

Shari'ah Treatment of Paradox between Access to Medicine and Global Pharmaceutical Patents under TRIPS Agreement 1994

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Abstract

This paper contributes to existing debate on issue of access to essential lifesaving medicine in result of global pharmaceutical patent protection standards. Application of Patent monopolies over pharmaceutical patents is very recent development under WTO regime. Considering pharmaceutical product as ordinary products and adoption of universal trade standards have resulted in high cost of lifesaving medicine which deprives poor masses around the world from enjoyment of life to health. Authorship on the subject has analysed the issue on jurisprudential, legal, and economic studies. A good number of Muslim countries put Islamic Shari'ah on supra-constitutional level. This paper will interpret pharmaceutical patent right under Islamic Shari'ah in post TRIPS Agreement developments.

Keywords: Trips agreement, Patents, Shari'ah, Access to Medicine, Masaleh Mursalah, WTO

Introduction:

Incentive for innovation is theory behind recent trends of protecting patents as monopoly for a certain period of time giving patent holder an opportunity to accrue benefit out of idea behind innovation. Patent monopoly right was only normative to initial years until 15th century when common legal system of England started honouring intellectual property rights including patent monopolies.¹ Same trend was adopted by other industrialised nations in 19th century.² To understand, patent right provides its holder a monopoly over idea as legal right to benefit out of it by selling, marketing, or licensing other parties.³ Patent right is not absolute and the inventor needs to satisfy some criteria for its award. These conditions are novelty, inventive steps, and industrial application of invention.⁴ States regulate patent grant and operation through authority and standards of defanging novelty, inventive steps, and industrial application are left to state for decision in accordance with their national needs. Generally, patent monopoly rights for innovation are set as 20 years and after expiration of period knowledge behind innovation go open for public use and further research and development.⁵ It is worth mentioning that enforcement of patent rights was not initially adopted in Pharmaceutical productions for the reason medicine and health services included in service towards humanity instead of trade and commerce. Adoption of Trade related Aspects of

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¹ Holger Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines*, (Oxford: Oxford University Press, 2008) p.29

² Ibid. p.29

³ V.J. Taraporevala, *Law of Intellectual Property* (V.J. Taraporevala, 2005), p.18

⁴ Lionel Bently Brad Sherman, *Intellectual Property Law* (Oxford: Oxford University Press 2004) P.385

⁵ David I. Bainbridge, *Intellectual Property* (London: Pearson 2010), p.412

Intellectual Property Rights, an agreement introducing globalisation of intellectual property rights under WTO regime, introduced indiscriminate application patent rights and monopolies on all industrial products including pharmaceutical products. This development has given pharmaceutical patent holders, companies in majority case, an edge over controlling and setting prices of essential lifesaving medicines all over the world.⁶

Globalisation protection of pharmaceutical patents, with a focus on lifesaving essential drugs, aims at securing research and development to boost pharmaceutical industry globally.⁷ The main reason for this was forwarded as recognising and appreciating investment of innovator as pharmaceutical research and development is very costly as compare to other industrial products. TRIPS Agreement 1994 mainly introduced global protection of pharmaceutical patents around the world.⁸ The fundamental reason for the agreement is providing minimum enforcement regime of trade related intellectual property rights, both territorial and international enforcement of intellectual property rights, and establishment of dispute resolution system to all member of World Trade Organisation (WTO). Patents, along with other intellectual property rights, are enforced through imposition of trade sanctions.⁹ Sarah Joseph, a famous critique on pharmaceutical patent protection, terms global patent protection regime under TRIPS Agreement as international instruments prioritising commercial rights over Right to Health. She states that:

*'It is arguable that they disproportionately favour the commercial interests of IP holder over countervailing public interests, including the human rights of others. Certainly, countervailing rights are only 'protected' as exception to the TRIPS regime. They are only relevant as a shield in defending against a failure to fully implement TRIPS, rather than as a sword to challenge the implementation of TRIPS. Therefore, the TRIPS regime undoubtedly elevates IP over other potentially conflicting human rights.'*¹⁰

Concerns related to impact of pharmaceutical patents are forwarded by legal theorists, economic analysts, and human rights activist. It is alleged that patent regime under WTO focus protection of commercial interests of pharmaceutical companies in comparison with human right to health as public interest. This paper digs out concept of patents as intellectual property rights in Islamic Shari'ah and highlights the significance of protection of public interest as fundamental concept of property.

TRIPS Agreement and Access to Medicine:

"We have no model which would meet the need for new drugs in a sustainable way. You can't expect for-profit organisations to do this in a large scale. If you want to establish a system where companies systematically invest in this kind of area [low-cost

⁶ HV Sandhya, "Evolution of Patent Laws". Retrieved from.

<http://shodhganga.inflibnet.ac.in/bitstream/10603/21666/5/chapter-ii.pdf>. Accessed on 3 January 2018

⁷ Sarah Joseph, *Blame it on WTO? A Human Rights Critique* (Oxford University Press 2011), p.220

⁸ Ines Lasic, "Pharmaceutical Patents, Right to Health and Access to Essential Medicine: A Human Rights Critique" (Master Thesis, University of Lund, 2013), p.7

⁹ V. Muzaka, *The Politics of Intellectual Property Law and Access to Medicine* (UK: Palgrave Macmillan, 2011), pp.76-77

¹⁰ Sarah Joseph, *Blame it on WTO? A Human Rights Critique* (Oxford: Oxford University Press 2011), p.216

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medicines for developing-countries], you need a different system.” - Former Novartis CEO, Daniel Vasella, in the Financial Times, September 2006¹¹

Choosing between commercialism and medical research as services remains fundamental paradox under debate for last two decades on question of access to lifesaving drugs.¹² Patent holder, through patent monopolies against lifesaving medicine may control the prices of products by excluding market competition. We may explain this by illustrating case of Hepatitis a disease widely spread in India, Pakistan¹³ and other developing countries. Effective drug treating hepatitis sofosbuvir is sold at cost of US \$8400.¹⁴ Estimated production cost for it is not more than US \$68-136.¹⁵ Gleevec is effective medicine for a type of cancer with the price of US\$ 3,227 for a month when it is patent protected and on market competition, it is available against mere US\$ 170.¹⁶

Almost 10 million people in developing countries are killed for life-threatening diseases every year.¹⁷ Diseases, like HIV/AIDS, tuberculosis, malaria and tropical are leaving a great number of people dying for the want of medicine.¹⁸ In result of AIDS only, 8000 people face death every day.¹⁹ Treatment for AIDS was invented by the name of *Azidothymidine* (AZT) before globalisation of pharmaceutical patents.²⁰ GlaxoSmithKline, a pharmaceutical giant, priced the drug for USD \$ 10,000 for a patient, a yearly treatment.²¹ This price openly posed a question of access to medicine and affordability.²² Almost 34 million populations in Africa are still waiting for the accessibility of drug to save their lives.²³

Issue of access to medicine is analysed by Thomas Pogge, a German philosopher, in his conceptualisation of 10/90 gap. He claims that only 10% of total research and development is done for diseases in developing countries where 90 percent of the world population lives and 90 percent share of global research investment focus 10% of global population in rich countries.²⁴ Among 4.8 billion population of developing and least developed countries, 2 billion people are facing access to medicine.²⁵ Post-TRIPS Agreement studies suggest that global enforcement of pharmaceutical patents

¹¹ Ellen F.M ‘T Hoen, *Private Patents And Public Health Changing Intellectual Property Rules For Access To Medicines*. Retrieved from. <http://accessmedicines.org/wp-content/uploads/private-patents-and-public-health.pdf>. Accessed on 12 January 2018

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Holger Hestermeyer, (2008). op.cit., 29

²¹ Holger Hestermeyer, (2008). op.cit., 29

²² Holger Hestermeyer (2008). op.cit., 29

²³ Ines Lasic (2013) op.cit., 34

²⁴ Thomas Pogge, ‘Montreal Statement on Human Right to Essential Medicines’ Cambridge Quarterly of Health Care Ethics (2007) 16: pp.97-108

²⁵ Ibid.

result in issues related to availability, accessibility and affordability of essential drugs.²⁶ Among other issues such as fake medicine, poverty, lack of innovation, and industrial backwardness; global enforcement of patents in medicine through TRIPS Agreement is prime concern for researchers.²⁷ In this process of enforcing pharmaceutical patents, developed countries put a great stress on developing countries through economic sanctions.²⁸ To prove the point, cases like *Big Pharma versus Nelson Mandela* in South-Africa may be quoted. State measures ensuring access to medicine were jeopardised by global pressure which was later withdrawn in result of public pressure.²⁹ An identical issue was faced by Brazil.³⁰

Patents as Intellectual Property in Islam:

To analyse the justification of intellectual property rights especially patent rights and access to medicine, one may refer to maxims and methodology of Islamic jurisprudence elaborating concepts of property, public interest, and Islamic Law of contract.³¹

According to Islamic Law, entire property on Earth belongs of Allah Almighty and holder of it takes and uses as sacred trust from the Creator in the capacity of trustee.³² Quran elaborates this concept in following verse: “And do not eat up your property amount yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people’s property.”³³ This verse of Holy Quran clearly mentions the concept on ownership on the same analogy of John Lock’s conceptualisation of property in his Labour Theory. Holy Prophet Muhammad (PBUH) also reflected and explained same ideals of property saying: “No property of a Muslim is lawful to his brother except what he gives him from the goodness of his heart, so do not wrong yourselves”.³⁴ In this case, all forms of properties including intellectual property or protection of patent may be accommodated in Islamic Law as something worthy of just appropriation among members of society.

Patent right is creates on format of contract law. Patent holder discloses the secret behind the innovation to the state and in return gets protection for the use and benefit of idea for a specified period of time. This shapes the operation of award of patent rights a contractual shape. Contracts have always been termed as very sacred by Islamic

²⁶ F M Scherer and Jayashree Wata, “Post-Trips Options for Access to Patented Medicines in Developing Countries” (2001). Retrieved from <http://icrier.org/pdf/jayawatal%20.pdf>. Accessed on 12 January 2018.

²⁷ Ellen F.M ‘T Hoen, “TRIPS, Pharmaceutical Patents and Access to Essential Medicines: Seattle, Doha and Beyond” Retrieved from <http://www.who.int/intellectualproperty/topics/ip/tHoen.pdf>. Accessed on 12 January 2018.

²⁸ Ibid.

²⁹ Ibid.

³⁰ JENNIFER L. RICH, “Roche Reaches Accord on Drug With Brazil” The New York Times (12 January 2018) Retrieved from <http://www.nytimes.com/2001/09/01/business/roche-reaches-accord-on-drug-with-brazil.html>. Accessed on 12 January 2018.

³¹ Steven. D. Jamar, “The Protection of Intellectual Property Under Islamic Law” Capital University Law Review 21: 1079, 1992. Retrieved from <https://ssrn.com/abstract=1148735>. Accessed on 12 January 2018.

³² Bashar H Malkaw, “Intellectual Property Protection From A Sharia Perspective” Retrieved from <http://www5.austlii.edu.au/au/journals/SCULawRw/2013/4.pdf> . Accessed on 14 January 2018.

³³ Ibid.

³⁴ Ibid.

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Laws. Quran States: "O ye who believe! Fulfil your undertakings."³⁵ Islamic Law does not unnecessarily restrict subjectivity of contracts and leaves it to discretion of parties rather it checks the objectivity of contract within the limits of commands of Islamic Shari'ah. Requirements for basic contractual requirements are legitimacy of subject matter, absence of *gharar*, and parties at same convenience and control over subject matter.³⁶

Final aspects in property and its use in Islamic Law is its objective. Property, including patents as property, aims at *Masleah*, famously known as public interest. Inclusion of public interest in utilisation of property deeply impacts the operation of pharmaceutical patents and its impact on right to health and access to medicine. Heba A. Raslan has justified patent protection based upon *Masleah*, a secondary source of Islamic Law under principles of Islamic jurisprudence. Intellectual property rights, including pharmaceutical patents, fall under *Muamalat* not *Ibadat*. For this reason, state has wider space to legislate, regulate, and adjudicate matters related to patents and other intellectual property rights.

Doctrine of *Maslaha Mursala* and Protection of Patent Monopolies:

Justification for protection is built upon doctrine of *Masaleh Mursala* of Islamic jurisprudence by majority of scholars and theorists.³⁷ Nature and protection of Intellectual property rights and ideas as property are argued based upon encouraging innovation in scientific and technological aspects of Muslim communities. Without any guarantee for protection of investment of time and labour along with large amount of capital, people will be reluctant to innovate and contribute towards knowledge. Heba Raslan contributes to this concept in following words:

*"From my point of view, preserving and protecting public interest from a Shari'a perspective calls for observing IP rights. Most intellectual creations, whether they are inventions, computer programs, books or trademarks consume significant amount of effort, time resources, and money. Those who develop such creations and those who publicly disseminate them deserve some form of compensation for their efforts ... Thus they have a legitimate interest in protecting their production and in earning profit. IP laws allow creators to financially benefit from their creations ... this right; however, is conditioned on fully disclosing creations to the public. Furthermore, the right is limited in duration so that after a specified period of time, the creation becomes public property, and everyone can freely use it. Accordingly, IP laws have society's interests at heart."*³⁸

So, enforcement of intellectual property rights are interpreted identical to development of public interest in society. Various other writers such as Burton Weisbrod observe the same approach of Islamic Shari'ah in rationalising protection of intellectual

³⁵ Ibid.

³⁶ Heba A. Raslan, "Shari'a and the Protection of Intellectual Property – The Example of Egypt," IDEA – The Journal of Law and Technology 47 (2007): p.510

³⁷ Ezieddin Mustafa Elmahjub, *Protection Of Intellectual Property In Islamic Shari'a And The Development Of The Libyan Intellectual Property System* (Doctoral Thesis, Queensland: Queensland University) Retrieved from https://eprints.qut.edu.au/76106/1/Ezieddin%20M.%20Jaballa_Elmahjub_Thesis.pdf. Accessed on 25 February 2018.

³⁸ Heba Raslan, "Shari'a and the Protection of Intellectual Property, the Example of Egypt" Intellectual Property Law Review (2007): p.528

property rights. Burton argues that public interest is a term open for interpretative scope and varies in its understanding in different situations:

*“The term public interest is complex and not susceptible of any simple definition. While the term ‘public interest’ has been used in many contexts throughout the ages, there has developed no consensus as to what it means, even in an approximate sense.”*³⁹

Case of pharmaceutical patent protection is very near to Burton’s clue about complexity of public interest. Islamic Shari’ah builds foundations of intellectual property rights including pharmaceutical patent protection based upon public interest⁴⁰ and same rationale is adopted by TRIPS Agreement and later development in the shape of Doha Declarations in 2001.⁴¹ Resolving complexity of public interest through understanding *Maslaha Mursala* and the principles defined by classical Islamic jurists may lead to resolve paradox between global protection of pharmaceutical patent protection and human right to health and access to medicine.

State Responsibility towards Patent Rights:

During time of Muhammad (PBUH), state focused on two main functions maintaining dichotomy; training companions for spirituality and guiding them for their daily life transaction. Quran as well as sayings of Holy Prophet Muhammad (PBUH) briefly described the daily life conduct during trade and commerce.⁴² Islamic Shari’ah commands, in early times, defined principles on civil transactions like contract, arbitration, mediation, and other daily life civil matters. Civil transactions, including trade and commerce, were regulated by state during times of prophet-hood and afterwards. Holy prophet described various kinds of contract and also guided the principles for legality of contractual relationships. One of saying of Holy Prophet states: “very agreement is lawful among Muslims, except one which is declared forbidden that which is allowed or declared allowed, that which is forbidden.”⁴³ Many other sayings explain the concept of fraud, misrepresentation, and unfair trade practices.⁴⁴ Later on, a regulatory system was established by Islamic civilisation to check the smooth running of civil transaction in accordance with Islamic Shari’ah standards explained in Quran and Sunnah.⁴⁵ Institution of justice was central led by *Qadi-ul-Qudat* while several other local *Qadis* were appointed to resolve issues related to civil transactions in various areas under Islamic rule. The main objective of this establishment was minimising unfair trade practices. Sadiq Reza, one of Islamic Scholar, quotes that institution of *Muhtasib* was introduced to deal with civil matters under Islamic Shari’ah rule. Objective of *Muhtasib* was to set measuring and weighting standards along with keeping an eye on all mal-

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ TRIPS Agreement 1994, Preamble

⁴² Al-Quran, Al-Baqarah:282-286

⁴³ Retrieved from <https://islamicbankers.files.wordpress.com/2015/09/ilt-islamic-law-of-transaction.pdf>. Accessed 19 February 2018

⁴⁴ Retrieved from <https://islamicbankers.files.wordpress.com/2015/09/ilt-islamic-law-of-transaction.pdf>. Accessed 19 February 2018

⁴⁵ Kristen Stilt, *Islamic Law in Action: Authority, Discretion, and Every Day Experiences in Mamluk Egypt* (Oxford: Oxford University Press, 2012), pp.96–112

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practices related to trade and commerce.⁴⁶ Role of *Muhtasib* was to administrate trade in market. He was custodian of Islamic Shari'ah standards of trade prescribed in Quran and Sunnah with the enforcement authority form head of state.⁴⁷

Intellectual property rights, especially patent rights, are ideas that belong to a person. These ideas take time and effort for creation. This idea shows that both tangible and intangible properties need time and effort if one desires to gain their ownership.⁴⁸ Islamic Shari'ah, in no way, allows gaining benefit or ownership over property without any effort.⁴⁹ We may take example of poetry in Arabs that was considered most precious form of innovation. Any type of infringement in shape of copying text or context was discouraged both morally and legally.⁵⁰ So, patent rights also need time and effort along with financial investment. Hence, it takes an idea or innovation in product to the same level of property.⁵¹ In Abbasid times, state became vigilant on research and development and established *Bait-ul-Hikma*, an institution mainly focusing innovation in both almost all fields of sciences, technology, arts, and social sciences. This institution not only stressed on innovation but also protected best brains from counterfeit of their ideas. State used to appreciate their ideas and contribution by awarding them huge sums of money and status in society.⁵² Ezieddin Mustafa Elmahjub, in his doctoral thesis quotes Hassan and Hilli explaining moral status of protection of intellectual property rights as:

*"The condemnation of... copying is consistent with the principles on creativity and originality. Creativity and Originality have been highly regarded in the Islamic historical academia and scholarship. Crafts, textiles, pottery, and bookbinding: all were normally signed with the author's name, dated and inscribed with the place of manufacture to indicate origin and authorship."*⁵³

Modern framework on intellectual property rights, including patent rights, is somewhat inspired from Islamic traditions where libraries and research institutions were following standards of piracy and unauthorized use of innovation. State, in Islamic Traditions, was adopting standards of protection of intellectual property rights in copy rights, patents, and other trade related intellectual property rights.

Apart from protection of patent and other intellectual property rights, Islamic Shari'ah always follows basic standards of trade and commerce described under Quran and Sunnah. Islamic Shari'ah provides equitable liberty to trade unless it collides with public interest and protection of society at large. One may understand that private rights, in Islamic Shari'ah, are often sacrificed for public rights in case of jeopardizing majority.

⁴⁶ Sadiq Raza, "Islam's Fourth Amendment: Search and Seizure in Islamic Doctrine and Muslim Practice" Georgetown Journal of International Law 40, (2009) Retrieved from. <https://ssrn.com/abstract=1426152>. Accessed on 9 February 2018.

⁴⁷ Ibid.

⁴⁸ Silvia Beltramitti, "The Legality of Intellectual Property Rights Under Islamic Law", Prague Yearbook of Comparative Law, (2009), p.56

⁴⁹ Al-Quran, An-Najm:39

⁵⁰ Steven. D. Jamar (1992),. op.cit., 34

⁵¹ Steven. D. Jamar (1992),. op.cit., 34

⁵² Ezieddin Mustafa Elmahjub, op.cit., 186

⁵³ https://eprints.qut.edu.au/76106/1/Ezieddin%20M.%20Jaballa_Elmahjub_Thesis.pdf (58)

Access to Medicine and Doctrine of Abuse of Right in Islamic Shari'ah:

Pharmaceutical patents provide patent holders monopoly over production, sale, marketing, and licensing. This monopoly is guaranteed by state for 20 years and pharmaceutical product goes open for public on market competition after expiry of this term. Pharmaceutical companies, patent right holder, often involve in complex trade practices just to multiply their profitability instead of easing access to medicine for public.⁵⁴ Study conducted by Rid Sterckx concludes in year 2000, companies contribute a mere total of 12 percent on research and development of medicine and rest of investment focuses marketing tactics and post-patent grant litigation. Moreover, pharmaceutical companies utilise public funds for research and development and later use the same research for award of patent monopoly to multiply their profit margins.⁵⁵ All these anti-human rights practices by pharmaceutical companies' impact on access to medicine in developing and least developed countries. Islamic Shari'ah does not allow use of right to abuse public interest as *Masaleh Mursalah* and doctrine of abuse of power will put a due check on this issue of pharmaceutical patents impacting access to medicine.

Impact of global patent protection of pharmaceutical products and its impact on access to medicine bring scope of Doctrine of Abuse of Right relevant to existing debate on paradox between TRIPS Agreement and International Covenant on Social, Cultural, and Economic Rights (ICESCR).⁵⁶ As discussed above, concept of ownership in Islamic Shari'ah is not absolute as all properties on Earth belong to Allah and ownership is trust controlled and regulated by state under status of Caliph or any other legitimate authority.⁵⁷ Moreover, a fundamental condition for utilising right of ownership over property is using it for positive purpose mainly public interest. It is very clearly demonstrated by Muslim scholarship on the subject that any type of use for accumulation of wealth or matter contrary to public interest is not covered by Islamic Shari'ah.⁵⁸

Based upon these arguments, Fathi al-Dirini, established his arguments for Doctrine of Abuse of right in Islamic jurisprudence.⁵⁹ The doctrine basically aims at finding balance between public and private rights. Al-Dirini, defines operation of rights on some principles based upon text of Quran and Sunnah. He mentions that all rights stem from authority of Allah (SWT), operation of these rights aim collective welfare of society, use of private rights by individuals should not harm collective rights of society, and most significantly if a conflict arises, public rights will prevail over private rights.⁶⁰

Arguments for protection of pharmaceutical patents may be examined on Doctrine of Abuse of Rights under Islamic Shari'ah. Plight of access to medicine is analysed in earlier parts of this thesis that shows global pharmaceutical patent protecting focusing only profitability for large corporations against human right to health as private right. Millions of people die an arbitrary death every year for the want of lifesaving drugs. Affordability of lifesaving drugs under patent protection is a big question which

⁵⁴ Rid Sterckx, 'Patents and Access to Drugs in Developing Countries: An Ethical Analysis' (2004) 4 *Developing World Bioethics*, pp.58-75

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ezieddin Mustafa Elmahjub, op.cit., 190

⁵⁸ Ezieddin Mustafa Elmahjub, op.cit., 190

⁵⁹ Ezieddin Mustafa Elmahjub, op.cit., 190

⁶⁰ Elizabeth Siew Kuan, "Balancing Patents And Access To Medicine" *Singapore Academy of Law Journal* 21, (2009): pp.457-484, 461

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needs solution. Islamic Shari'ah clearly demonstrates elements for ownership in property. The ideals under Islamic Shari'ah stress on public interest as one of the pivotal consideration for ownership of property including intellectual property rights. Pharmaceutical patents include in intellectual property rights and Islamic Shari'ah will own only those rights those do not impact public interest in the shape of access to medicine, and integral part of right to health.

Islamic Shari'ah Treatment of Pharmaceutical Patents under TRIPS Agreement 1994:

Global health crisis has gone more complex after advent of TRIPS Agreement in pharmaceutical patents. Access to medicine has been declared one of the challenges under Millennium Development Goals (MDGs) and sustainable progress for global population.⁶¹ World Health Organisation has also pointed towards this issue in various annual reports highlighting impact of global pharmaceutical patent protection under TRIPS Agreement on access to medicine.⁶² All member states to TRIPS Agreement also bear duty under ICSECR for ensuring affordability, availability, quality, and accessibility of life saving medicines for its public.⁶³ Writers on the subject establish that pharmaceutical corporations involve in trade practices to defeat the ideals of human rights to health and access to medicine.⁶⁴ In this scenario, Islamic Shari'ah treatment will see the issue from its ideals of right of property and justification of intellectual property rights based upon *Masleh Mursalah*.

Analysing pharmaceutical patent monopolies with Islamic Shari'ah perspective lead us analysing patent as intellectual property on following grounds. Patents are innovations and involve investment of time, labour, and financial capital. Especially in case of pharmaceutical patent, a great deal of financial risk is involved as many products and formulas do not result in effective treatment marketable and profitable. In this case, Islamic Shari'ah will protect innovation for the reason of its legitimate value and profitability to public. On the same time, it will also question the operation of monopoly on questions of accumulation of wealth and public interest. Islamic Shari'ah standards of creating equilibrium between public and private rights will also come relevant to debate. Pharmaceutical patents are private rights and in case of their conflict with public right to health, state will own a duty to harmonise the situation. Overall, convenience of harmonisation will be in favour of public interest in comparison with private protection of patent monopoly. Moreover, application of Doctrine of Abuse of right also prohibits all trade practices resulting in profitability in comparison with public interest.

Islamic Shari'ah treatment of globalisation of pharmaceutical patent protection will tangibly contribute towards debate of finding equilibrium between patent protection as intellectual property rights and right to health and access to lifesaving medicine.

⁶¹ Ibid.

⁶² World Health Organization Infectious Disease Report 2002, Retrieved from <http://www.who.int/wer/2002/en/>. Accessed on 8 February 2018.

⁶³ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, (Maastricht, 22-26 January 1997) Retrieved from http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html, para. 13. Accessed on 8 February 2018.

⁶⁴ Stephen. P. Marks, "Access to Essential Medicines as a Component of the Right to Health" Retrieved from <https://wcfia.harvard.edu/publications/access-essential-medicines-component-right-health>. Accessed on 9 February 2018.

Conclusion

Muslim states such as Pakistan, Iran, Iraq, Egypt, Afghanistan, and others, consider Islamic Shari'ah as supra-constitutional. Constitutional principle of Islamic Shari'ah supremacy brings judicial interpretation of right under principles of Islamic Shari'ah and Islamic jurisprudence. TRIPS Agreement and Free Trade Agreement obliged them to adopt global standards of pharmaceutical patent protection that impacts access to medicine and industrial progress. Interpretation of TRIPS Agreement and other patent related international instruments may be interpreted in accordance with principles of ownership over property as trust, doctrine of public interest (*Maslaha Mursala*), and Doctrine of Abuse of Right. This will give them an edge to accommodate flexibilities under TRIPS Agreement, Doha Declaration 2001, and later international legal instruments dealing globalization of patent rights.