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Database as Intellectual Property: Position and Accordance of Protection

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Abstract: The borderless world of internet has witnessed a keen discussion and debate on database property and its protection. We are all aware of its ample protection available under the man-made criminal law. However, is database property amply protected by Syariah criminal principles? This study attempts to look into this issue. Being a legal study which is qualitative in nature, relevant materials, data and information on database are collected, assessed and critically analyzed. Critical analysis is simultaneously performed on all materials pertaining to Syariah criminal principles. This study finds that database content may be regarded as valid property in the eyes of Syariah and as such should receive protection. The existence of basic Syariah criminal principles which could be used to protect database properties is also acknowledged. It is, however noted that these basic Syariah principles are unrefined, being too general in nature. These principles have also not been codified in a single legislation. This has resulted in an ineffective and inconclusive protection for database properties. Ultimately, this study suggests that validity of database property should be universally acknowledged and codified under Syariah law so as to receive conclusive and effective protection under Islamic criminal law. In achieving this, Syariah criminal principles should therefore be refined and codified in one single written legislation.

Key words: Database property, database protection, man-made criminal law, Syariah, Syariah criminal principles, Islamic criminal law

INTRODUCTION

It is well known that database receives conclusive protection under the modern man-made criminal law. Any act of manipulating, misusing or abusing a database is regarded as crime and will be criminally punished. This proves that database property is well protected under the modern criminal law. However, do Syariah criminal principles protect database property? This study looks into this issue. This study examines critically the question of whether Syariah criminal principles protect database properties. For instance, can an act of manipulating, misusing and abusing database property be regarded as crime under Islamic criminal law? In this assessment, this study simultaneously assesses and determines the validity, legality and value of database property in the eyes of Syariah. It is important to determine its position because only recognized and valid property will be protected by Islamic criminal law. All these will be dealt within this writing.

MATERIALS AND METHODS

The legal study conducted was indeed qualitative in nature. Being so, research methodologies of library research and critical analysis were used in analyzing relevant materials, data and information. This legal study has collected relevant materials, data and information on database property in general. These were critically assessed and analyzed. A critical analysis was also performed on all materials pertaining to Syariah criminal principles in determining availability of protection.

DOES SYARIAH RECOGNIZES DATABASE AS INTELLECTUAL PROPERTY?

Database is indeed an intellectual property in the eyes of the man-made law and is thus protected against any kinds of abuse or misuse. The question now is, is database property recognized as valid property by Syariah?

The validity of database as a recognized intellectual property is based on the following sources:

The Qur'an and the traditions of Prophet: Even though, intellectual property is not explicitly mentioned in the texts of the Quran or the Tradition of the Prophet, both texts did emphasized on the prohibition of manipulating other people's property without

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obtaining permission. This contention is supported by Surah Al-Nisa' (4:29-30) which states that:

> Believers, do not consume your wealth among yourselves illegally but rather trade with it by mutual consent. You shall not kill one another. Allah is merciful but he that does that through wickedness and injustice shall be burnt in fire. That is an easy thing for Allah

There is a tradition narrated by Imam Muslim which leads to the same effect:

> A Muslim is prohibited from encroaching other Muslim's life, property and dignity

Both texts make illegal the act of intruding other person's property which may implicitly include the intellectual property of that person.

Masalih al-Mursalah or public interest: The basis of this principle is to protect public interest with the aim of securing benefit and preventing harm. It is thus significant to show that the intellectual product is a property which needed protection. Thus, a few conditions that must be complied with:

- Intellectual property must be a valid and recognized property in the eyes of Syariah
- The maslahah or necessity embedded in intellectual property must be obvious
- The maslahah or necessity contained in intellectual property must be for the public at large

It may be argued that any effort of protecting intellectual property from any illegal intrusion will be in line with the above conditions of public interest or masalih al mursalah.

Based on the above sources, the issue of database protection under Syariah is currently under examinination and debate. Such development is heart warming as it indicates jurisprudential exercise by Muslim jurists and academicians in coming up with new Syariah principles which will govern database protection.

In evaluation of this issue, the recent muslim scholars, first of all, debated on the position of intellectual property. Despite the lack of past views from previous muslim jurists on the intellectual property matters (which had prompted rare individual opinions disapproving database as valid property), several new scholars have performed detailed research on this matter and have come up with new legal principles. According to Dr. Mustafa Ahmad al-Zarqa', intellectual property is defined as:

> Including copyright for instance the right of a writer to gain benefit from his publication, a journalist from his news papers privilege and an artist from his beautiful effect of artistic work. It is also consisted of industrial rights for example an invention of equipment, a creation of different patented trade to gain market trust and a creation of trademark to obtain goodwill

This concept has also been discussed by Al-Shaykh Ali al-Khafif. He describes intellectual property as:

> Something which is relied upon unobvious/ intangible items (ma nawiyyah) which can not be detected by human senses but can be sensed using human minds for instance ideas and creations

The elements of intangible items and creations of human minds seem to be the important criteria in interpreting intellectual propert. As explained by Dr. Ajil al-Nashami, intellectual property mean:

> A right which is relied upon intangible goods, either in the form of product of human minds for example the right of a writer towards his writing; for academic or literary purposes or in industrial innovations. This is to include the product from the employees' efforts, such as the right of sellers in a patented product and a trademark. Its implication would result in the owner obtaining monopoly in using the said products of effort

A similar definition is suggested by Dr. Muhammad Uthman Shibir. He characterized intellectual property as a right against intangible property which focuses on the product of human mind such as academic and literary writings as well as industrial innovations. The above-mentioned definitions have led to one conclusion that is intellectual property can be described as a bundle of rights to control intangible properties in the form of human minds products. Despite the similarity in definitions of property between those muslim scholars and the modern scholars, one fact remains clear. In order for a property to be fully accepted in Syariah law, those definitions must fulfill two additional elements. Firstly, the right must be acknowledged by Syariah and secondly the right must fulfill proprietary Syariah requiremen.

To formulate a comprehensive and accurate definition of Islamic intellectual property, two important elements need to be considered namely: Firstly, the current legal practice and secondly, the concept of haq under Syariah principle. Taking into consideration both elements, Islamic intellectual property has thereafter been described as:

> A bundle of rights (haq) which has been recognized by Islamic law (shara') for an individual by which he has power to control the expression of idea which has been reduced into material form and to ensure the interest in it by applying and governing it within the determined rules of shara

The above definition has outlined several elements of intellectual property that need to be satisfied before a product is protected under Syariah.

The first element refers to the rights obtained under Islamic intellectual property. The phrase: "A bundle of rights which has been recognized by shara" connotes that the process of expressing idea must be permitted in Islam. Thus, any creation or invention which goes against specific Syariah principles would not be protected. The intellectual product must not involve any prohibited element. The straightforward example of this is the production of a pornographic film which contains prohibited elements under Syariah. Such intellectual property would not be protected. It seems that the work of database has no difficulty to be protected under the Islamic intellectual property as long as the information or knowledge comprised are not against the Syariah principles. Moreover, the rights conferred by the Islamic intellectual property does not refer to knowledge or information but actually refers to rights to the effort of reducing the knowledge into material form. This indicates that the information embedded in a database is not protected but the compilation of information which includes the act of obtaining, verifying and presenting the information is afforded protection.

The second element emphasizes on the requirement of authorship. The words "for an individual" does not limit the meaning to human being individual but also include other entities, such as company. If an intellectual property is produced by an individual then such individual is the exclusive author and he alone enjoys protection of such property. On the other hand, if an intellectual property is produced under a company, the actual authorship does not belong to the owner exclusively. This is because such authorship above all belong to the company as a whole. In such a case, it is the company which could claim protection of that intellectual property as such product has been assigned to that particular company.

The third element refers to a power to control. An author or owner of an intellectual property would have to control over any manipulation of his product. In other words, he may prevent other person from intruding into his work.

The fourth element is derived from the phrase "the expression of idea which has been reduced into material form". This indicates that protection is conferred to the effort of materializing the intellectual property product and not to the product. The element of originality is required here as the research is not allowed to copy other person's creation or invention. In other words, the work produced must originate from the researcher. However, this condition does not require the work to be entirely new. Rather, it necessitates the investment of skill in creating the product which includes the use of existing works with a new style. This argument is supported by the previous muslim scholar, Imam Al-Qarafi in his book, al-Furuq. This opinion corresponds to the current intellectual property law which requires materialization of the work into certain form before it can be protected, database in fact has been reduced to material form in the form of digital storage, thus fulfilling this requirement.

The fifth element highlights on the importance of interest as an element. This is found in the phrase "to ensure the interest in it by applying and governing it". The rights given to the owner of intellectual property is aimed to protect his interest. To that effect, he is conferred certain authorities to enable him to use and govern his rights. However, it is to be noted that the owner's interest must be balanced up with the interest of public at large (Arieff, 2002). In other words, consumers (the public) must be allowed to enjoy the benefit of intellectual property product, within certain limitations as prescribed in the intellectual property rules.

The final element gives limitations on the authorities possess by the owner. The definition states that within the determined rules of shara. This phrase suggests that in performing the intellectual property rights, the owner must ensure that the act is within the limitations allowed by Syariah. It is forbidden for the owner to suppress the consumers for example by charging a high price for the intellectual property product.

In conclusion, intellectual property, such as database, is indeed valid in the eyes of Syariah provided that all Syariah requirements are fulfilled. In satisfaction of all requirements and conditions, such intellectual property should be protected by Syariah. It follows that the owner must also be accorded with the right to protect it from intellectual property point of view. This argument is based on the fact that recent muslim jurists have begun to recognized intellectual property as valid and valuable. Even though, the concept of intellectual property in Islam had rarely been discussed by the previous muslim jurists (also known as the al-mutaqaddimun), a new legal principle of intellectual property has been introduced by

the recent muslim jurists. This indicates that Syariah now recognizes intellectual property as a valid and valuable property.

The next question is, is database property protected under Syariah criminal principles. In other words, can an act of manipulating, misusing and abusing database property be regarded as crime under Islamic criminal law? This study argues that database deserves legal protection under Islamic criminal law and any manipulation, misuse and abuse of such property is indeed a crime. The detailed argument is subsequently presented.

Syariah concept of criminal punishment: A criminal offence is known as jarimah or jinayah. The Islamic jurisprudential meaning of jurm or jarimah is: A sin, fault, crime and offence and an act of disobedience irrespective of the fact whether it is committed intentionally or inadvertently (Shabir, 2002; Mehat, 1993). Criminal responsibility of an offender can only be determined if specific elements are satisfied.

The first element is known as the legal element. In order to convict a criminal it is imperative that the legal element is in existence. Legal element refers to an explicit provision prohibiting a criminal act and declaring punishment thereof (Anwarullah, 1997). In had, qisas and ta'zir offences, the offender must have known of both the offence as well as the punishment before he could be prosecuted and punished by the court. Hence, before offences of had, qisas or ta'zir are enforced in a state, it is the obligation of the authority in power to publicized relevant information regarding these offences. For instance, ta'zir offences should be well enacted and codified first before offenders could be charged, prosecuted and punished. Such move is to ensure that the public are well informed on the matter. This proves that Islamic criminal law does not operate with retrospective effect and that punishment is only effective if that act has been enacted, codified and publicized as offence at the time when the offence is committed (Anwarullah, 1997). The second element is known as substantial element. This element refers to the doing of an act which amounts to the commission of the crime. Man-made criminal law refers this as the actus reus element. In other words, there must be ample evidence gathered during investigation to prove that the accused has indeed committed the Syariah criminal offence.

The third element is called cultural element. It refers to the maturity, capability and accountability of the criminal. Man-made criminal law refers this as the mens rea element. This signifies the fact that only a person who has attained enough maturity and rationale bears criminal responsibility. For instance, a minor or a lunatic is exempted from any criminal liability and cannot be punished under Islamic criminal law (Anwarullah, 1997).

As already mentioned above, there are three types of offences under Syariah criminal law namely had, qisas and ta'zir. However for the purpose of analyzing the protection of database under Syariah criminal principles, the study focuses on the offence of theft (sariqah) from both had and ta'zir perspectives.

Crime of had and its nature under Syariah criminal principles: Hudud or had in its singular term, literally means boundary, limit, barrier or obstacle. It is defined by muslim jurists as unalterable punishments prescribed by Allah in the Qur'an or by Prophet Muhammad in the tradition (Shabir, 2002). These punishments are prescribed for serious crimes as its main purpose is to deter and also to combat these serious crimes. It is said as the right of Allah as it is meant for the betterment of the society. There are a number of verses in the Qur'an which mention how Allah SWT had prescribed had offences and punishments and how mankind are reminded to follow them. For example in Surah al-Baqarah (2:229), Allah says which means:

> These are the bounds set by Allah; do not transgress them. Those that transgress the bounds of Allah are wrongdoers

Had punishments set out by the Qur'an cannot be reduced, enhanced or excused. Syariah criminal principles are strict on this. For instance, pertaining to the offence of illicit sexual intercourse which is an offences against public morality and decency, Allah says in Surah al-Nur (24:2) which means:

> The adulterer and adulteress shall each be given a hundred lashes. Let no pity for them detain you from obedient to Allah, if you truly believe in Allah and the Last day and let their punishment be witnessed by a number of believer

The legal enactment of had is also substantiated by a few traditions. In one of them it was reported from the Prophet that he said:

> Whoever commits an ordained crime, his sentence is hastened in this world. Then Allah is much more just than that He should make the punishment double on His servant in the next world. Whosoever commits an ordained crime and then Allah cancels it from him and pardons him, Allah is more honorable than that. He should return to a thing which He has pardoned

There are 700 offences that have been fixed by the Qur'an (Mehat, 1993). This study, however will only analyze the had offence of theft as it is related to the issue of copying or manipulating database.

SYARIAH CRIMINAL OFFENCE OF THEFT: DEFINITION AND ELEMENTS OF CRIME FROM HAD AND TA'ZIR PERSPECTIVES

Theft or Sariqah has been prohibited by Syariah. In Surah Al-Maida (5:38) Allah has declared theft as a punishable crime and fixed its punishment:

> As for the man or woman who is guilty of theft, cut off their hands to punish them for their crimes

The term theft is defined as:

> To take away the property of another person surreptitiously without the knowledge and consent of that person

Syariah highly respects the right to own property and it protects this right through certain legal sanctions. Theft is different from robbery. In robbery, it involves the act of seizing the victim's property forcefully and publicly whereas theft normally involves the removing or taking of another person's property in secret. This argument is substantiated with the verse in the Qur'an which says:

> But any that gains a hearing by stealth (Anwarullah, 1997)

Before a person could be found liable for punishment for the offence of theft, two types of requirements must first be fulfilled. First of all, it must be proven that the criminal offence is committed intentionally. Secondly, the stolen property must also fulfill specific property requirements

It is of utmost important that the elements of actus reus and mens rea must be satisfied. In other words, it must be proven that the criminal act of taking another person's property has indeed been committed. It must also be proven that the criminal act is done intentionally and willfully. This requirement has it basis in the verse in the Qur'an whereby it is stated to the following effect:

> But, if one is forced by necessity, without will ful disobedience nor transgressing due limits then he is guiltless

In other words, the thief must not be the victim of force, fraud, duress or dire necessity which may compel him to commit the theft. In that situation that person does not remain the master of his decision and action and hence should neither be convicted nor punished.

In addition to the above requirement, it must also be proven that specific property requirements are satisfied. Muslim scholars have come to the conclusion that in order to convict a thief under had punishment, the following basic conditions must be satisfied:

- The stolen property must be taken out of the possession surreptitiously
- The property must be in custody (hirz)
- The property must be of a moveable nature
- The stolen property must be of a prescribed value (nisb) or more
- The offender must not have any direct or indirect ownership in the stolen property and it must be owned by an individual

The first requirement necessitates that the property is stolen surreptitiously from the custody of the owner. The word "surreptitious" denotes that the act of stealing must be committed in secret, stealthily and in veil. This word has been explained in depth by Ibn Humam which suggests that if the theft is committed in daylight, surreptitiousness must continue till the completion of offence. On the other hand if the theft is committed at night, surreptitiousness is required at the commencement of the theft but it need not continue after the commencement of the offence. This description connotes that for an act of theft to be liable for had, it is essential that the act is done in secret.

The second requirement is closely related to the first that is the property must be taken away from a person who has custody over it. Custody or hirz literally means to protect, to save or to guard. From the literal meaning it indicates that custody is an arrangement made for the safety of the property. This requirement is substantiated by the Hadith of the Prophet which states:

> Hand will not be cut if theft is committed from the fruits still hanging on the trees or on the mountain but when it is brought to the protected place then theft from it of more than nisab is liable for hadd (Shabir, 2002)

It is agreed by Muslim scholars that an act of taking away another person's property is regarded as theft under had if the property is under the custody or in the possession of the owner or possessor. Therefore, custody or hirz has been categorized into two. Firstly, custody in form of building where entry by the public is prohibited and the property in the building have been safeguarded by the owner. Examples of such custody are houses, offices, tents and boxes. Secondly, custody through a watchman. Instances of such places are mosques, shopping complexes or deserted places, such as deserts, fields and gardens (Anwarullah, 1997).

The third requirement relates to the nature of the property where it is required that the property must be moveable. This condition is derived from the fact that the property must be easily taken away. This is only possible if the property is moveable in nature. Thus, things

attached to earth or permanently fixed to anything cannot be taken away and therefore cannot be stolen to be punished by had. In short, movability is required even temporarily. This means that an act of temporarily retaining or depriving the property from the custody of the owner or custodian of the property is punishable provided that the act is done without permission and with a dishonest intention.

The fourth requirement emphasizes on the value of the goods or property. Islamic criminal law has ascertained a prescribed value of stolen property before a person is liable for theft under had. The imposition of theft punishment is only possible if the value of the stolen property is equal or more than the prescribed amount. How much is the prescribed value? According to the scholars of Hanafiyyah, the prescribed value for this offence is ten dirham which has its basis in the Hadith of the Prophet which means: Hands of the thief will not cut off in less that 1 dinar 10 dirham.

The scholars of Maliki, on the other hand is of the view that the value of stolen property to attract had punishment should be three dirhams or equivalent to a fourth of a dinar. Meanwhile, the scholars of Shafie, among them Imam Shafie and Imam Ahmad have described the minimum value of the stolen property should be one fourth of the dinar in gold or 3 dirhams in silver.

The fifth and final requirement requires the property to be owned by an individual. This condition will have effect on the position of public property. Thus, it is submitted that a thieve who steals public properties not owned by anyone, such as wild birds and animals as well as properties lying on the road cannot be held liable for had. The fifth requirement also requires that the offender must not have any direct or indirect ownership in the stolen property. Therefore, if an employee who has not received his salary in full, steals from his employer, he will not be liable for had punishment that is hands cutting but can only be punished for ta'azir.

In conclusion, it is imperative to observe the above two types of requirements before deciding on whether or not the offence is regarded as theft and whether or not had punishment may be passed. Should all relevant requirements are met, there will of course be a conviction and had punishment for theft will be enforced. Failure to satisfy either the requirement of actus reus or mens rea or an absence of proof on any one of the property requirements would result in two possible consequences. It may result in no conviction at all which will consequentially render the criminal act unpunishable. In contrast, it may also result in conviction of theft but the punishment is mitigated from had to ta'zir.

Syariah criminal offence of theft: Had and ta'zir punishments: The had punishment for the offence of theft is amputation of the right hand of the convict from the joint of the wrist. If he commits the crime for second time, his left foot up to the ankle should be amputated. If it is committed for the third time, according to Hanafiyyah scholars he shall be liable for ta'azir. However, the scholars of Shafiiyyah and Malikiyyah were of the opinion that his left hand shall be cut from the wrist and for the fourth time his right foot shall be cut from the ankle (Anwarullah, 1997).

Had punishment is implemented on serious offences and the forms of punishments are harsh and severe. On that reason, the decision of infliction of had must be made carefully and must adhere to strict conditions. For instance, evidentially it must be proven without doubt that the commission of theft was in a complete form. On the top of that it must be simultaneously proven that the theft was committed intentionally by the offender. In addition to the above actus reus and mens rea requirements, all property requirements should also be fulfilled. Only then would the conviction be made and the above-mentioned had punishment for theft is executed (Anwarullah, 1997).

Lacking of proof on any of the above conditions would definitely result in the had punishment of theft not being imposed on the offender. This is based on the Hadith of the Prophet which says: In cases of doubt, set aside hudud.

The question of whether there would at all be a conviction depends on the circumstances of each case. Should the lack of proof lead to serious doubts as regards to whether or not the theft has at all been committed by the offender charged, it may result in no conviction at all and the offender will consequentially be discharged without being punished. On the other hand, should it only lead to minor doubts which still proves that the offender has indeed committed the theft, it may still result in theft conviction but the punishment would now be mitigated from had to ta'zir.

Unauthorized copying of database: An analysis from perspective of Syariah criminal principles: The most apprehensive problem in protecting database is the unauthorized copying of database content. By copying, the users do not have to pay for the original content which result in database owner loosing his profit. The worst part of this is, should this act is to be permitted by law, the database owner who has invested substantial effort, creativity and money in the creation of the database will not be able to recuperate everything that he has sacrificed. This repercussion will not only effect the

owner of the database but also the general society. This is because the frustrated database owner may not create other new and useful database that could benefit the public (Manap, 2012). Since, man-made criminal law has amply protected database by criminalizing and punishing any act of unauthorized copying and manipulation of database content, this study now attempts to look at whether or not database receive the same protection under Islamic criminal law.

This study has critically analyzed all materials on Syariah criminal principles on theft, as well as all materials, data and information on database obtained during this research. From this critical analysis, it is generally observed that any act of unauthorized copying of database content should be universally criminalized and punished under Islamic criminal law. This study contends further that such a criminal act may be regarded as theft. This is so as the data or information may be regarded as valid property in the eyes of the Syariah as such database property contains haq and manfaah. Therefore, it should be well protected (Manap, 2012). As such, the very act of unauthorized copying of data involves the act of taking away another person's property surreptitiously without the knowledge of the owner and such act should be criminalized and well punished (Manap, 2012). This study, however observes that the validity of database as property under Islamic criminal law has not been codified so far by any muslim country. Such clarification, acceptance and codification on this issue is vital as it would put an end to any debate on the status and validity of such property.

Based on the critical analysis conducted on all relevant materials, data and information on database, this study acknowledges the existence of basic Syariah criminal principles on had and ta'zir which could be used to protect database properties. For instance, based on analysis conducted on circumstances of cases involving unauthorized copying of data, such act constitutes theft but the offender may receive ta'zir punishment. This is so as the necessary property requirements under theft have not been satisfied. This position is summed up below.

The first argument is that database content is moveable but unauthorized copying of data does not involve physical mobility as such property is only virtual in nature. On the other hand, in order for the offender to be convicted of theft and punished under had, it must be proven that the offender has physically moved the property from the custody of the owner or custodian of the property and moves away with it. Although database is regarded as property as it is recognized as haq and manfaah, the act of copying the content or information in a database does not involve the physical act of taking away a property which necessitates had punishment upon conviction. Copying means reproducing a work. This means that the original work remains in its primary form and has therefore not been moved away to another place physically (Manap, 2012).

The second argument is that database work belongs to the public. For instance, a person creates a database which contains information that could be shared with the public free of charge. Another example would be a database created by the public sectors or government departments which shares information with the public. In other words as a member of the public, the offender who steals content or information from such database has an indirect ownership over the stolen data and as such could only receive ta'zir punishment. This line of reasoning is substantiated by the fact that when the governors asked Hazrat Umar on the punishment of the person who committed theft from bait al-mal (government treasury), he instructed not to cut the offender's hands on the ground that everybody has a right in the property of the treasury (Anwarullah, 1997).

The third argument is based on the fact that the value of the stolen data does not necessarily reach the prescribed value of property (nasb). As such, such stealing if data would not necessarily be punished by had. For example, the reproduction of database can be committed in complete form or in small fragments. As to the former, it can be concluded that the substantial part has been taken which means that the prescribed value of property may have been attained. On the contrary, the latter refers to the act of copying the insubstantial amount of data which may not have reached the stipulated value as required by the Syariah. In this circumstance, the act of copying may not be regarded as theft within the ambit of hudud but only in ta'zir (Manap, 2012).

The fourth argument suggests that the act of copying database committed by the licensee or sub licensee is not regarded as theft under had. An example of this would be a servant or an employee who commits theft from the custody of his master or employer to which he is allowed access. In such case, the employee is not liable for theft under had but only ta'zir. On that basis, a database user, i.e., the licensee or sub licensee is not liable for theft under had even though the reproduction of content is made without permission (Manap, 2012).

The fifth argument indicates that the offender of theft may only receive had punishment if the property is stolen from protected custody. Hence, an offender who steals unguarded or unprotected property may only receive ta'zir punishment. The situation is as such in many cases involving unauthorized copying of database content.

Many online database in websites are accessible without any circumventing device. This means that these websites do not install proper protection that could prevent data from being stolen. As such unauthorized copying of such unprotected data may only warrant a ta'zir punishment (Manap, 2012).

This study acknowledges the existence of basic Syariah criminal principles on ta'zir which could be used to protect database properties. It is, however noted that these basic Syariah principles are unrefined, being too general in nature. These principles have not also been codified so far so as to provide a clear, effective and conclusive protection for database properties in the eyes of Islamic criminal law.

TA'ZIR OFFENCES AND PUNISHMENTS: THE NEED FOR REFINEMENT AND CODIFICATION

Ta'zir offences and punishments, as we knew are too general in their nature. This study argues that any ta'zir offence and punishment needs to be refined and codified in order for it to function effectively and authoritatively in the society.

The criminal offence of ta'zir, as we already knew is the third category of offence after had and qisas under Syariah criminal law. There are three types of ta'zir offences. The first type being ta'zir offences which are originally criminalized and punished under the category of had by the Qur'an or the Hadith but had their had punishments being mitigated to ta'zir by virtue of any of the had requirements not being fulfilled. The second type of ta'zir offences represents a new category of offences which are not previously categorized as crimes by the Qur'an or the Hadith but later on being criminalized and punished by reason of necessity and public interest. Last but not least, the third type of ta'zir offences refers to offences which are criminalized by the Qur'an or the Hadith but which punishments are not determined by either divine source and as such ta'zir punishments are awarded (Mehat, 1993).

Ta'zir offences and their punishments have beens described by Ibn Farhan in his book Tabsirat al-Hukkam as a disciplinary, reformative and deterrent punishment (Shabir 2002). This may reflect the literal meaning of ta'zir which rooted from the word 'azar which means to prevent, to respect and to reform. It is safe to conclude that there are three objectives of ta'zir. First of all, ta'zir seeks to punish and discipline the offender, secondly it seeks to reform him and thirdly, it seeks to deter any future commission of crime (Mehat, 1993).

Generally speaking, the basic elements of crimes, such as actus reus and mens rea must be proven before the offender could be convicted and punished. As there is no specific punishment prescribed by the primary sources of Al Qur'an and Hadith, the penalty for such crimes proceeds from the discretionary authorit, i.e., judicial authority. The judge for that matter is allowed to exercise his discretion to determine the type of punishment as well as the appropriate quantum. The judge in doing that will take into consideration the seriousness of the offence, the offender's background, the public interest and welfare in deterring such conduct.

It is to be noted that the punishment of ta'zir is implemented based on public interest. However in protecting the public interest and public order, its implementation is confined to certain limitations. The first condition being the offender must have committed an act which caused actual damage to public peace, public order and tranquility. Secondly, the danger posed must be in a form of an actual threat to public interest or public order. Thirdly, substantiation of the penalty must be done in a justified manner. This is important so as to avoid misuse of discretionary power given to the judge. For that purpose, the justification for penalty on the basis of public interest must be adaptable and in accordance with the respective situation surrounding each case (Mehat, 1993).

The ta'zir punishment serves as a corrective measure to reform the offender. The ultimate purpose of this punishment is to protect the society at large. The type and quantum of punishment differs, depending on the circumstances of each case, the society and the state. Judges will take into account the seriousness of the offence, the offender's background and the public interest in deciding and appropriate punishment for the offender. The range of ta'zir punishments includes imprisonment, whipping, fine, compensation, banishment, confiscation of wealth, reprimand, threats, boycott, public disclosure of offence, flogging or even death penalty (Shabir, 2002; Anwarullah, 1997).

Such is the generality of ta'zir offences and punishment. Therefore, should Islamic criminal law is to regulate, criminalize and punish any act of database copying and manipulation, this study argues that such Syariah criminal principles on ta'zir should be refined and codified. This study maintains that only through such refinement and codification can Islamic criminal law provide good and effective database protection.

Problems and findings: Critical analysis has been conducted on all materials on Syariah criminal principles on theft, as well as all materials, data and information on database obtained during this research. As a result, this study argues that data or information contained in

database may and should be regarded as valid property in the eyes of the Syariah. This is because such database property contains haq and manfaah and should, therefore be well protected. As such, it is contended that any act of unauthorized copying of database content should be universally criminalized and punished under Islamic criminal law. This study contends further that such a criminal act may be regarded as theft. This study, however observes that the validity of database as property under Islamic criminal law has not been universally accepted and codified so far by any muslim country. Some Muslim academicians on Islamic criminal law still substantiate arguments either for or against its validity.

Meanwhile, this study also acknowledges the existence of basic Syariah criminal principles on ta'zir which could be used to protect database properties. It is critically observed, however that these basic Syariah principles, like any other ta'zir principles are still unrefined, being too general in nature. These principles have not also been codified in a single written legislation so far by any country. This has so far hampered any positive effort to provide a clear, effective and conclusive protection for database properties in the eyes of Islamic criminal law.

CONCLUSION

This study observes that this Malaysian legislation could be tentatively adopted with some modification and adaptation so as to harmonize it with Syariah criminal principles. Only then can Islamic criminal law provide the best of protection to such properties.

SUGGESTIONS

Ultimately, this study suggests that database content, if not in contradiction with all principles in the Qur'an and the tradition, should be universally recognized and regarded as valid property under Islamic criminal law. It also suggests that database, being a recognized property under the Syariah, should receive good and conclusive protection under Islamic criminal law. In achieving this, Syariah criminal principles should, therefore be refined and codified in one single written legislation so as to cover issues pertaining to database. Syariah criminal principles governing the validity of database as property should be codified explicitly and authoritatively. Other Syariah criminal principles governing criminal protection on such property must be equally codified in detail. The Malaysian legislation on database, in the form of Malaysian Copyright Law 1987, should serve as a good guideline and example on how such principles could be codified.

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