



## Data's Nature and Its Prevailing Right under Islamic Law

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### **Abstract**

Currently, data has acquired significant economic value due to the fast-paced development of information technology and data analysis. Due to the emergence of data as a key resource in the economy, the development of legal rules governing them has become increasingly important. Meanwhile, the protection of personal data is one of the civil rights of every individual, and their information should be appropriately protected. Under GDPR, personal data is protected in the European Union. There are still a number of countries, however, that do not have an independent law on data protection, or that have not yet finalized the draft law they have on data protection. Among the Islamic countries, Iran, Iraq, and Afghanistan lack comprehensive laws on the protection of personal data. Other Islamic countries with regulations concerning the protection of personal data can refer to Islamic jurisprudence for clarification if there is a gap in these laws. Thus, in this study, we discussed the nature of data in Islamic law and the laws governing it. Regarding this, it is noteworthy that data is considered property under Islamic law and is governed by ownership laws.

**Keywords:** *Personal Data; Data Subject; Property; Ownership; Islamic Rights*

### **Introduction**

Protection of people's privacy has always been an essential objective of international organizations, and numerous international documents specify the necessity to preserve people's privacy. Due to technological advancements, the possibility of processing and transferring personal information quickly, and their availability on the Internet, legislators have given particular attention to people's personal data more than ever before. Meanwhile, the European Union has taken the initiative and approved GDPR.

Outside of the European Union, many countries lack a legal framework protecting personal information despite its importance. We can point out countries such as Iran, Afghanistan, and Iraq among the more than 50 members of the Organization of the Islamic Conference that do not have an independent data protection law. Considering that there is no comprehensive law regarding data protection in these countries, the protection of personal data and the rights of the data subject should be searched across a variety of laws, including civil and criminal laws, along with legal doctrine, and Islamic law.

The necessity of obtaining consent from the data subject for the processing of personal data can be inferred from Islamic law in Iran, Afghanistan and Iraq. As per Islamic law, data are considered property, and the owner of the property may take possession of it at his discretion, so the subject of the data has a right to permit the processing of his data. It is essential to infer from Islamic law the obligations of data processors in the legal systems of Iran, Afghanistan, and Iraq. This is due to the fact that the laws and doctrines do not mention these obligations. As regards the transfer of data, it is useful to refer to Islamic jurisprudence to determine the conditions of the transfer.

There are some Islamic countries, such as Saudi Arabia and Bahrain, where there is a law that protects data, where Islamic law still plays an important role in protecting data and the rights of data subjects. The reason for this is that if there is an ambiguity or gap in the data protection laws of these countries and other Islamic countries, it may be possible to solve the problem by referring to Islamic jurisprudence. As a result, it is impossible to properly comprehend the data protection situation in Islamic countries without an understanding of Islamic law's perspective on data protection.

### **The Nature of Data under Islamic Law**

It is of great importance to discuss the nature of data in light of the increasing use of the Internet and the large population of Internet users. To examine this matter, it is necessary to define the concept of property in the Islamic legal system. Various aspects of the concept of property have captured the attention of Islamic jurists. Nevertheless, the concept of property has not been thoroughly studied in contemporary contexts, such as data, so this gap should be filled by examining the concept of property and its adaptation to data characteristics.

### **The Literal Meaning of the Word Property**

In Islam, property is considered the cornerstone of society. In the words of God: Don't give your wealth, which sustains your life, to anyone who has no understanding of its value and will destroy it<sup>1</sup>. In the Qur'an, it is described as God's favor for mankind<sup>2</sup>. According to Islam, wealth is very crucial, and a person is advised to collect wealth to satisfy his needs, so that trying to acquire wealth is equivalent to fighting for the sake of God.

The expansion of societies has resulted in many laws regarding property being passed in such a way that many of the laws of today relate to the possession, transfer, and bargaining of property. Transactions are an integral part of Islamic jurisprudence in Islamic countries. In most transactions, property is the primary subject matter, and all transactions have a financial outcome. It is pertinent to note that even some acts of worship have a financial impact, such as payment of Zakat.<sup>3</sup>

Due to the lack of a definition of property in Islamic jurisprudence as well as in many Islamic countries, the literal meaning of the term is important. Consequently, in order to fully understand the idiomatic meaning of property, it is imperative to also take into account its literal meaning. The term "property" refers to anything that can be owned by an individual (Ibn Manzoor, 1984, p.635). Initially, camels were called property by the Arabs since they were used for transporting gold and silver as well as their wealth, but later they used the term to refer to anything that had an economic value (Ibn Manzoor, 1984, p.635). In Persian, property is described as something that can be exchanged (Moin, 1996, p.3078).

Depending on the time and place of its occurrence, the definition of property can change, which means something can be considered property at one time and place, but not at another time and place. As

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<sup>1</sup> The Holy Qur'an, Surah Nasa, verse 5.

<sup>2</sup> Verses 198, 2 and 76 of Surah Baqarah, Surah Ma'edah and Surah Towbah, respectively.

<sup>3</sup> Zakat is the obligation on Muslims to donate a certain amount of property for the purpose of improving the lives of the poor and other social causes.

an example, wine and pork are not considered property in many Muslim countries, while they are considered property in other countries.

### **The Concept of Property in Islamic Law**

As a first step in demonstrating that data is considered property in Islamic countries, it is necessary to examine the concept of property and its characteristics in Islamic law. Jurists have not independently discussed property in Islamic law. Instead, the concept of property has been emphasized in discussions of contracts and civil responsibility. In regards to the validity of the contract, the characteristics of the property are outlined and also in the discussion of civil liability, compensation for the damage caused to the property is addressed.

Shafi'i, the leader of the Shafi'i religion, defines property as something that has value, such as gold and silver, which people keep and do not discard (Shafi'i, 1989, p. 171). All things that have an owner are considered property by Maliki jurists (Shatabi, 1996, p. 32). According to Hanbali jurists, everything that has a benefit is considered property (Mardawi, 1998, p. 194). According to the old Hanafi jurists, property refers to tangible things. However, the new jurists believe that property is everything that has a price and should be compensated in the event of its loss (Al-Zuhaili, 2008, p. 50).

As can be seen, Islamic jurisprudence has different perspectives on the definition of property. However, one of the most important considerations is the importance of customs in the definition of property. In light of this, the value of any property is influenced by the level of interest and social desire for it. The value of a property will decrease if the social desire for it decreases (Sadr, 1989, p. 197). Therefore, property is something that creates public desire in such a way that people compete and fight over it (Hakim, 2000, p. 325).

Islamic law has been able to keep itself alive and dynamic by using custom as one of its sources. As an example, custom determines the way in which documents and contracts are drawn up as well as the definition of terms used in them. It is believed that Islamic jurists place great emphasis on custom; they consider it a concept that enables Islamic law to be coordinated with social developments and meet the needs of society. Islamic jurists who regard custom broadly have stated in their books that the concept of property is customary. In the words of Ibn Abidin, "the criterion for something to be recognized as property is that at least some people consider it to be property (Ibn Abidin, 1991, p. 501). In Islamic countries, the concept of property is a customary one, which is why Article 47 of the Afghan Civil Code, derived from Hanafi jurisprudence, considers property to be something of value in the opinion of the people.

Considering Islamic sources, the following characteristics are considered to be property characteristics:

- A. There is the possibility of allocating it to a natural or legal person. In this regard, air and sea cannot be considered property since they cannot be assigned to one individual.
- B. Having economic value. The custom determines whether something is economically valuable or not. If an item does not have an economic value according to custom, but it is valuable to someone who wants to use it, it is considered property.
- C. Having a benefit. This is defined as satisfying a need, regardless of whether the need is material or spiritual. Obviously, this benefit must be approved by Islamic law. For most jurists, benefit is the primary element of the property definition.

### **Adapting the Property's Features to the Data**

There are two conditions for property, according to some Islamic jurisprudents: it must have a benefit and this benefit must be accepted by Islam as well (Ansari, 1989, p. 58). This benefit may be

customary, i.e., it can satisfy the needs of the society. Additionally, personal benefit is accepted, i.e., if something is useful to many people or even just to a single individual, it is considered to be property. The benefits of data to society and, in many cases, to a particular person or persons are undeniable.

Data have the characteristic of being assigned to natural or legal persons because they are created by humans or technology. While some things such as sunlight and air are not like this and therefore cannot be assigned to individuals.

Additionally, data has economic value, which is why many people and organizations are willing to pay for it. Many new businesses, such as social networks, search engines, and advertising companies, progress through the acquisition of data, and their success is measured by the amount of data they possess. It is for this reason that both the public and private sectors collect and process data.

A large number of Islamic jurists have not defined property, considering it unnecessary and allowing its definition to be determined by custom (Naraghi, 1996, p. 113). In light of the fact that custom plays a significant role in the definition of property, it should be noted that with the advancement of information technology and the change in society, examples of property are becoming increasingly prevalent. In regards to the data, it should be noted that according to the perspective of custom, the three characteristics of property in Islamic law are reflected in the data. Thus, it is clear that custom recognizes data as property.

### **The Nature of the Prevailing Right to Data in Islamic Law and Islamic Countries**

Data are distinguished from ordinary goods and services by their economic characteristics. Data are non-competitive. Thus, it is possible to use the data simultaneously by both humans and machines without compromising its advantages. Several companies may be able to utilize the information of a user simultaneously, for example. (Martens, 2016, p.38) Due to the cheap cost of data production and distribution, a booming market has emerged with both large and small players participating. (Martens, 2016, p.42) As a consequence, data can be said to possess the characteristics of a public good, i.e. non-rivalry and non-excludability. The two characteristics described above make data ownership more complex than ownership of a typical asset. There are both positive and negative opinions about data ownership. Among the arguments raised by opponents are:

The Internet has created a global village as a result of its rapid growth. Continuity and existence of this global village are dependent on the use of information. Data ownership issues disrupt the free flow of data and threaten the survival of this global village. (Stepanov, 2020, p. 65). In the process of combining data from different sources, new data may be generated, which may eventually lead to a complex web of ownership. It is difficult to determine who owns the data in this situation and this may lead to its misuse (Stepanov, 2020, p. 79).

The rights of intellectual property are rights granted to the creator of an intellectual work in order to increase the motivation of the producer to produce scientific, literary and cultural works. On the other hand, society also draws benefit from this intellectual work. Since the very beginning, laws concerning the protection of intellectual property producers have taken into account the interests of society. Since the public is concerned about the copying and library use of intellectual works (Habiba and Shakeri, 2013, p. 38), this concern can also be raised with regards to personal data.

Ownership of data impedes the free exchange of information, contrary to what is in the interest of society. It is possible, however, to protect the rights of data subjects in other ways. The laws of many countries, for example, provide that personal data may be processed with the consent of the data subject. According to Article 5 of the Saudi Arabian Personal Data Protection Law approved in 2021<sup>4</sup>, the

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<sup>4</sup> PDPL2021.

processing of personal data or changes to the purpose of personal data processing require the consent of the individual concerned. Nevertheless, in certain circumstances, the law permits the processing of personal data without the consent of the individual. Furthermore, personal data must be processed with the consent of the data subject in accordance with Article 4 of the Personal Data Protection Law of the United Arab Emirates approved in 2021. <sup>5</sup>The data subject's information can be processed without his consent in certain circumstances, for example, if it is necessary to protect public interests or to prevent the spread of disease through the processing of personal data. Oman's law stresses that personal data may only be processed with the explicit consent of the data subject and the controller's written consent.<sup>6</sup>

However, there is no economic justification for acknowledging data ownership, and bringing up the issue of data ownership may impede free competition and trade. (Drexel & Hilty, 2016, p.2) It is widely believed that information is a public good that everyone should be able to access, and its availability increases public welfare. The more valuable a piece of information is, the more critical it is that everyone has access to it free of charge and that the information does not belong to any one individual (Drexel, 2016, p.31).

There are also arguments put forward by advocates of data ownership in support of their positions. In the GDPR and in the laws of certain countries, such as Saudi Arabia and the United Arab Emirates, data ownership is not specifically mentioned, but that does not mean that data ownership rights do not exist. De facto ownership fills the legal gap here. (Duch-Brown & Martens & Mueller-Langer, 2017, p.13).

The information paradox theory may also provide a rationale for recognizing data ownership. Taking this theory into account, the buyer considers the value of information before purchasing it. In the event that the seller discloses the contents of their goods before the transaction is consummated, the buyer may lose interest in the transaction. Our right of ownership over the information prevents the buyer from using it, even if he is aware of the information, and any disclosure of information is done in a secure manner before sale (Wolfgang, 2016, p. 12).

In the European Union, data ownership is not acknowledged, but fundamental rights to protect privacy are nonetheless respected. As a matter of German law, there are provisions that protect the rights of data subjects, but ownership of data is not recognized. (Asswad & Marx Gomez, 2021, p.8) However, the fundamental question is what is the status of data ownership under Islamic law. Our objective is to first define ownership in accordance with Islamic law and in Islamic countries, and then to analyze the nature of the prevailing right.

### **The Definition of Ownership in Islamic Law and in Islamic Countries**

The Prophet of Islam supported the right to ownership in a number of ways and allotted a portion of the power of the Islamic state to do so (Sharifzadeh and Naderan, 2002, p. 11). There is also a recognition of personal property in the Qur'an, for example, verse 7 of Surah Hadid: Help the poor with your wealth, and God will reward you abundantly.

There is no single definition of ownership among Islamic jurists. As per some jurists, ownership is a permanent right, which entitles the owner to occupy his property within the limits of the law (Katouzian, 2002, p. 161). According to Senhoury, one of Egypt's greatest jurists, ownership consists of the right of the owner to use and possess his property (Senhoury, 1998, pp. 492 and 493). Another Muslim jurist views property ownership as creating several rights for the owner: the right to use the property, the right to sell the property, and the right to transfer it. Owners have the right to utilize the benefits of their property, for example, rent out their properties, and the right of prohibition, which means that other

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<sup>5</sup> Federal Decree-Law No. 45 of 2021 regarding the Protection of Personal Data ('the Law').

<sup>6</sup> Article 9 promulgating the Personal Data Protection Law ("Oman PDPL") 2022.

people cannot occupy the property of the owner without the owner's permission (Boroujerdi Abdeh, 2002, pp.30-35).

The laws of Islamic countries do not provide a uniform definition of ownership. There is no definition of ownership in some countries, such as Iran. Article 802 of the Civil Code of Egypt states that an owner may use or occupy his property within the limits of the law. The Civil Code of Iraq, article 1408, defines full ownership as the right of the owner to use his property and benefit from its benefits as well as to take any advantage of his property. Article 1900 of the Civil Code of Afghanistan states that ownership is a right granted to the owner, and that only the owner is entitled to use or occupy the property within the legal framework.

The following characteristics can be attributed to ownership according to the definition of ownership in the laws of Islamic countries.

- 1- Ownership is an absolute right: i.e., the owner can make any use of his property, as long as this use is not prohibited by law. Furthermore, if the owner's possession of his property is to the detriment of others, he has no legal right to such possession, since it is mentioned in various verses of the Holy Qur'an that harming others is forbidden in Islam. There is an absolute right to ownership in Article 802 of the Civil Code of Egypt.
- 2- Ownership is an exclusive right, which means that the owner can use his property exclusively and not permit others to use it, even if the possession of others is not harmful to the property. Nevertheless, the owner has the right to prevent others from taking possession of his property (Parsapour, 2002, p.50). According to Article 1900 of the Afghan Civil Code, property rights are exclusive.
- 3- Ownership is a permanent right, i.e., ownership does not expire and is only transacted from one person to another. In Islamic law, for example, when a property owner dies, his ownership does not cease, but is transferred to his heirs. Two conclusions can be drawn from the permanence of property rights according to Islamic jurists:
  - A. As long as the property is not destroyed, ownership remains.
  - B. Ownership of property remains in effect even if the owner does not make use of it (Katouzian, 2002, p. 108).

Specifically, Article 198 of the Personal Status Law of the Kingdom of Saudi Arabia provides that after the death of the owner, the property is transferred to his heirs. Having read this article, we can conclude that in Saudi Arabia, as in many Islamic countries, ownership is regarded as a permanent right.

### **Ownership of Data under Islamic Law and in Islamic Countries**

According to Islamic law, property ownership is an absolute right, which means that the owner can take advantage of his property in any way he desires. Islamic countries also recognize the absoluteness of ownership, as indicated in Article 802 of the Egyptian Civil Code, Article 30 of the Iranian Civil Code, and Article 1900 of the Afghan Civil Code. This feature of ownership does not apply to the right governing personal data, since personal data is dependent upon the identity of the data subject, and the data subject may not transfer it to a third party. In spite of the fact that the data subject has limitations on his possessions, his property rights remain unaffected. In recent years, we have seen governments intervene in the private property of individuals in order to protect public interests, and in some cases, the owner is prohibited from using his or her property. Under Egyptian law, for example, Article 802 of the Civil Code stipulates that the owner may only take possession of property within the limits of the law.

In al-Maghni, mentioned that if a person is in dire need of food, he may be permitted to take it from the owner of the property if the owner does not require it immediately. (Ibn Qadameh, 1997, p. 50) As a consequence, in Islamic law, whenever the possessions of the owner are detrimental to others, the

owner is restricted in his possessions. Turkish Civil Code Article 2 mentions the same point. As per Turkish civil law, every person must make use of their rights in good faith, including their property rights, and therefore cannot harm others while practicing their property rights.

Ownership is regarded as a permanent right in Islamic law. In the view of some Islamic jurists, permanence means that the relationship between the owner and the property continues to exist as long as the property exists (Mahmoodi, 2013, p. 104). The data subject's relationship with his personal information also displays this characteristic.

According to the data protection law of Islamic countries, an individual is entitled to prevent others from using his personal information. In accordance with Article 4 of the Bahrain Data Protection Law approved in 2018, it is prohibited to process personal data without the consent of the data subject. As well, Article 5 of Kuwait's Data Protection Law approved in 2021<sup>7</sup> considers the processing of personal data to be legal if it is done with the consent of the data subject. Thus, the third feature of ownership in Islamic law also applies to the governing right to personal data.

Additionally, there are researchers who accept data ownership outside of the Islamic legal system. In Janger's view, ownership of personal data has three characteristics:

1. Data subjects are the primary beneficiaries of personal data, which means they are free to use them in any manner they desire.
2. As a data subject, you have rights against others, and others must respect those rights.
3. The third aspect is compensation, i.e., if someone damages the rights of a data subject, he must compensate the Data subjects. (Victo, 2013, p 552).

In Islamic countries, the three characteristics of data ownership that have been proposed by Janger can also be seen in their laws. In the data protection laws of Islamic countries, many tasks have been assigned to the controller and processor, which implies that the primary beneficiary of personal data is the data subject. The data protection law of Egypt<sup>8</sup> was published in the official journal in 2020 and is now in effect. It is stated in article 2 of this law that the data subject has the right to object to the processing of his data or to correct his information. In Article 3, conditions relating to the processing of personal data are described. This article requires that data processing be legal and transparent. Data collection and processing conditions and the rights that the law has recognized for the data subject indicate that in Egypt's laws, the main beneficiary of the personal data is the data subject.

Article 18 of the Data Protection Law of Qatar approved in 2020<sup>9</sup> illustrates the second characteristic of data ownership.<sup>10</sup> This article provides that the data subject has the right to request the deletion of his information by the primary controller - who is the party to the contract with the data subject - and by other controllers who are not parties to the contract with the data subject but are considered third parties. To put it another way, the rights of the data subject against third parties have been acknowledged.

In Islamic countries, compensation for data subjects is also a legal requirement. Any person who suffers material or moral damage as a result of the non-implementation of this law can demand compensation from the violator (controller or processor) in accordance with Article 38 of the Data Protection Law of Qatar. There is also a reference to compensation in Article 40 of the Saudi Data Protection Law.

<sup>7</sup> Data Privacy Protection Regulation (DPPR 2021).

<sup>8</sup> The Egyptian Law No. 151 of 2020.

<sup>9</sup> PDPPL2020.

<sup>10</sup> Where the Data Controller has made the data public and is obliged under paragraph (1) to erase it, the Data Controller must take reasonable steps to inform any other Data Controller that is Processing the data that the Data Subject has asked for erasure of: (A) any links to the data; (B) copies of the data; or (C) replication of the data.

## **Conclusion**

Islamic law has relied on custom to identify property from the beginning, and the property of an object is determined by the custom of the time. While Islamic countries do not have a single definition of property, paying attention to custom can assist in identifying property in Islamic countries such as Iran, Afghanistan and Egypt. Property has three characteristics under Islamic law and the laws of Islamic countries: economic value, benefit, and the ability to be assigned to individuals. In the data, it is possible to find all three characteristics of property.

Data ownership isn't recognized in the European Union and some countries, such as Germany, but personal data is protected using other methods. As an example, the data subject be able to access and correct his own information, restrict the processing of his personal data, or raise an objection to the processing of his personal data. According to Islamic law, however, the right governing personal data is considered ownership.

In Islamic jurisprudence and the law of Islamic countries, the three characteristics of absoluteness, exclusivity, and permanence apply to the relationship between data and the data subject. There have been researchers outside of Islamic law who consider the relationship between data and the data subject to be special ownership. Three characteristics of this ownership can be identified: the data subject is the primary beneficiary, the data subject has rights against third parties, and the data subject has the right to compensation. It is possible to observe the three characteristics of data ownership proposed by Janger in the laws of Islamic countries such as Qatar, Saudi Arabia, and Egypt.

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