therefore, *Ta'zir* allows for judicial discretion, providing flexibility for rulers to administer justice with mercy and consideration for the changing interests of society.” ... with the fact that the Sharia was revealed for all times and places, and that the interests of people and the rulings they follow change and alter with the changing times and their changes. So, it was necessary to leave an outlet for the rulers out of mercy for the people.” Ahmed Fathi Bahnassi, *Introduction to Islamic Criminal Jurisprudence* (4th edn, Dar Al-Shorouk Press 1989) 23.

⁹ Ghazali (n 3).

¹⁰ Mahmoud Naguib Hosni, *Introduction to Islamic Criminal Jurisprudence* (Dar Al Nahda Al Arabiya, Press 1984) 47.

¹¹ Omar Al-Saeed Ramadan, *Explanation of the Penal Code, General Section* (Dar Al Nahda Al Arabiya, Press 1986) 547.

¹² Al-Bukhari, *Sahih al-Bukhari, Oneness, Uniqueness of Allah (Tawheed)*, English Version, Volume 9, Book 93, Hadith 473, state that Narrated Jarir bin `Abdullah: Allah's Messenger (ﷺ) said, “Allah will not be merciful to those who are not merciful to mankind.”

¹³ Mamoun Salama, *Penal Code - General Section* (Dar Al Fikr Al Arabi for Printing and Publishing Press 1976) 615.

these issues. It is contemporary jurists who have undertaken the task of examining the rulings and legitimacy of intellectual property rights. They have concluded that violating or disregarding intellectual property rights falls under the category of religious prohibitions, as it involves acts of fraud, deception, lying, theft, and causing harm to others – actions unequivocally prohibited in Islam.

Intellectual property laws are designed to protect various forms of intellectual creations, whether industrial, commercial, literary, scientific, and artistic works. These laws aim to foster innovation and creativity by providing legal protection to creators. In cases of rights violations, offenders may face criminal penalties and be required to pay compensation. These laws serve the dual purposes of general deterrence - discouraging potential violations - and specific deterrence -preventing repeat offenses by the same individual. This approach aligns with the legislative philosophy of ensuring that penalties effectively fulfil their intended purpose. However given the rapid pace of technological advancement, an urgent question arises: Have traditional penalties achieved the objectives envisioned by legislators, particularly in terms of general and specific deterrence within society? Furthermore, are these penalties aligned with contemporary technological development? More broadly, is the existing legal framework capable of addressing emerging intellectual property crimes?

II. GENERAL POLICY OF PENAL LEGISLATION

Legal rules are designed to regulate social interests through the legal principles they establish, which must evolve in response to changing social realities to effectively serve their intended purposes. The legislator initially evaluates social interests and then formulates the necessary rules to protect them within specific legal frameworks.¹⁴ Contemporary penal policies have increasingly focused on achieving deterrence by exploring methods to prevent crime and rehabilitate offenders to reduce recidivism. This approach involves subjecting offenders to rehabilitation and reform programmes to fulfil the ultimate purpose of punishment.¹⁵ It is essential to recognise that penal policy varies depending on the governing legal framework and the individuals it addresses. Therefore, the objectives of the law and the needs of those it addresses -whether they are rights holders, offenders, or members of society - must be considered. Additionally, the economic, social, and cultural dimensions of the law should be taken into account to achieve its intended goal.

A. The Philosophy of the Intellectual Property Rights Protection Law and Its Reflection on the Prescribed Penalty

Criminal protection methods are distinguished by their significant impact on offenders, making them the most powerful means of legal protection.¹⁶ The law clearly enumerates the criminal acts that constitute an infringement of intellectual property rights. The penal provisions in Egypt's Law No. 82 of 2002 reflects the legislator's philosophy in protecting intellectual property rights. The law distinguishes between industrial property rights and artistic and literary property rights, especially in terms of the protection levels afforded. Recognising Egypt's status as a technology-importing country, the legislator has incorporated flexibility into

¹⁴ Ahmed Fathi Sorour, *The Mediator in the Penal Code (General Section)* (Dar Al Nahda Al Arabiya Press 1991) 64.

¹⁵ Fahd Yousef Al-Kassasbeh, 'The Role of Modern Penal Systems in Reform and Rehabilitation - A Comparative Study' (2012) 39 (2) *Journal of Sharia and Law Sciences* 388.

¹⁶ Mohamed Helmy Abdullah, *Criminal Protection of Copyright, A Comparative Study in French Law and Arab Laws* (PhD Thesis in Law, Faculty of Law, Cairo University Press 2010) 140.

the industrial property laws to allow society to benefit from industrial and technological advancements.

As a nation with a significant cultural export presence and a robust legacy in the literary and artistic fields, Egypt has strengthened the protection of creators' rights through comprehensive legislative measures. The legislature has also established specific exceptions and limitations to promote science and culture,¹⁷ applying these exceptions narrowly to ensure the preservation of authors' rights.¹⁸ In alignment with this philosophy, the legislator has established both primary and supplementary penalties. For violations of industrial property rights, the law prescribes fines, with imprisonment as a penalty in cases of recidivism - excluding cases involving trademarks. In the new law, No. 82 of 2002, the legislator maintained the same penalties outlined in the repealed Law No. 57 of 1939, which granted judges the discretion to impose imprisonment, fines, or both.

On the other hand, the Egyptian legislator amended the punitive policy in Law No. 354 of 1954 concerning copyright, which initially prescribes fines for copyright infringement and imprisonment in cases of recidivism. Under the new Law No. 82 of 2002, judges are granted discretionary authority to impose a penalty of imprisonment, a fine, or both. Additionally, the legislator has introduced supplementary criminal penalties under Articles 32, 53, 113, 114, 134, 181, and 204 of the Intellectual Property Law. These penalties include the confiscation of counterfeit items involved in the crime, the tools used in counterfeiting, and the publication of the conviction judgment in one or more daily newspapers at the expense of the convicted individual. In some cases, the law also mandates the closure of the offending facility for a specified duration.

B. Commentary on the Punitive Philosophy of the Intellectual Property Rights Protection Law

Although the punitive policy adopted by the Egyptian legislator is significant, it is recommended that the legal provisions concerning trademarks, copyrights, and related rights should be reformulated to enhance clarity and hierarchy. Such reformulation would facilitate more effective judicial application of the law, enabling judges to tailor punishments according to the specifics of each case.¹⁹ in accordance with the theory of legislative individualisation of punishment²⁰. Furthermore, the Egyptian legislator's approach to penalties for violations of an author's moral rights is endorsed, recognising that financial compensation alone is insufficient

¹⁷ Hassan Abdel Moneim El Badrawy - Hossam El Din Abdel Ghani El Sagheer, *Copyright in Egyptian Law "An Analytical Study from a Developmental Perspective"* (Study published by the Alexandria Library Press 2008) 22.

¹⁸ Nabil Ibrahim Saad, 'Exceptions and Restrictions on Copyright in the Regular and Digital Domains' a paper presented to the Conference on New Aspects of the Legal Regulation of Intellectual Property Rights (University of Sharjah, College of Law Press November 2009) 3.

¹⁹ Ahmed Awad Bilal, *Principles of Egyptian Penal Code (General Section)* (Dar Al Nahda Al Arabiya Press 2007) 55.

²⁰ The theory of legislative individualisation of punishment is defined as "the process by which the legislator tailors the punishment to be proportionate and compatible with the material seriousness of the crime, while also considering the potential harm the crime poses to society. Additionally, the legislator considers the personal circumstances of the offender, to the extent that these circumstances can be anticipated at the time of defining the crime and its corresponding punishment. As a result, when the legislator establishes penalties within the criminal code, they are graduated based on the nature of the crimes and the characteristics of the offenders. This approach mandates the judge to apply a specific legal provision that prescribes a penalty that is either more severe or more lenient than the standard punishment for the same act, depending on the particular circumstances or the identity of the offender." Sohair Youssef Mohamed, 'Individualization of Punishment in Criminal Law' (2023) 13 (84) *Journal of Legal and Economic Research* (Faculty of Law, Mansoura University) 7.

to remedy such infringements. This approach grants judges the discretion to impose appropriate criminal penalties for the offenses committed. Additionally, it is recommended to increase financial fines for violations of intellectual property rights committed for commercial purposes. Such an adjustment would better align with punitive policies in economic laws and could generate substantial revenue for the state treasury.

In the same context, it is believed that the primary goal of criminal penalties, from the perspective of rights holders, is to prevent the infringement of their rights. This can be achieved by imposing supplementary penalties, such as confiscation and destruction of counterfeit or forged products and the tools used in their creation, as well as the closure of the offending facility. These penalties are designed to deter future violations, ensuring both general and specific deterrence.²¹

C. The Expected Role of Rights Holders in Reducing Intellectual Property Rights Infringements

Intellectual property rights holders should offer protected products and works at reduced prices in developing countries. This strategy aims to encourage consumers to choose original products and works over counterfeit or forged ones, thereby mitigating intellectual property rights infringements. By narrowing the price disparity between counterfeit and original products, the profitability of counterfeit goods diminishes, leading to a decline in such infringements.

III. NEW INTELLECTUAL PROPERTY RIGHTS CRIMES AND THEIR LEGISLATIVE CONFRONTATION

The recent technological advancements have led to the emergence of new forms of intellectual property rights crimes, using modern technological methods. Although these crimes are often described as ‘new’, many are essentially traditional forms of infringement that have been adapted to use contemporary technology. Examples include the online sale of counterfeit or forged products online, the violation of undisclosed information, and patent infringements facilitated by advanced technological means. Fundamentally, these are traditional crimes that are already criminalised and punishable under national legislation, but their methods, locations, and tools used have evolved to incorporate information and communications technology and electronic devices.

In 2002, the “Anti-Cybercrime and Information Networks Department” was established under Ministerial Decree No. 13507 to combat internet-related crimes, including intellectual property rights violations. The department's responsibilities encompass monitoring cybercrimes, apprehending offenders, and preparing technical evidence for computer and internet-based crimes. Additionally, Egypt joined²² “the Arab Convention on Combatting Information

²¹ Following the issuance of a criminal judgment, rights holders can leverage this judgment to establish the element of fault in tort liability, thereby enabling them to file a civil lawsuit to seek compensation. This approach aligns with the principle of the conclusiveness of criminal judgments in civil proceedings, as outlined in Article 456 of the Criminal Procedure Law No. 150 of 1950 and Article 102 of the Evidence Law in Civil and Commercial Matters No. 25 of 1968. However, rights holders are not precluded from directly approaching the competent civil judiciary to claim compensation for damages resulting from the wrongdoing, without the necessity of first needing to secure a criminal judgment.

²² The Arab Republic of Egypt joined the Arab Convention on Combating Information Technology offences in 2014, according to Presidential Decree No. 276 of 2014, (published in the Official Gazette - Issue 46 - on November 13, 2014).

Technology offences”,²³ signed in Cairo on 21 December 2010. This convention addresses crimes related to copyright and related rights violations²⁴ and establishes the criminal liability of both natural and legal persons for crimes committed through information technology. Furthermore, in 2018, Egypt enacted Law No. 175 of 2018, along with its Executive Regulations No. 1699 of 2020, known as the Egyptian Anti-Cyber and Information Technology Crimes Law. While some²⁵ have considered this law sufficient for addressing cybercrimes related to intellectual property rights, it is argued that it does not specifically regulate these types of crimes. Instead, the law primarily focuses more on crimes involving networks, information systems, emails, websites, private accounts, and privacy violations.

In Egypt, cybercrimes involving intellectual property rights are managed through established legal and enforcement procedures. The Department of Computer Crime and Information Network within the Ministry of Interior is responsible for investigating these crimes, identifying suspects, and preparing technical reports. The cases are subsequently forwarded to the Public Prosecution Office for further investigation and are then adjudicated by a criminal trial before the competent judiciary. However, several practical challenges remain, such as the difficulty in pursuing perpetrators when crimes are committed using technological methods that cross the Egyptian borders. This complicates the identification of the perpetrator and the imposition of penalties.

Regarding crimes of copyright infringement through artificial intelligence technologies, it was noted that last year, an Egyptian composer released a new song featuring a vocal performance by a prominent Egyptian artist, generated using artificial intelligence (AI) techniques. This release faced opposition from the artist's heirs, leading to a dispute that nearly escalated to the courts. Similarly, recent years witnessed numerous disputes between authors or rights holders and companies developing AI systems. These disputes typically arise from the unauthorised use of copyrighted works by AI systems during the training process, without obtaining the necessary permissions or licenses.

These issues raise significant questions regarding responsibility for intellectual property infringements committed by AI systems, whether AI systems themselves can be held criminally accountable, and the legal mechanisms required for imposing and enforcing penalties in such cases. Under current criminal law, liability for violations of intellectual property rights²⁶ committed by AI systems falls on the natural person responsible for managing and directing the AI system, in accordance with the principle of actual responsibility. However, this may change if AI and robots were to be granted legal personhood in the future.

²³ The Arab Convention on Combating Information Technology offences, done at Cairo, the Arab Republic of Egypt, on 15/1/1432 (H), 21/12/2010 <<https://nsarchive.gwu.edu/document/18573-national-security-archive-arab-convention>> accessed 13 September 2024.

²⁴ Article No. (17) of *the Arab Convention for Combating Information Technology offences* stipulates that: “Crimes related to the violation of copyright and related rights: violation of copyright as defined by the law of the State Party, if the act is committed intentionally and for non-personal use, and violation of related rights related to copyright as defined by the law of the State Party if the act is committed intentionally and for non-personal use.”

²⁵ Hatem Ahmed Mohamed Battikh, ‘The Development of Legislative Policy in the Field of Anti-Cyber and Information Technology Crimes - A Comparative Analytical Study’ (2021) 1 (7) *Journal of Legal and Economic Studies* (Faculty of Law, Sadat University) 6.

²⁶ Sebatso Motsamai, ‘Criminal and Civil Liability of an Artificial Intelligence (AI) for Cybercrimes, Machine or Robot for an Act or Conduct Committed Independent of Human Intervention or Control’ (2022) 11 (6) *Journal of Civil & Legal Sciences* 1.

The United States has proposed legislation aimed at legalising the use of copyrighted materials in AI training, which require companies developing generative AI systems to disclose copyrighted training data they use. The objective of this legislation is to enhance transparency regarding the use of copyrighted works for AI training, thereby decriminalising this practice. However, concerns persist about the financial and moral rights of authors whose works are used by AI systems. There is a persisting need to regulate AI technologies through an international coalition that could develop a global charter or code of ethics, ensuring that the rights of authors whose works are used in AI training are adequately protected.

IV. CONCLUDING REMARKS

Intellectual property rights represent a relatively new concept within Islamic jurisprudence where violations are viewed as acts of fraud and deception both of which are prohibited in Islam. The infringement of intellectual property rights is perceived as a violation of the financial interests of the rights holders. The most appropriate penalties for such offenses include fines, confiscation, destruction of counterfeit goods, and facility closure. These measures are deemed both deterrent and effective, in accordance with the principle that “the punishment should fit the crime”.

Given the legislative gaps in addressing emerging intellectual property rights violations and the inability of current laws to keep pace with technological changes, there is a pressing need for a comprehensive reform of the existing intellectual property rights protection law. Such reforms should align with modern techniques and technologies, ensuring that the law effectively addresses the challenges of modern technology. AI systems are set to reshape the legal landscape of intellectual property rights, necessitating a reconsideration of punitive policies for both traditional and emerging IP crimes. As AI becomes increasingly embedded as an integral part in modern life, it is crucial to manage its use responsibly, fostering human development while ensuring the protection of the rights of creators and innovators.